Neutral Citation Number: [2020] EWHC 1921 (Ch)

Case No: CP-2018-000038

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMPETITION LIST (Ch D)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 17/07/2020

Before :

THE HONOURABLE MR JUSTICE ROTH

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Between :

PHONES 4U LIMITED (In Administration)	**Claimant**
- and -	
(1) EE LIMITED **(2) DEUTSCHE TELEKOM AG** **(3) ORANGE SA** **(4) VODAFONE LIMITED** **(5) VODAFONE GROUP PUBLIC LIMITED COMPANY** **(6) TELEFONICA UK LIMITED** **(7) TELEFÓNICA, S.A.** **(8) TELEFONICA O2 HOLDINGS LIMITED**	**Defendants**

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- -

Kenneth MacLean QC and Owain Draper (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**
Meredith Pickford QC and David Gregory (instructed by **Clifford Chance LLP**) for the **First Defendant**

Mr Robert O'Donoghue QC and Hugo Leith (instructed by **Covington & Burling LLP**) for the **Second Defendant**

Marie Demetriou QC and David Scannell QC (instructed by **Norton Rose Fulbright LLP**) for the **Third Defendant**

Ewan McQuater QC, Rob Williams QC and Adam Kramer (instructed by **Hogan Lovells International LLP**) for the **Fourth and Fifth Defendants**

Mark Hoskins QC and Sarah Abram (instructed by **Mishcon de Reya LLP**) for the **Sixth, Seventh and Eighth Defendants**

Hearing dates: 2 & 3 July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE ROTH

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 2pm.

Mr Justice Roth :

1. INTRODUCTION

1. This judgment concerns various aspects of disclosure sought by the Claimant ("P4U") from the Defendants, or some of them, that were argued at the second case management conference ("CMC"). These matters, save for one particular aspect discussed in section 3(e) below, would not normally justify a reserved judgment. However, the pressure on time during the hearing, which covered also a range of other matters, meant that it was more expeditious for my decisions on these disclosure issues to be given subsequently and thus in writing. Nonetheless, I shall not engage in extensive discussion of each aspect which has to be resolved.

2. The CMC was held in the form of a 'hybrid' hearing whereby only a limited number of lawyers for each party were in court, with the others, including some junior counsel, viewing the proceedings remotely.

3. To set the issues in context, it is necessary to outline the nature of the underlying proceedings.

2. THE PROCEEDINGS

4. P4U was one of the two major retail intermediaries for mobile telephones in the UK until it went into administration in September 2014. The other major retailer of that kind was Carphone Warehouse ("CPW"), which merged with Dixons in mid-2014. These proceedings are principally concerned with the events of 2013-2014, leading up to what was effectively the financial collapse of P4U.

5. The First Defendant ("EE") was at the time a 50-50 joint venture ("JV") between the Second Defendant ("DT") and the Third Defendant ("Orange"). EE, the Fourth Defendant ("Vodafone") and the Sixth Defendant ("O2") were all mobile network operators ("MNOs") providing connections in the UK at the material time. The Fifth Defendant ("Vodafone Group") is the parent of Vodafone, and it is common ground that the two Vodafone defendants constitute a single undertaking for the purpose of EU and UK competition law. Similarly, the Seventh and Eighth Defendants are related companies to O2 and it is common ground that those three companies constitute a single undertaking for the purpose of EU and UK competition law. Save where it is necessary to distinguish between them, I shall simply refer to the Fourth and Fifth Defendants together as "Vodafone" and to the Sixth to Eighth Defendants together as "Telefonica".

6. The present proceedings are brought by P4U through its administrators. P4U had a series of agreements with each of the MNOs for the supply of connections to retail customers, whereby P4U could arrange for a customer to 'sign up' for supply through one of the MNO networks. At various points between about January 2013 and September 2014, the agreements which each of O2, Vodafone and EE had with P4U either expired and were not renewed or the relevant MNO gave notice terminating its agreement. P4U alleges, in summary, that these events were not the result of independent action by these competing MNOs but followed exchanges or commitments between the Defendants, which infringed the prohibitions on anti-competitive agreements or arrangements under UK and EU competition law; and that such conduct was at least the principal reason why the MNOs ceased to deal with P4U. Further, P4U

contends that the MNOs would have continued to deal with it in the absence of such anti-competitive conduct, in which case P4U would not have been forced to go into administration.

7. Hence the Particulars of Claim state, in the summary of P4U's case at para 3(j):

> "… P4U avers both as a primary fact based on the existence of the "commitments" and as a reasonable inference from the commitments and the other pleaded circumstances that the Defendants (or some of them) unlawfully colluded:
>
> (i) to each cease trading with one or other of the retail intermediaries in the UK market (which intermediary, in the event, was P4U);
>
> (ii) alternatively, to cease trading with P4U specifically; and/or
>
> (iii) further or alternatively, to put P4U out of business and then to acquire the whole or parts of P4U's business and/or assets at a fraction of their value once P4U was placed into administration."

8. As regards both Orange and DT, P4U contends, as clarified in its responses to Part 18 Requests for Further Information, that DT and Orange "participated directly and actively in the infringement" and further that the decision by EE to cease supplies was "in substance, taken by [DT] and/or Orange and/or was the result of decisive influence from those companies". P4U also argues that DT and Orange form part of the same undertaking as EE for the purpose of UK and EU competition law and are liable on that basis for any infringement by EE.

9. P4U raises a distinct breach of contract claim against EE based on an express obligation of good faith and on alleged implied terms in the P4U-EE agreement; and claims in tort as against Orange and DT for procuring or inducing that breach by EE, or alternatively conspiracy to injure P4U by unlawful means, i.e. the breaches by EE of its contract. However, these additional claims are not significant for the purpose of the disclosure issues.

10. The Defendants all strongly deny that they were involved in any collusion or anti-competitive conduct. The relevant Defendants assert that the decisions of, respectively, EE, O2 and Vodafone to cease supplying P4U were taken by those respective companies individually for sound commercial reasons. Further, all the Defendants contend that the financial problems faced by P4U were such that its administration was not the result of the events on which P4U relies.

3. DISCLOSURE

11. It is common ground that these proceedings are to be treated for disclosure purposes as a competition claim. Accordingly, they are governed by PD 31C – *Disclosure and Inspection in Relation to Competition Claims*. The Practice Direction includes the following:

> "1.5 The court may only permit disclosure or inspection that is proportionate.
>
> 1.6 In order to determine proportionality, the court must in particular consider the factors set out in article 5(3) of the Damages Directive.
>
> 1.7 Where this paragraph applies, Part 31 applies to the extent that it is consistent with this paragraph."

12. Article 5(3) of the Damages Directive (Dir 2014/104/EU) provides, insofar as relevant:

> "Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:
>
> (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
>
> (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; … "

13. Because of the application of PD 31C, disclosure in these proceedings falls outside the Disclosure Pilot for the Business and Property Courts prescribed by PD 51U: see para 1.4(1) thereof.

14. Competition claims for damages based on anti-competitive collusion are most often follow-on claims after the infringement of competition law has been determined by a decision of a competition authority: i.e. in the UK either the Competition and Markets Authority ("CMA") or the European Commission ("the Commission"). The present claim is therefore striking as a private, stand-alone action seeking to establish the facts giving rise to an infringement as well as the financial consequences.

15. A private claimant faces significant challenges in seeking to prove that parties engaged in secret or covert collusion. There is an obvious asymmetry of information as between the alleged participants in the collusion and the claimant. That is expressly recognised in recital (15) to the Damages Directive, which includes the following:

> "Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence."

16. All parties are agreed that this is an appropriate case for standard disclosure, both from P4U to the Defendants and from the individual Defendants to P4U. I made an order accordingly at the CMC as regards disclosure by P4U (which is not covered by this judgment), and I agree that standard disclosure is similarly appropriate here from the Defendants. As provided by CPR rule 31.6, standard disclosure requires disclosure of documents on which a party relies along with documents which adversely affect his own case, adversely affect another party's case, or support another party's case.

17. Further, it is common ground that a trial of this action will not take place before mid-2022 at the earliest. On that basis, the parties have helpfully agreed that the date for standard disclosure should be 29 January 2021.

18. However, within the scope of standard disclosure, and by way of specific and targeted disclosure, there are a range of particular issues dividing the parties. The hearing of this CMC had to be postponed by a few weeks from the original dates of 10-11 June. That interval gave rise to a further outpouring of correspondence between the parties' solicitors which has successfully resolved or narrowed some of those issues, although generating some further points of dispute. I approach the various disputed disclosure questions within the legal framework and having regard to the considerations set out above.

(a) Document 'hold notices' and 'hit' reports

19. An important issue as regards some of the Defendants concerns the particular custodians whose documents will be subject to searches. I address that in section (b) below. After the possibility of a claim was communicated to them with a request to preserve relevant documents, in 2014/15 each Defendant (apart from the Seventh and Eighth Defendants), largely through their in-house lawyers, sent so-called document 'hold' notices to various employees. Such a notice is an instruction to preserve any documents which might be relevant to the anticipated litigation: see, e.g., paras 4.1-4.3 of PD 51U.

20. P4U has requested a list of those personnel to whom such notices were sent. It submits that the identification of those individuals by the relevant in-house lawyer in 2014/15 may be helpful in indicating who might be appropriate custodians, especially as this was done much closer in time to the alleged infringements than an assessment being made some five or six years later. P4U emphasises that it is not suggesting that every person who received a hold notice should become a custodian, but submits that this is relevant background information which may assist in identifying potential candidates.

21. EE and Orange have provided information to P4U's satisfaction. Accordingly, this request is now directed at DT, Vodafone and O2.

22. Those Defendants all resisted this disclosure on the basis that such information is irrelevant. Hold notices may be issued to a large number of personnel out of an abundance of caution, whereas now the parties' legal advisors are carefully applying their minds to identify appropriate custodians for a document search. Disclosure of such lists would therefore only spark a lot of irrelevant inquiries and requests for further custodians, which would be time-consuming and unnecessary. Mr Hoskins QC, for Telefonica (and thus for O2) further submitted that as the courts wish to encourage a liberal approach to the issue of hold notices, if parties were then required to produce

the list of people to whom such notices were sent this would have a chilling effect on the initial decision on the identities of personnel to be covered.

23. I am not impressed by those arguments. I am not deciding that a list of those employees sent hold notices should routinely be provided to the opposing party. The present case, with allegations of covert collusion between competitors, has unusual features and P4U inevitably has very limited knowledge of the way decision-making within the various Defendants took place and, if there had been collusion, who would have been likely to become aware of it. I do not think that identification of the recipients of such hold notices is of high relevance, but I consider that it may be of some assistance in countering the asymmetry of information to which I refer above. I note that in resisting the addition of particular custodians sought by P4U, Mr O'Donoghue QC for DT and Ms Demetriou QC for Orange both emphasised that those individuals did *not* receive a hold notice. I think that in itself indicates that the choice of addressees of such notices has some relevance. As for the risk of a 'chilling' effect, in proceedings in the Business and Property Courts to which PD 51U applies, the parties are under a duty to send out such notices "to all relevant employees and former employees", and legal representatives are required to obtain written confirmation from their clients that this duty has been complied with: para 4. I do not consider that parties will adopt a different approach or disregard this duty either because the claim is a competition case falling outside PD 51U or because its list of such employees has to be disclosed.

24. I should add that Mr Hoskins also submitted that the hold notices are privileged documents and that providing the list of addressees of those notices may infringe that privilege. This argument was not developed and I do not think it is well-founded. Such a list clearly does not comprise legal advice and it does not involve the gathering of evidence: it is simply a list of those who may have relevant evidence to ensure that such evidence is preserved. There was no request for disclosure of the hold notices themselves.

25. None of the Defendants opposing this application suggested that production of this information would be burdensome or expensive. In all the circumstances, and consistent with the 'cards on the table' approach to modern litigation, I will order that this information is provided by DT, Vodafone and O2. I would only add, as should be obvious, that this does not mean that any names on those lists should become custodians for the purpose of disclosure searches. If an application is made to add a particular individual as a further custodian, that will have to be considered on its particular merits.

26. The 'hit' reports which were the object of P4U's submissions are so-called 'participant hit' reports. Those show in tabular form the persons at other Defendants with whom each custodian at each particular Defendant communicated by email over the relevant period. I appreciate that the data has the qualification that it covers persons 'cc'-ed to a particular email as well as direct addressees. Further, DT and Orange, as the JV parents, had obvious reason to communicate with EE on a wide range of factors, and all the MNOs will have had legitimate grounds to communicate with each other on a number of issues wholly unrelated to P4U and the use of retail intermediaries, e.g., as regards network sharing or interconnection. Nonetheless, I consider that such reports may assist in identifying the main channels of communication at the relevant level as between the Defendants. I emphasise that these 'hit' reports cover emails only from persons already identified as relevant custodians. From the 'hit' reports which have been disclosed, it is apparent that the number of communications shown is not vast.

27. EE, Orange, Vodafone and Telefonica have all provided copies of those reports to P4U, without any admissions as to their relevance. As with the hold notices, there is no suggestion by DT that production of an equivalent document would be burdensome, and I consider that it should do likewise.

28. As regards both 'hold' notices and 'hit' reports, given the nature of the documents and the reason they are sought, there is no reason for those Defendants who have not yet provided them but are now ordered to do so to delay until the time for overall standard disclosure. They should be provided by 31 July 2020.

(b) Custodians

29. The parties have made very considerable progress in agreeing on the relevant and appropriate custodians for documentary searches. The outstanding questions in that regard at the CMC concerned (i) P4U's request for some additional custodians as regards each of Orange, DT and Vodafone; and (ii) the relevant date range for the searches of DT's custodians.

30. As noted above, neither Orange nor DT operated as an MNO on the UK market at the relevant time. Their involvement in these proceedings arises through their co-ownership of EE. On that basis, both Orange and DT have proposed as custodians their respective representatives on the board of EE at the material time:

    i) for Orange: Mr Gervais Pellissier, Ms Delphine Ernotte-Cunci and Mr Benoit Scheen, and also Mr Christophe Naulleau who although not a director regularly attended EE board meetings;

    ii) for DT: Mr Timotheus Höttges, Ms Claudia Nemat, Mr Thomas Dannenfeldt and Mr Michael Tsamaz.

31. It is fair to say that the list of additional custodians sought by P4U has recently reduced. As regards Orange, it now seeks two further custodians, Ms Sandra Pottier and Mr Stéphane Richard:

    i) Ms Pottier is sought on the basis that she was the head of the international legal department who corresponded with a number of the senior EE individuals who are custodians. Orange states that she only provided legal support to the Orange members of the EE board in advance of meetings and also to other teams whose role was limited to monitoring and presenting financial information to those board members. All reported to Mr Pellissier. Orange submits that any relevant documents will be captured by the searches of the agreed Orange custodians.

    ii) Mr Richard was the CEO of Orange. For P4U, Mr MacLean QC stressed that the CEOs of some of the MNOs were personally involved in some of the exchanges relied on and that it was "inherently likely" that Orange's assessment of the UK mobile market was considered at the highest level in Orange, given its substantial stake in EE; further, the hit reports showed that Mr Richard had been in communication with Mr Swantee of EE. In response, Orange pointed out that it was unsurprising that Mr Swantee as CEO of EE was in communication with Mr Richard as CEO of Orange, its JV parent. Orange was not itself operating as an MNO in the UK so its CEO was in a significantly

different position from EE, Vodafone UK and O2. Moreover, Mr Richard had not even been sent a hold notice as it seemed so unlikely that he would hold relevant documents.

32. I am not prepared to extend the list of Orange custodians to include these two individuals. At this stage, I would regard that as disproportionate and unnecessary. They will doubtless hold a huge number of documents, including a significant number relating to EE, which will be entirely irrelevant. Mr Swantee is a custodian at EE, so if he had communications with Mr Richard which are relevant to this case, they should come out in EE's disclosure. I also accept that it is highly likely that any relevant communications from Ms Pottier will come out through the search of Mr Pellissier's documents.

33. I take a similar approach as regards DT, for which P4U seeks four further custodians. P4U's views on the appropriate additional custodians appear to have changed even since it completed its comments on DT's disclosure schedule on 22 May. They now include Mr René Obermann, who was CEO of DT in the period 2006-2013. He too corresponded with Mr Swantee, but again that is unsurprising. He also corresponded at some point with Mr Colao of Vodafone, but any relevant communication should come out through Vodafone's disclosure as Mr Colao is one of the Vodafone custodians. It seems to me that Mr Obermann is in an equivalent position to Mr Richard, and Mr O'Donoghue similarly made the point that Mr Obermann had not been sent a hold notice since he was so removed from any of the issues in the case.

34. I also regard it as disproportionate to add Mr Kniese or Dr Kühbacher, simply because they had correspondence with relevant EE personnel, including in the case of Dr Kühbacher with Mr James Blendis, EE's General Counsel. Since Dr Kühbacher was Vice-President, Legal Affairs at DT, extensive communications of that kind are to be expected. However, I am just persuaded to take a different approach to Mr Fridbert Gerlach. His LinkedIn profile apparently describes him as "Vice President Area Management UK". It may well be that the area management team had no decision-making power, but that is not the point. His position suggests that he is likely to have been kept abreast of developments in the UK market. Further, it appears that Mr Gerlach sometimes attended EE board/business review meetings. I recognise that relevant communications may be captured by the disclosure from the DT members of the EE board, but I think Mr Gerlach's particular area of involvement merits his inclusion. I recognise also that some of the same points might be made as regards Mr Daniel Daub but in order to keep matters in proportion I shall not require that he should also be included.

35. DT further proposes to limit the date ranges for searches of its custodians to the period when they were members of the board of EE, with a two months buffer either side. I regard that as reasonable and proportionate. The submission that there could be important emails involving these individuals outside that period was wholly speculative. For Mr Gerlach, I do not know for what period he was on the area management team that covered the UK, but the date range in his case should cover so much of that period as falls within the overall agreed range of 1 June 2012 to 31 October 2014.

36. As regards Vodafone, P4U also seeks further custodians although Mr MacLean observed that in their case P4U has less concern. Vodafone has now agreed to six

custodians from Vodafone Group and 12 from Vodafone UK. P4U is seeking one further individual from Vodafone Group (Ms Rosemary Martin) and three more from Vodafone UK (Ms Cindy Varga, Mr Eddie Allen and Mr Alexander Bishop). I have considered what is said about each of them in P4U's comments on Vodafone's disclosure schedule and I regard the case for including any of them at this stage as weak. That request will therefore be refused.

37. I emphasise that this decision does not mean that further requests by P4U for additional disclosure by way of searches of additional custodians (or date ranges) cannot be made at a later stage. P4U will receive very substantial disclosure by the end of January 2021. Once P4U has digested that material, if it has grounds to contend that there appear to be gaps or likely further documents, since the trial will not be before June 2022, there will be ample opportunity for P4U to apply for further disclosure. Indeed, this very point was made by Ms Demetriou on behalf of Orange.

(c) Early disclosure

38. As noted above, it is agreed that disclosure is to be given by 29 January 2021. However, aside from the 'hold' notices and 'hit' reports addressed above, P4U submitted that three categories including what Mr MacLean described as "important documents", should be provided sooner:

    i) Board minutes, along with supporting Board presentations and Board 'packs';

    ii) external communications as between each of the Defendants and other MNOs;

    iii) a Vodafone spreadsheet, prepared in 2015, which contains the records of mobile calls and SMS messages between three Vodafone executives and senior individuals at other MNOs.

39. As regards (i), Mr MacLean submitted that early access to those documents will assist P4U in preparing its intended application for permission to adduce expert evidence. That may be so, although I doubt that the minutes themselves are likely to take P4U further than the commercial justifications for the individual MNOs' decisions to cease dealing with P4U set out in the various Defences. To go further, I expect that P4U will need to consider the underlying presentations and document 'packs'. I was told by counsel for various Defendants that to access those documents was not straightforward, and I accept that there may well be a significant task in redacting irrelevant material. The relevance of these documents is not in dispute and P4U will receive them at the end of January. This case is not proceeding by staged disclosure and in all the circumstances I consider that there would have to be a strong case for any early disclosure. I was not persuaded that there is such justification here.

40. If that is the conclusion as regards category (i), the case against early disclosure is even stronger as regards category (ii). It may be that there is not a huge volume of such documents, but a proper search and review of them is still significant work. Indeed, I note that (ii) was not in fact part of the formal application before the Court, issued as recently as 4 June. And I do not see a justification for making a separate order as regards document (iii).[1] Any requirement to give early disclosure disrupts the orderly

[1] The Vodafone spreadsheet was also not the subject of P4U's formal application.

progress of disclosure by the party having to provide it, which is a particularly challenging task at a time when many staff are working from home. No doubt it is always of assistance for any party to get the documents in which it is particularly interested sooner rather than later, but the time for disclosure has been agreed and that deadline is only seven months away. I refuse this aspect of P4U's application.

(d) Unfiltered searches

41. Most of the document searches are to be conducted using keywords, which are either being agreed between the relevant parties or can be the subject of a separate short application to the Court if necessary. At the same time, it has been agreed as regards both the disclosure from P4U and the disclosure from the Defendants that certain categories of documents should be the subject of manual review without keywords. That is of course more onerous, but it recognises the facts that keywords are an imperfect tool and may miss relevant material. However, of its nature, this means that the range of documents subject to such unfiltered searches should be kept reasonably narrow.

42. P4U has now reached agreement with EE, Orange and DT as regards the scope of unfiltered searches. This issue is therefore outstanding only as against Vodafone and Telefonica. However, it became apparent from exchanges during the hearing that discussions between the lawyers representing P4U and Telefonica are ongoing with the potential of either arriving at agreement or narrowing the issue further. Accordingly, the question as regards Telefonica was, by agreement, held in abeyance, to be pursued by a separate application if no agreement can be reached.

43. As regards Vodafone, P4U seeks an order that it should carry out unfiltered searches of:

    i) communications by each of its custodians with anyone at the other Defendants;

    ii) internal communications between a number of identified custodians over specified periods.

44. As regards the first category, I recognise that if there were anti-competitive exchanges with other Defendants concerning P4U or CPW, those may have been indirectly expressed or carefully worded, to avoid giving an impression of collusive behaviour. In response to this application, Vodafone offered to carry out unfiltered searches of communications between its custodians and the custodians at the other Defendants. Mr McQuater QC pointed out that Vodafone would have entirely legitimate grounds to communicate with personnel at the other MNOs as there were various cooperative projects between them. I have regard to the strict requirement of proportionality imposed by PD 31C, and I recognise that manual searches of custodian-custodian communications will go a significant way to meeting P4U's point. Nonetheless, I was told that, on the basis of the hit report, this category comprises only some 618 documents in the outgoing direction. The total number will therefore be larger but, as Mr McQuater acknowledged, it is unlikely to be enormous. Accordingly, given the nature of the allegations in this case, I am persuaded that an unfiltered search of those documents is appropriate and that this should not be limited only to those addressed to the other Defendants' custodians.

45. The second category breaks down into a series of requests concerning particular custodians and particular periods. However, in each case this concerns internal communications. In my judgment, people are much less likely to engage in circumlocutions when communicating with their own colleagues. Even over a relatively short period (although in one case P4U sought unfiltered review over a period of 13 months), the volume of internal email exchanges is likely to be very substantial. I therefore do not regard the requests in that category as proportionate. If, after review of the internal Vodafone communications that it does receive, it appears to P4U that relevant exchanges are missing, it will always be open to P4U to apply for appropriately targeted specific disclosure. But that is a matter for the future.

(e) Personal data

46. P4U considers that some relevant communications between individuals at the Defendants may have been made on their personal electronic devices, and not necessarily using their work email or mobile devices, and therefore considers that these should be included in any search. Mr Greeno of P4U's solicitors states in his witness statement made in support of the application:

> "It is in the nature of allegations of collusion that conspirators will likely have used relatively informal/discreet channels of communication to reach and implement any unlawful agreement or understanding."

47. P4U therefore seeks provision that the Defendants should secure the agreement of their respective custodians to access their personal devices for the purpose of conducting searches. Mr MacLean said that since EE had agreed to investigate the practicalities of this, P4U does not seek any order or direction as regards EE, but it was concerned about the position of all the other Defendants. He explained that at this stage, P4U requested that the Defendants should write to their custodians to ask them, as he put it: "Will you please give us access to your mobile phone and personal email accounts for the purpose of conducting searches in relation to the issues in this action." He said that if any should refuse, P4U can then consider what steps it might take. Mr MacLean made clear that the relief sought was therefore narrower than in P4U's draft order, which would require the solicitors acting for the relevant Defendants to "take reasonable measures to secure and obtain access to" the various devices.

48. The Defendants[2] strongly resisted this application. Their submissions, in summary, were that:

    i) The court has no jurisdiction to make an order for searches of such personal devices. They were the personal property of the custodians, some of whom were indeed no longer employed by the relevant Defendant.

    ii) An order of that kind would infringe the individuals' right of privacy under the European Convention on Human Rights ("the Convention"). Personal computers, laptops and mobile phones will contain a great deal of personal, and potentially very confidential, material bearing no relation to the individual's work. For DT, for whom some of the custodians are based in Germany, Mr

[2] i.e. excluding EE, who were not the object of the application and so took no position.

O'Donoghue further referred to the German Telecommunications Act which he said requires that the secrecy of the contents of telecommunications (which includes personal mobile devices) be maintained.

iii) The approach of P4U seeks to circumvent the established procedure for third party disclosure. If P4U wanted disclosure from a particular individual, it should make an application under CPR rule 31.17, in which case the individual would in the usual way get his or her costs of meeting the application, which could include the costs of taking legal advice.

iv) It is unclear what precisely the Defendants were being asked to do and an order of the court should not be expressed in vague terms. If they were to write to these custodians, they must be able to explain that each individual is fully entitled to refuse to supply his or her devices for searching.

49. It is well-known that where companies do engage in unlawful, collusive behaviour, the individuals involved sometimes use their personal devices and may deliberately avoid using their work email or work devices. It is notable that competition authorities engaged in investigating infringements of competition law are given express power to enter and search not only business premises but also, when authorised by a warrant from the court, domestic premises when they have reasonable grounds for suspecting that there will be relevant documents on such premises: Competition Act 1998, s. 28A. That the use of such a personal device is not mere speculation in the present case is shown by the fact that EE states that when its CEO, Mr Olaf Swantee, received anti-competitive approaches from Mr Ronan Dunne, the CEO of O2, as pleaded in EE's Defence at para 74, Mr Swantee made audio recordings of "all or part" of those conversations on his personal iPad (albeit that this iPad cannot now be found).

50. What can, and should, the Court do in those circumstances? On the question of jurisdiction, I think it is necessary to consider the basic principles. Disclosure (outside the Disclosure pilot) is governed by CPR Part 31. Rule 31.8 provides:

> "(1) A party's duty to disclose documents is limited to documents which are or have been in his control.
>
> (2) For this purpose a party has or has had a document in his control if –
>
> (a) it is or was in his physical possession;
>
> (b) he has or has had a right to possession of it; or
>
> (c) he has or has had a right to inspect or take copies of it."

51. Rule 31.4 defines "document" to mean "anything in which information of any description is recorded". PD 31A notes at para 2A.1 that the term therefore "extends to electronic documents, including e-mail and other electronic communications" and states:

> "In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and

> back-up systems and electronic documents that have been 'deleted'"

52. The note at para 31.8.2 of the *White Book* states that the concept of 'right to possession' in the rule "covers the situation where a party's documents are in the hands of a servant or agent." If and insofar as an employee of a company, however senior, sends or receives emails or SMS messages in relation to the business of the company, I think it is clear that they are doing so in the course of their employment. Accordingly, the employer (or in the case of an agent who is not an employee, the principal) has a right to require production by the employee of those 'documents', including after the termination of the employment or agency: *Bowstead & Reynolds on Agency* (21st edn), para 6-093. Hence, in *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886, the Court of Appeal held that the appellant company was entitled to an order requiring its former CEO (the respondent), after termination of his appointment, to give it access to the content of emails relating to its business affairs which were stored on his personal computer. As Mummery LJ stated in his judgment (with which Patten and Black LJJ agreed) at [56]:

> "Mr Adkins was under a duty, as a former agent of Fairstar, to allow Fairstar to inspect emails sent to or received by him and relating to its business. The termination of the agency did not terminate the duty binding on Mr Adkins as a result of the agency relationship."

53. On that basis, the Court made an order enabling the retrieving of the relevant emails and inspection of their content, initially by an "independent IT person". I note that it was not suggested that it made any difference that the appellant was a Dutch company and that Mr Adkins was engaged not by a contract of employment but through a service agreement governed by Dutch law.

54. I emphasise that the principle here engaged does not depend upon there being any particular term in the contract of employment (or in Mr Adkins' case, his contract of services) giving the employer or principal an express right of inspection or access to personal devices. Further, while the principle is one of English law and some of the Defendants operate abroad, none of them advanced a case that any relevant foreign law was materially different in this regard. As for the German Telecommunications Act to which DT referred, not only were no details provided but I would find it extraordinary if that statute prevented a court from ordering provision of personal mobile phones for investigation as to whether they contained evidence of collusion in breach of EU competition law. The requirement in article 5(2) of the Damages Directive that the court should be able to order the disclosure of relevant categories of evidence of course applies in Germany. I would add that the principle will become increasingly important as employees work more from home, where they may not have a separate work computer or an additional mobile phone provided by their employer.

55. In the present case, many – and perhaps most – of the relevant custodians apparently deny that any emails or SMS messages relating to the affairs of their employer were made or received on their personal devices. Pursuant to CPR rule 31.7, the Defendants in giving standard disclosure are required only to make "a reasonable search" for relevant documents. The question therefore is what the Defendants should be required to do in these circumstances. In my judgment, it is prima facie reasonable that in the

first instance they should request that their present or former employees or agents should make the devices available for inspection. I note that it was on this basis that an order was made in similar terms in *BES Commercial Energy Ltd v Cheshire West and Chester Borough Council* [2020] EWHC 701 (QB): see at [74]-[79].

56. However, I recognise that as the devices are the personal property of the individuals and are likely to contain a lot of personal and private information, this interferes with the individuals' right of privacy under article 8 of the Convention. That does not preclude the court making an order for access to the devices and inspection, otherwise the competition authority's statutory right to seek such relief could never be exercised. But it means that the court must seek to ensure that the order interferes with the individuals' rights as little as possible. Further, any order must be proportionate. The requirement for proportionality indeed arises also by virtue of PD 31C and article 5(3) of the Damages Directive.

57. I therefore do not consider it appropriate that the individuals should be asked to provide their personal devices to the relevant Defendant. I believe that all the Defendants or Defendant groups in this case are using the services of independent IT consultants to assist with electronic searches. In my view, the request should be that the devices are provided to the relevant Defendant's IT consultant, upon that entity having given an undertaking to the court to the effect that:

    i) the device will be searched only for documents or messages relating to the business of [the relevant Defendant] or P4U or CPW for the purpose of these proceedings;

    ii) no other content on the device will be disclosed to [the relevant Defendant] or their solicitors;

    iii) on completion of the search and of taking images of any documents falling within (i), the device will be returned to the individual.

    If, contrary to my understanding, some of the Defendants are not using independent IT consultants but are conducting the searches themselves, I will hear further representations as to an appropriate means of protecting the privacy of non-work related communications on the devices.

58. As regards proportionality, I do not think that an order in these terms is appropriate for all the custodians of all the Defendants. While P4U will doubtless maintain that the secrecy of the alleged collusion means that at this stage it has been able to identify only very limited instances, I think it is significant that the pleadings refer to communications at a very high level within the companies. In my judgment, it is reasonable and proportionate that the individuals who are requested to provide their personal devices for inspection are limited to four custodians for each Defendant or Defendant group (i.e., for this purpose, the two Vodafone Defendants and the three Telefonica Defendants, respectively, count as one). In the case of Orange, there are only four custodians in any event. In the case of DT, Vodafone and Telefonica, the four key custodians selected for this purpose may be largely self-evident but if there is doubt, it shall be for P4U to make the selection.

59. I do not consider that an order in these terms in any way circumvents the rules governing third party disclosure. The order is not for disclosure as against the individuals. It is an order against the relevant Defendant that it takes reasonable steps towards providing 'documents' within its own control, having regard to its position as employer or principal.

60. Moreover, I do not think that this engages the issue involved in *Dubai Bank Ltd v Galadari* (6 October 1992, unreported save in *The Times*), of which I was sent a transcript and then brief written submissions from the parties following the hearing. That was one of the many judgments given in the course of proceedings concerning a massive and complex fraud allegedly practised by the defendants on the plaintiffs. On the plaintiffs' motion for specific discovery, Morritt J observed that he could not order the defendants to disclose documents "which are not now and never have been in their possession, custody or power".[3] But he held that he could nonetheless order them "to obtain possession, custody or power of the [relevant documents] by all lawful means available to them." In its judgment setting aside this order, the Court of Appeal noted that the order fell outside the procedural rules for discovery of documents or the *Norwich Pharmacal* principle and was of a quite different kind:

> "It is an order against a party to use all lawful means to obtain possession etc of documents so that an order for the discovery of those documents, *at present not possible*, may then be made." [my emphasis]

The Court proceeded to hold that this would therefore extend the ambit of discovery and that there was no jurisdiction to make such an order.

61. By contrast, and as explained above, I consider that an order that the Defendants should disclose documents held by their present or former employees on their personal devices could be made under the rules. The order now sought is for a step towards the practical exercise of that established jurisdiction, by seeking to identify documents that fall under the Defendants' control. It falls within the broad power under CPR rule 31.5(8) for the court to give directions as to how disclosure should be given. As P4U points out, the writing of letters to agents to gain access to documents for disclosure was ordered by the court in *Bank St Petersburg PJSC v Arkhangelsky (No 2)* [2015] EWHC 2997 (Ch): see at [45].

62. Although I therefore do not regard it as relevant to the principal issue, the *Dubai Bank* case is of some assistance as regards the submission that an order of the kind sought is not sufficiently precise. In response to the defendants' additional argument that the expression "all lawful means" in the order under challenge was not sufficiently clear, the Court of Appeal observed:

> "A court asked to commit for contempt a defendant who had taken steps to comply with an order which the court considered genuine but insufficient could, and almost certainly would, deal with the problem by giving a further, more specific direction."

[3] The wording reflecting the former RSC Ord 24, rule 1, which has been replaced by CPR 31.8.

As should be apparent from the above analysis, I do not consider that the Defendants, in writing to request access to the devices, should tell their custodians that they are entitled to refuse the request. I shall direct that the Defendants should be required to produce to P4U copies of their letters of request and the replies received. If any of the custodians should refuse, then, as Mr MacLean recognised, it will be for P4U to consider what if any steps it wishes to take.

4. CONCLUSION

63. For the reasons set out above, in response to P4U's application I conclude that:

i) DT, Vodafone and O2 should provide copies of the lists of addressees of 'hold' notices, by 31 July 2020;

ii) DT shall provide a copy of its 'hit' report of emails to persons in any of the other Defendants, by 31 July 2020;

iii) the application for additional custodians on the part of Orange is dismissed;

iv) Mr Fridbert Gerlach should be added as an additional custodian on the part of DT but save to that extent, the application for additional custodians on the part of DT is dismissed;

v) the date range for disclosure for the DT custodians who were members of the EE board shall be the duration of their board membership plus a two months buffer on either side, as proposed by DT. The date range for Mr Gerlach shall cover the period of his position in the area management team covering the UK within the overall period 1 September 2012 to 31 October 2014;

vi) the application for additional custodians on the part of Vodafone is dismissed;

vii) the application for early disclosure of certain categories of documents is dismissed;

viii) Vodafone should carry out unfiltered searches of communications by each of its custodians with anyone at the First to Third and Sixth to Eighth Defendants, but not of communications between its own custodians;

ix) each of Orange, DT, Vodafone and Telefonica should write to four of its custodians, to be selected by P4U, to request access, under the terms and upon the undertakings set out above, to their personal mobile telephones and emails for the purpose of searching for work related communications over the relevant period relevant to the issues in this case; and provide to P4U copies of their letters and any replies.

64. As regards the time period for compliance with para 63(ix), I hope that can be agreed between the parties, given the practicalities involved. In the event of any failure to reach agreement, an application can be made in writing for this to be determined by the Court.