Neutral Citation Number: [2021] EWHC 680 (Ch)

Case No: HC-2000-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 22/03/2021

Before :

MR JUSTICE MANN

- -

Between :

Various Claimants	**Claimant**
- and -	
News Group Newspapers Limited	**Defendant**

- -
- -

David Sherborne, Sara Mansoori and Ben Hamer (instructed by **Hamlins LLP**) for the **Claimants**
Clare Montgomery QC, Anthony Hudson QC and Ben Silverstone (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 4th & 5th March 2021

- -

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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MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is a ruling dealing with two related privilege matters in this litigation. The first relates to Post-it notes said to have been created in January 2007 and the second relates to a memorandum containing "options" in relation to a claim brought by Mr Glenn Mulcaire, a private investigator who worked for the defendant (a newspaper publisher) and who supplied it with illegally gathered information (often voicemail interceptions). The privilege is claimed by the defendant on the footing that the documents were created by an in-house solicitor and are covered by legal professional privilege. The claimants challenge the claim to privilege on the grounds that the first set of documents (the Post-it notes) are not privileged and such privilege as either document might otherwise have attracted has been lost because of the application of the so-called "iniquity principle" or "iniquity exception", as being documents evidencing the furtherance of an iniquitous purpose or scheme. I shall use the word "iniquity" and its derivatives as useful words to describe the sort of conduct which has to be established in order to prevent privilege being claimed even though it is an old-fashioned word and perhaps not always quite apt in its traditional sense.

The principles

2. Before turning to the facts of the case it will be useful to record the principles on which privilege can be claimed and lost so far as those principles are applicable to this case.

3. So far as the existence of privilege is concerned, the point in this case turns on the evidence as to the claim to privilege. It was common ground that the burden is on the person who claims privilege. I do not need to set out authority for that proposition. Next, it was not disputed that it is for the claim of the privilege to be made with sufficient clarity as to the basis on which the privilege is claimed – see *WH Holdings Ltd v E 20 stadium LLP* [2018] EWCA Civ 2652, citing the decision of Beatson J in *West London Pipeline and Storage Ltd v Total UK* [2008] 2 CLC 258:

> "86…(1) the burden of proof is on the party claiming privilege to establish it… A claim for privilege is an unusual claim in the sense that the party claiming privilege and the party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and the affidavit should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect…"

4. So far as the iniquity point is concerned, the principles were in the main not significantly in dispute. The dispute was more on their application to this case. The principles can be set out as follows:

i) "If a person consults a solicitor in the furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client (or his agent) and the solicitor do not attract legal professional privilege." Per Longmore J in *Kuwaiti Airways Corporation v Iraqi Airways Corporation* [2005] 1 WLR 2734 at para 14.

ii) Although the principle thus described refers to a criminal purpose, it is not confined to such purposes. It is well established that the principal may also apply in civil proceedings. In *Barclays Bank v Eustice* [1995] 1 WLR 1238 it was extended to a case of a man planning to dispose of his property in circumstances in which section 423 of the Insolvency Act 1986 would apply to avoid the disposition. Schiemann LJ said:

> "… We start here from a position in which, on a prima facie view, the client was seeking to enter into transactions at an undervalue the purpose of which was to prejudice the bank. I regard this purpose as being sufficiently iniquitous for public policy to require that communications between him and his solicitor in relation to the setting up of these transactions be discoverable."

Miss Montgomery QC for the defendant reserved the right to argue elsewhere that that case took the principle too far and was wrongly decided, but she accepted that it bound me and that I was entitled (and obliged) to apply it.

iii) Whether or not that case went too far, it is well established that the principle applies where the conduct can be characterised as dishonest and fraudulent. See generally Thanki on The Law of Privilege, 3rd edition at paragraph 4.36ff and the many cases cited there. In *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 Norris J said:

> "The enumeration of examples is useful only insofar as it enables some underlying theme or connectedness to be identified. In each of these cases the wrongdoer has gone beyond conduct which really amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy." (para 62)

iv) In *JSC BTA Bank v Ablyasov* [2014] EWHC 2788 Popplewell J put it this way:

> "But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege." (para 93)

v) The standard of proof of the iniquity in question has been expressed at various levels, as summarised by Warby J in *Holyoake v Candy* [2017] EWHC 52 at para 76:

> "The authorities show that a speculative case that the documents in question might involve or evidence iniquity will not suffice to displace LPP, where it would otherwise apply. The test of whether there is a "strong prima facie case" of iniquity has been adopted: *BGBP Managing Global Partner Ltd v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch) [2011] Ch 296 [68] (Norris J). Where fraud is one of the issues in the action the view has been expressed that a "very strong" prima facie case will be required: *Kuwait Airways* [42](2) (Longmore LJ). The lowest it has been put in the authorities before me is that where fraud is not one of the issues in the action a "prima facie case" of fraud may be enough: *Kuwait Airways v Iraqi Airways* [2005] EWCA Civ 286 [2005] 1 WLR 2734 [42](3) (obiter). It is to be borne in mind that the court will not too readily find a prima facie case of fraud, or wrongdoing of comparable gravity"

Bearing in mind the seriousness of finding that privilege has been lost, and the consequential disclosure of a document without a final determinative finding of the iniquity involved (which will often be the case), and bearing in mind the fact that once there has been inspection the cat is irretrievably out of the bag (at least in the sense that the actual disclosure cannot be reversed), I prefer the view that the standard of proof has to be at the "strong prima facie case" end of the spectrum (see Vinelott J in *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156 at 1173).

5. There is one important distinction which has to be borne in mind in the circumstances of this case, and that is the difference between giving advice in the context of some apparent iniquitous activity, on the one hand, and giving advice, or doing other acts, in order to further an iniquity on the other. The latter is capable of removing privilege that would otherwise be attracted. The former, by itself, is not. There will need to be something more – the advice must involve furthering the iniquity, or being part of it.

The documents in question

6. I shall have to return to the context in which the documents arose, but in this section I describe the disputed documents themselves.

7. The overall context of the documents is that Mr Glenn Mulcaire had been carrying out illegal information gathering activity and passing the fruits on to journalists at the defendant's newspaper the News of the World. He was found out and prosecuted, and he feared the loss of his employment by the defendant. He had engaged a lawyer to act for him in making claims against the defendant; that lawyer was Mr Moray Laing. Mr Laing communicated with Mr Tom Crone, who was at the time the defendant's Legal Affairs manager and a qualified barrister. It is not disputed that his work involved the giving of legal advice.

8. The first document is actually a set of Post-it (or similar – I shall use the brand name for the sake of convenience) sticky notes which were placed by someone (probably but not certainly Mr Crone) on a physical print-out of an email from Mr Laing to Mr Crone. That email contained a list, said to be a list of activities conducted by Mr Mulcaire for the newspaper. This part of the dispute has been bedevilled by the way the material was presented by the defendant. That manner of presentation made it look as though part of the email had been redacted and did not make it clear that the redaction applied to something else. That something else was the content of the Post-it notes. The defendant disclosed those by placing a large piece of paper over them and marking it "Redacted". Without explanation (which did not come until the first round of evidence in this application) one would have thought a single A4 piece of paper had had its entire content redacted. The notes were also (it subsequently transpired) shown in situ on the email, obscuring part of its text but shown as one block marked "Redacted". It looked as though there was an attempt to redact part of the email's contents. A certain amount of heat was generated about that, but that can be put on one side for present purposes. What is in issue is the content of the rectangular Post-it notes.

9. The evidence about these notes is given in a witness statement of Ms Maxine Mossman dated 25 February 2021. That statement, which has obviously been carefully drafted, makes the following point about the notes:

   i) "From the Style of the Handwriting and the Content of the Notes, these appear to have been written by Mr Crone." (para 85(b))

   ii) "The information on the notes was redacted because it attracts legal advice privilege, as notes made by a lawyer in the context of providing legal advice to NGN." (para 85(d).

   iii) She does not know, and has not been able to find out given the passage of time, why the notes were placed on the email in the way in which they were, or why the document was scanned in the way in which it was, which was so as to obscure part of the text of the email.

   iv) "Without waiving privilege, I can confirm that the content of the notes that has been redacted does not relate to the list contained in the email from Mr Laing, and there is nothing iniquitous in the notes." (Para 88).

   v) That is all that is known about the content of the notes. Ms Mossman does not say that the notes are not relevant to this action. If the notes had no relevance to the action then one would have expected her to say that because it would be prima facie a simple and complete answer to the application for inspection, whether or not coupled with a claim to privilege.

10. The second letter is a memo which has been called the "Mulcaire options memo" for the sake of convenience. It was sent by Mr Crone to Mr Hinton, a senior executive in the defendant, and copied to Mr Andy Coulson, then editor of the News of the World, attached to an email dated 10 January 2007 (at 14:16). That email said:

> "When we spoke about the Clive/Mulcaire situation last week you asked me to let you have a not [sic] on the Mulcaire

> "options". Here it is. I am due to meet his lawyer again tomorrow afternoon. If we haven't communicated by then, I'll put it off."

11. The claim for privilege in relation to this memo is made in paragraph 95 of Ms Mossman's witness statement in which she sets out the content of a letter written on behalf of the defendant setting out the basis of privilege (pursuant to an earlier order that I had made in these proceedings specifically directed to that memorandum):

> "[The memo] related to an employment-related claim which Mr Mulcaire's lawyer (who was an employment lawyer) had indicated to Mr Crone a few days earlier that Mr Mulcaire might bring against NGN … [The memorandum] contained Mr Crone's advice (following consultation with NGN's external solicitors) about the options available to NGN in connection with Mr Mulcaire's contract. The contents of the memorandum are legal advice. It was written by a lawyer and included not only that lawyer's advice but the advice of an external firm of solicitors on a claim threatened against the company. It was sent to the editor of the paper, who had responsibility for the management of claims against NGN in respect of the News of the World, and to the Executive Chairman of News International, who had overall responsibility for the management of litigation against News International."

12. In paragraph 99 of her witness statement, Ms Mossman adds:

> "Without waiving privilege, I can confirm that there is nothing iniquitous in the 10.01.07 Memo."

While I do not ignore that statement completely, for present purposes I do not consider that it has much weight. It can probably be taken as a statement by a responsible solicitor that on the face of the document there is nothing blatantly "iniquitous" about it, but the debate in the application before me is rather more subtle than that. I do not regard it as a conclusive answer to the claimants' application.

The underlying case for privilege, subject to the iniquity exception

13. The starting point is to consider whether the documents themselves would be capable of attracting privilege were it not for the possible application of the iniquity exception. The answer to that in the case of the Mulcaire options memo is plain. But for the possible exception, privilege has clearly been made out. The passage set out from Ms Mossman's witness statement, shorn of the context upon which Mr Sherborne for the claimants relies, makes out a clear case for privilege. It states that it contained legal advice both from Mr Crone and from external lawyers. That is enough to establish a claim for privilege. Mr Sherborne did not dispute that.

14. The claim in respect of the Post-it notes is rather thinner. There is a degree of uncertainty as to whose notes they were – it is merely said that they "appear to have been written by Mr Crone". It does not appear that Mr Crone has been consulted on

the point (though I was told he is no longer employed by the defendant, having left in July 2011). Ms Mossman says what the notes do not relate to (the list) but she does not in any way indicate what they do relate to. The statement she makes in paragraph 85(d) is very thin – "notes made by a lawyer in the context of providing legal advice to NGN".

15. The question for me is whether the witness statement is "as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect" (see above). In my view it comes pretty close to being insufficiently specific. A bald assertion such as that made by Ms Mossman is not really specific at all. However, I think that she has done enough. It may be thought to be impossible for a description of notes made by the lawyer to be fuller than that without indicating what the subject of the advice was, and that itself may be privileged. It is hard to see how more could realistically have been said about the notes without crossing that boundary. Furthermore, I bear in mind the litigation circumstances in which she gave her evidence. The witness statement of Mr Galbraith, the claimants' solicitor who provided the witness statement in support of the application, was not specifically geared to the content of the Post-it notes because it was not appreciated by him that that was what was being redacted. Accordingly, Ms Mossman's evidence was responding to a different type of claim, one which did not relate to the contents of the notes because at the time the claimants did not know that there were Post-it notes with solicitors' notes on them. It was understood that the redaction had been of the contents of the email print on which (as it turns out) the notes were stuck. In the course of explaining the situation she described the notes and made the statements about their contents that she did. If the original attack had been as to privilege in the notes she might well have been a bit more specific.

16. In the circumstances I consider that Ms Mossman has just done enough to make out a claim for privilege for these notes, even though the lack of detail is a little striking when compared with the fuller account given in relation to the Mulcaire options memo.

The iniquity relied on

17. The iniquity relied on in relation to each document is different but related. What underpins both is said (putting it shortly) to be the intention of the defendant ("NGN") to disguise the work that Mr Mulcaire actually did (and was engaged by NGN to do) so as to make it less likely that NGN would be exposed to allegations that journalists other than Mr Goodman had engaged Mr Mulcaire to conduct unlawful activities. The defendant wished to make sure that when Mr Mulcaire mitigated in a forthcoming criminal prosecution he would keep quiet about the scope of his involvement with NGN and, in particular, his involvement with journalists other than Mr Goodman. To that end there was a "cleansing" of a list of activities appearing in the email of 9th January and in subsequent material so that his activities could be presented as being lawful at the forthcoming sentencing hearing in the Crown Court; and the Mulcaire "options" were options intended to buy Mr Mulcaire's silence to protect the defendant from revelations as to how widespread phone hacking (and other illegal activities) were in NGN at the time – it extended beyond Mr Goodman (who had been found out) and Mr Mulcaire.

18. This requires some elaboration. The following account is drawn from the defendant's documents, disclosed from various sources (not always the defendant), and from other publicly available knowledge and information.

19. By November 2006 Mr Mulcaire and Clive Goodman (a News of the World reporter) had been arrested and on 29th November they pleaded guilty to charges involving phone hacking. It is plain from various documents that Mr Crone and others at the News of the World were worried about what would come out of this in terms of the culpability of the newspaper and others working in it. The sentencing hearing was due on 26th January. In addition, Mr Mulcaire was threatening employment-related proceedings, and he engaged Mr Laing, an employment lawyer. Mr Crone was clearly concerned about how to manage the interface between those sets of proceedings or potential proceedings.

20. At this time, of the News of the World journalists only Mr Goodman had been charged. It is apparent, however, that Mr Crone (and no doubt others) were concerned that others were involved with Mr Mulcaire and might have been involved in his unlawful activities. Mr Crone was aware of previous complaints and had tapes in his safe relating to hacks in 2004 of David Blunkett and Kimberley Fortier in which a journalist other than Mr Goodman was said to have been involved. When in September 2006 the police requested details of journalists for whom Mr Mulcaire had worked, Mr Crone told Mr Coulson in an email that they did not want to provide such details. The tone of the response is that he knew there were some other journalists; he certainly did not say there were none other than Mr Goodman. In his evidence to the Leveson Inquiry he accepted that he believed that the suggestion, apparently promulgated by the newspaper, that there was only one rogue reporter involved in the relevant unlawful activities, to be wrong. His evidence amounted to an acceptance that he knew this at the time of the sentencing hearing of Mr Mulcaire and Mr Goodman on 26th January 2007. It is clear enough from the evidence produced by Mr Galbraith, as explained by Mr Sherborne, that Mr Crone knew that journalists other than Mr Goodman were involved with Mr Mulcaire, or at the very least that that might be alleged, and that that was a very unwelcome prospect. According to an email that Mr Crone wrote to Mr Coulson on 15th September 2006, following a briefing by the police of Rebekah Wade, the police were not at that time planning to investigate further journalists, but they would if they got direct evidence, for example, of journalists themselves intercepting voicemail messages.

21. It is also clear that Mr Crone was concerned about what might emerge as a result of Mr Mulcaire's prosecution and sentencing. On 21st December 2006 he took a call from Mr Greg Miskiw, a former News of the World news editor who had been a "handler" of Mr Mulcaire. According to his note of that conversation Mr Mulcaire had asked that Mr Miskiw should ring Mr Crone about his position. Mr Miskiw is recorded as saying that Mr Mulcaire was "upset", he had hired a lawyer for the employment side of things and he:

> "wants a severance payment – and will give a confid'y und'g"

He had contacted a literary agent and would do a story, and "MUST" have money to tide him over (the capital lettering appears in the note). Mr Mulcaire was very bitter about the News of the World not "helping him out" and was looking for "some sort of

severance deal". (At this time Mr Mulcaire was being paid a regular sum as if an employee of the newspaper.) The note seems to end with the following:

> "How he mitigates will depend on NoW attitude to him – if he feels he's been abandoned he might say "a lot more""

I say "seems to end" because this part is curiously placed on an opposite page under a redacted note presumably relating to something else, but nobody suggested that it does not fall to be treated as part of the overall note made by Mr Crone.

22. On 22nd December Mr Laing made contact with Mr Crone forwarding him an earlier unanswered email to another person in the company which sought to make contact and which said that both Mr Mulcaire and Mr Laing had each been made "indirectly aware" that senior management at the newspaper were keen to discuss matters in order to reach an amicable resolution of any claims that Mr Mulcaire might have.

23. On 3rd December 2006 Mr Crone emailed Mr Coulson with a "briefing note on the current Clive situation", saying that it ought to go to Mr Hinton "(especially with the emergence of Mulcaire's employment lawyer and the thinly disguised blackmail threat)". So it is apparent that Mr Crone perceived that Mr Mulcaire was threatening the News of the World with disclosures that it might be worried about. Mr Crone did not dismiss that threat as irrelevant.

24. The memo that he sent was headed "Re: Clive Goodman". It stated that he was appearing for sentencing on 26th January and said:

> "(I am anxious that those who need to know have an understanding of the possible outcomes.)"

It pointed out the dangers to the defendant as a result of what might emerge from that hearing - although the document is headed "Re: Clive Goodman", it also dealt with Mr Mulcaire's sentencing hearing as well. The following passages are relevant:

> "2. In terms of trying to predict fall-out from the January 26th hearing i.e. *PR, possible further police activity and possible further legal proceedings*, we need to look at what might be said in court by each of the parties (Prosecution, Clive and Mulcaire) and at a threat of civil proceedings we have received from one of the "victims …
>
> Their summary of Clive's activities will be restricted to the single charge against him as described above.
>
> Because of the enormous amount of evidence they seized in the raids on Mulcaire's premises, their outline of the case against him will paint a far bigger picture. They are likely to say that the 5 extra charges are samples of a much larger group of people whose voicemails he accessed; that the evidence suggests only one paymaster, the News of the World; and that he has been exclusively contracted to the NoW for a number of

> years, his last annual contract (one of the seizures) being worth £x…" (The italicisation is in the original.)

Having summarised the contacts with the lawyer who had indicated that Mr Mulcaire was looking for a severance agreement which would contain a confidentiality clause, the memo goes on:

> "He is looking for a meaningful discussion. I told him I'd need to take instructions and advice and I'd speak to him in the new year.
>
> Ignoring the element of illegal activity, it is not out of the question that although he contracts as a company and is clearly a freelance or consultant, his legal status gives him employment rights against us. I have sent his contracts to a Farrers' employment law expert for a view.
>
> What Mulcaire might say (or counsel) in court is clearly linked to the outcome of his "employment" discussions. It is quite likely in any event that he will say all of the activities with which he is charged were conducted for the NoW. Whether he says a lot more (e.g. names) or a lot less may depend on any talks that may take place.
>
> 3. The PR fall-out from the January 26th hearing is bound to be pretty awful even if neither Clive nor Mulcaire make allegations against the NoW or NoW individuals.
>
> If they do make specific allegations, there is a real possibility that the police will renew their active interest in investigating possible offences by other parties."

25. It would seem that a virtually identical document was sent to Mr Hinton. Mr Crone was obviously pointing out the risks to the defendant from disclosures made at the sentencing hearing by Mr Mulcaire and the possible links between that risk (or its management) and the outcome of discussions about a severance deal for Mr Mulcaire.

26. The day before he sent the Mulcaire options memo, Mr Crone received from Mr Laing a copy of the email about which so much confusion has arisen in relation to this application. On 9 January 2007 at 23:33 Mr Laing emailed Mr Crone with the subject "List" and saying:

> "Tom,
>
> Long day…!
>
> List as requested: –
>
> Companies House Searches
>
> Bankruptcy/Insolvency Searches

> Credit Searches – dates of birth and address confirmations
>
> electronic surveillance – foot and mobile
>
> Land Registry Searches re-property ownership, mortgage details
>
> Equity and Asset location
>
> Tracing and Locating individuals
>
> BA in Graphology – handwriting comparisons
>
> Risk and Strategy Assessment re-stories/potential stories
>
> Employment Research
>
> Friend and Family Research
>
> Telecoms Research – Authenticity of phone no.s etc
>
> Employee Security Awareness Training
>
> Hope above is of assistance. Call me if you need any more."

27. The document that was originally made available to the claimants by the Defendant was a print of the email, printed on 31st January 2007 and partially obscured as referred to above. A skewed piece of paper had apparently been placed over part of the text, with the word "Redacted" upon it. It obscured the last part of each of those lines though in a rather haphazard way. What caught the eye of the claimants when the full version was later obtained was the apparent removal of the references to "mobile" electronic surveillance, dates of birth (useful for guessing pin numbers) and the word "Research" after "Friend and Family" – the identity of friends and families of targets is useful for the purposes of carrying out voicemail interception against such persons, something that is now known to have gone on. The claimants regarded this as wrong and sinister, though it has to be said that the sinister impact of the last purported redaction is lessened by the fact that the words "Friend and Family" was left in. In any event, an explanation has now been given as to what the purported "Redaction" was – it was not an attempt to redact the content of the email, but an attempt to show the position of something stuck on the email whose content was redacted i.e. the Post-it notes.

28. The print of that email, as disclosed, shows that it was printed much later than its date, namely on 31st January 2007. That has a significance as will later appear.

29. Mr Crone responded to that email the next day (10 January 2007) at 11:27:

> "okay, thanks, Moray… Not sure about the "electronic surveillance… Mobile" is what I'd put forward. Is there a legal form of that?"

That remark seems to demonstrate a sensitivity on the part of Mr Crone to that description. The email also demonstrates that for some purpose of exposition Mr Crone was looking for a different way of expressing the activity apparently described there.

30. Later on or the same day the second document with which this application is concerned was sent. On 10 January 2007 14:16 Mr Crone emailed Mr Hinton (via his PA), copying in Mr Coulson:

> "Les,
>
> when we spoke about the Clive/Mulcaire situation last week you asked me to let you have a not [sic] on the Mulcaire "options". Here it is. I am due to meet his lawyer again tomorrow afternoon. If we haven't communicated by then, I'll put it off."

The attachment was the memo of which inspection is sought in this application, and in respect of which privilege is claimed and disputed.

31. It appears from subsequent email traffic that the proposed meeting was postponed, and Mr Laing chased for a replacement meeting on 12th January. In the meanwhile it appears that Mr Crone had had a conversation with Mr Neil Blundell, Mr Mulcaire's criminal solicitor, because on 12 January 2007 (at 13:33) Mr Blundell emailed Mr Crone "further to our telephone conversation this morning":

> "I write to confirm that I am seeking written confirmation from News International, with regard to the retainer payments paid to our client.
>
> At present the CPS are suggesting that cash payments totalling £12,300 and the retainer payments covering the indictment. (November 2005 to August 2006) were Mr Mulcaire's benefit from the criminality.
>
> All we need from News International is confirmation that the retainer payments were for legitimate work which included:
>
> 1. Fact-finding full story;
>
> 2. Confirmation of facts for stories;"
>
> 3. Credit status checks;
>
> 4. Land Registry searches;
>
> 5. Equity searches on businesses and individuals; 6. Tracing individuals; 7. Confirmation of details held on individuals; 8. Company searches; 9. County Court searches; and 10. Surveillance.

> We are trying to establish the legitimacy of what Glenn usually undertook for News International. If it is possible to include the total period he has worked for News International that would be helpful as it would show he has worked with News International for many years and not just the indictment period.
>
> I do not propose asking for any further from you [sic] and I am certainly not looking for any comment on the allegations themselves or his general conduct and how it is viewed."

In the interests of clarity I record that I have set out items 5 to 10 as they are set out in the email, but nothing turns on that layout.

32. Mr Sherborne for the claimants sought to point out that this list omits parts of the list in the 9 January email which suggested unlawful activity and omits "Friend and Family" completely. That is true so far as it goes, but it would appear that what Mr Mulcaire's solicitors were asking for was a record of the lawful activities. Mr Sherborne suggested that the need for this list emerged during the preceding telephone call between the two solicitors, and that may be right, but it is not possible to infer with a great degree of certainty that the idea of omitting the unlawful parts (if that is what they were) came from Mr Crone as opposed to Mr Blundell. The first two paragraphs of this email did not appear in the witness statement of Mr Galbraith which sought to make the iniquity case; nor were they shown to me by Mr Sherborne. It seems to me they have a significant bearing on the provision of the list which Mr Blundell was seeking because they would tend to support a case that it was Mr Blundell who was seeking confirmation for the purposes of Mr Mulcaire's sentencing hearing, rather than the list being something which the two solicitors contrived between them for the purposes of misleading the court, which (as will become apparent) is part of Mr Sherborne's case. Mr Sherborne described this list as being "sanitised" when compared with the list of 9th January. It is certainly a list which omits reference to possible unlawful aspects of the activities, but whether or not "sanitise" is the right word depends on the motivation for and purpose of the list.

33. Mr Crone replied the next day (Saturday, 13 January 2007). He said:

> "Thanks for that, Neil.
>
> In principle, we agree to let you have written confirmation re Mr Mulcaire's retainer payments, the wide range of legitimate activity he undertook for us and the length of time he worked for us. We anticipate doing this by way of a letter to you from me. I am gathering in the relevant information and hope to let you have that letter next Thursday. Sorry for the delay, but I will be out of the country from tomorrow morning until Wednesday night."

34. On 18 January 2007 Mr Coulson asked Mr Crone if he had had a further conversation with Mr Mulcaire's employment lawyer. That would seem to demonstrate a certain anxiety on the part of Mr Coulson, no doubt borne of an anxiety as to what Mr Mulcaire might say in the absence of an acceptable deal. Mr Crone replied the same

day saying that he had chased for an answer that morning (it is not clear to what he was expecting an answer) and that Mr Hinton had not got back to him yet either.

35. On 19th January 2007 Mr Crone provided the letter which Mr Blundell apparently wanted. The letter is from Mr Crone and is addressed to Mr Blundell at Russell Jones & Walker and it reads:

> " I am of the legal manager of News Group Newspapers Ltd, publishers of the News of the World, and have been asked by solicitors for Glenn Mulcaire to describe the nature of his relationship with the newspaper and the work he undertook for it.
>
> My enquiries arising from this request show that:
>
> Mr Mulcaire's contract with the News of the World stipulated that he would provide a "research and information service". In return for a weekly retainer of £2019 he was available 24-hours a day and was contactable seven days a week which often proved invaluable from a newsgathering perspective. He conducted the following services:
>
> 1. Gather facts for stories and analyse the extent of our proof before publication.
>
> 2. Confirm facts and suggest strategies.
>
> 3. Credit status checks.
>
> 4. Land Registry checks.
>
> 5. Directorship searches and analysis of businesses and individuals.
>
> 6. Tracing individuals from virtually no biographical details; including date of birth searches, electoral role searches and checks through databases.
>
> 7. County Court searches and analysis of court records.
>
> 8. Surveillance. Often stories needed this kind of specialist work and could take up a lot of his time.
>
> 9. Specialist crime adviser. He had a detailed knowledge of criminal investigations and procedure in a number of high-profile cases.
>
> 10. Vast professional football knowledge. As a former footballer he was heavily involved in all aspects of the game and knew several key contacts who provided help with a large number of football related stories.

> 11. He had a vast database of contact numbers in the sports and show business world. This was useful for contact details and proof purposes on a number of different stories.
>
> 12. Analysis of documents and handwriting.
>
> Mr Mulcaire's weekly wage may seem substantial but I understand the cost to the News of the World would have been very much greater had the work been spread among several investigation agencies. His rate per hour probably averaged at less than £50. I should also add that there is nothing at all unusual about a newspaper employing outside investigators. Most newspapers do it, as do solicitors, insurance companies and many commercial organisations."

36. Mr Sherborne emphasises the list of activities which he says has been heavily "sanitised". His case is that the list is highly misleading and at its highest Mr Sherborne's case is that this list was intended to be used to mislead the court at the sentencing hearing. The list was said to be designed to attribute a lawful source to what Mr Mulcaire did so as to remove or lessen the prospect of other journalists being named. If it had been held or found that Mr Mulcaire's illicit activities were being carried out under the contract then other journalists would or could have been thought to have become involved. That is a material part of his case on the privilege/iniquity point.

37. The continuation or otherwise of payments to Mr Mulcaire was obviously on the minds of the defendant's officers. On 23 January 2007 Mr Coulson wrote to Mr Kuttner:

> "am I right in thinking that payments to Mulcaire end this month (Jan)?"

Mr Kuttner responded that he was checking but weekly payments had continued, including that week. Mr Coulson responded:

> "my view is that we fulfil the contract but not pay a penny more. double check this with Tom but I suggest this month's payment is final."

Mr Crone joined in on 25th January saying:

> "the contract extension agreed between Mulcaire and Ian Edmondson was for 6 months ending on Dec 31st 2006. It has occurred to me that by continuing payments after that date we are compromising ourselves on a possible future claim from him… But my logic on that was that keeping him non-hostile until after tomorrow was more important."

This demonstrates the continuing concern that Mr Mulcaire be not antagonised. It would suggest that discussions with his lawyers before that time had ascertained that, although no binding arrangement had

apparently been reached, Mr Crone and others were not anticipating that Mr Mulcaire would necessarily be acting in a hostile manner towards them.

38. The sentencing hearing took place on 26 January 2007. Mr Sherborne submitted that the letter must have been used at that hearing to create an impression of a contract which did not include the unlawful activity for which Mr Mulcaire was to be sentenced. I am told that the transcript does not record in terms that the letter was referred to or before the judge, but Mr Sherborne has drawn my attention to the submissions of counsel which, he says, suggest that it must have been available. The passage occurs at page 125 of the transcript at which counsel is recorded as having submitted as follows:

> "May I deal with the retainer payments. He was subject, and it is important, to an agreement with News International for some five years. You have heard references made to a contract that is about to conclude. In fact, it has concluded. He agreed to provide research and information services and was paid a weekly amount that had increased over the years, as Mr Perry explained, to just over £2000 a week. Of course, it was a gross amount that he was receiving.
>
> He conducted the assignment efficiently, promptly and with some expertise and skill and he had, as I have already put it in a document to your lordship, the amount of responsibilities that he had and the sort of work that he was performing for him."

39. I agree that it is very likely that that is a reference to the contents of the letter, so it was used and the sentencing judge (Gross J) is likely to have seen it.

40. It is said that that sort of analysis is important because it managed to achieve the attribution of a large part of his pay to lawful activities, as was demonstrated by the fact that in the end the confiscation order to which Mr Mulcaire was subject was in the sum of £12,000 only, which was a sum of money said to be attributable to his unlawful activities. The rest of his income was left untouched. Thus, it is said by Mr Sherborne, the defendant achieved its objective of presenting large parts of his activities as lawful, which in turn reduced the likelihood of the involvement of other journalists (apart from Mr Goodman) being referred to or coming to light. In essence, Mr Sherborne submits that the Crown Court was misled, and that was the purpose of the letter which Mr Crone wrote.

41. Mr Mulcaire was sentenced to an aggregate of 6 months imprisonment. A confiscation order was made in the sum of £12,300, being the amount of cash said to have been received by Mr Mulcaire in respect of the relevant (limited) illicit activities which were the subject of the prosecution.

42. The next day, 27 January 2007, Mr Laing sought a meeting with Mr Crone as soon as possible. It is apparent that the potential employment dispute had not been settled by this time, which is odd bearing in mind the apparent desire of NGN to settle it to avoid difficulties arising out of the sentencing hearing. In an email Mr Laing said his client and his "extremely distraught" wife wanted to know where they stood. Mr

Crone responded that he would not be able to get instructions for a few days and they ended by planning a meeting for 31st January.

43. It is not known whether this meeting took place, but it was on this day that Mr Crone printed off the email with the list of 9th January – that is apparent from a date at the bottom of the print that we have. There is no evidence from Mr Crone as to why he did that. Mr Sherborne invites me to infer that it was done for the purposes of the meeting on 31st January (of which there is no apparent record, or at least no record has been disclosed – the circumstances of disclosure in this case mean that the absence of a documentary record of that meeting does not mean that it did not take place) and that the Post-it notes which were stuck on that document are likely to have been made for the purposes of the meeting and they must have related to the list. I have difficulty accepting that hypothesis, at least with the degree of certainty that would be required by Mr Sherborne's need to establish a strong prima facie case of iniquity. The meeting, if it was to take place, was to discuss terms for the termination of Mr Mulcaire's contractual relationship. It is not easy to see why the list would be relevant to such a meeting. By now, on Mr Sherborne's case, the creation of a list of Mr Mulcaire's activities had served its purpose of producing a list which could helpfully be presented to the Crown Court at the sentencing hearing. It is not apparent why Mr Crone would want to print the email out at all at this stage, but it seems clear that he did. It may or may not be the case that he made some notes in anticipation of that meeting on Post-it notes, but while nothing relevant is known of Mr Crone's working habits in relation to preparatory notes, that would seem to be a slightly odd way to go about making notes in preparation for the meeting. Mr Sherborne's suggestion that the notes related to the list itself is dealt with by Ms Mossman's evidence that the notes do not relate to the list. That seems to me to be entirely plausible – why would Mr Crone, on 31st January, be making notes about the list? I deal below with the extent to which these uncertainties feed into Mr Sherborne's case based on iniquity. At the moment I will merely observe that those uncertainties do not provide a promising start for a case which has to establish a strong prima facie case.

44. As I have pointed out, an agreement to settle Mr Mulcaire's employment claim was not reached before or even immediately after the sentencing hearing. In March 2007 there was contact between Mr Laing and Mr Crone. According to a witness statement given by Mr Laing to the police in 2012 in connection with a later prosecution, Mr Laing expressed the view that the true relationship between the defendant and Mr Mulcaire was an employer/employee one, making him entitled to bring a claim for unfair dismissal. Mr Crone said he would get back to him and in due course telephoned Mr Laing to say that News International were not prepared to settle. However, in due course they did settle. On 24th April 2007 Mr Mulcaire made an application to the Employment Tribunal. It claimed that his employment had ended on 25th January 2007 (the day before the sentencing hearing) by virtue of his not being paid thereafter. His form claims that his dismissal was the result of the defendant believing that he was about to make disclosures of the identities of other individuals with whom he worked at the defendant. That claim was settled and Mr Mulcaire received £55,000 on 21st June and £25,000 on 19th October. According to Mr Galbraith the settlement agreement (which was not shown to me) contains a non-disclosure provision.

The iniquity

45. The two elements of the iniquity relied on by Mr Sherborne have a common root, namely an alleged desire by the defendant to make sure that journalists and employees other than Mr Goodman were not implicated in wrongful activity by Mr Mulcaire at his sentencing hearing. It is said that that involved Mr Crone sanitising the list of his activities and that the options memo provided to Mr Hinton was intended to further the unlawful or improper purpose of inducing Mr Mulcaire not to spill the beans at his sentencing hearing. The concealment of the involvement of others was an iniquitous activity for these purposes. The Mulcaire options memo must have contained options for silencing Mr Mulcaire and it therefore contained advice as to the pursuit of iniquitous conduct. Privilege did not protect such matters. So far as the Post-it notes are concerned, Mr Sherborne first suggested that they explained how it was that the parts said to show offending behaviour came to be omitted when a later list of activities was reproduced. Since that was iniquitous behaviour then that destroyed privilege in the notes. The contents of the notes are likely to be part of the furtherance of what Mr Mulcaire did in order to prevent the defendant from being exposed to further prosecution and further civil claims.

46. It is as well to consider the two allegedly privileged documents in the correct order. The first is the Mr Mulcaire options memo; the second is the Post-it notes, which are likely to have come later even though they were stuck on a print of an earlier email – they must have been stuck on the physical print on or after 31st January, and there is no reason to suppose they were created a significant time before then.

47. I also remind myself of what it is that Mr Sherborne needs to establish. He needs to establish (a) a strong prima facie case (b) that Mr Crone was asked to advise, or took it upon himself to advise, as to the conduct of an iniquitous enterprise. It is not sufficient to demonstrate that he gave advice in a context in which something iniquitous was possible, or in contemplation, or contemplated by the client. His advice must go further than that.

48. In January 2007 (and probably some time before) Mr Hinton perceived that there was a problem involving Mr Mulcaire. Accordingly, in the week before 10th January (a Wednesday) he asked for "options". That is important, because these are the instructions to Mr Crone to do what he did. So the question is whether it is sufficiently clear that he was being asked to advise on how to do something iniquitous, or that he actually gave advice as to how to do it, or how Mr Hinton should do (or authorise) something sufficiently wrongful. Although he did not put it this way, Mr Sherborne's case is that one or other (or all) of those things happened (on a strong prima facie basis).

49. Mr Sherborne's submission is in effect that the instructions and/or the advice were all about keeping Mr Mulcaire quiet and that the proposals for doing so involved a sufficient degree of wrongdoing to penetrate the privilege. What those instructions and advice were have to be the subject of inference, of course.

50. The basis of Mr Sherborne's inference is the surrounding circumstances (what the problem was) and the overt steps that can be seen to have been taken to address the perceived problem.

51. The likely problem that Mr Hinton was concerned about must have been the forthcoming sentencing hearing of Mr Mulcaire now that he had pleaded guilty. At the beginning of 2007 Mr Crone, and doubtless others including Mr Hinton, were concerned about the exposure of the News of the World to allegations that journalists and others, other than Mr Goodman and Mr Mulcaire, were involved in unlawful activities. Mr Crone in particular knew that that might well be the case, so the risk was the exposure of something that he understood to exist. Mr Mulcaire and Mr Goodman had been charged and were awaiting sentence. It is clear enough that Mr Crone saw the sentencing hearing as being a possible danger point for the exposure that he feared, and if he had had misgivings about that they will have been confirmed and increased by his contacts with Mr Laing and Mr Miskiw.

52. It is likely that Mr Hinton was looking for "options" for dealing with this problem, and it is likely that Mr Crone gave him one or more options. So the question is whether there is evidence that Mr Hinton was instructing Mr Crone to so something which was iniquitous (to a strong prima facie case level), and/or whether Mr Crone advised him to do or authorise such a thing or things.

53. If matters stopped there there would not be a sufficiently strong case of iniquity either in the instructions or in the advice so as to justify penetrating the privilege. Even if the instructions were "What can be done to stop Mr Mulcaire from spilling the beans", that would not be an instruction to advise as to how to do something wrongful. Nor is it inevitable (on these limited assumed facts) that the advice would include something wrongful at all. Mr Sherborne needs to go further and establish a good case for saying that the advice, at least, involved the promotion of iniquitous behaviour.

54. In effect Mr Sherborne seeks to do so by looking at the dealings with Mr Laing. He invites an inference and a finding that Mr Crone embarked on a course of conduct which demonstrated that what he had in mind was sufficiently improper conduct. In order to induce Mr Mulcaire to keep silent he was prepared to assist in a process which helped to establish that the basic contract under which Mr Mulcaire had been engaged involved only lawful behaviour. That would assist the defendant because it would mean that any journalists who might have engaged with him would not necessarily have been using him for unlawful purposes, and it would have assisted (and indeed did assist) in limiting the scope of a forfeiture order to cash payments made separately from his contract remuneration. He relies on the fact that in the now historic case in which Ms Sienna Miller sued the defendant, the defendant positively averred in its Defence that the prosecution and the court accepted that the contract was one encompassing lawful activities.

55. Mr Sherborne's case involves starting with the list prepared by Mr Laing and seeing how it became "sanitised" over the next few days so as to enable the defendant and Mr Mulcaire to present it as lawful. He emphasises Mr Crone's dislike of the reference to mobile surveillance and demonstrates how the list of contractual activities was next presented in the letter from Mr Blundell of 12th January, which had apparently been preceded by a telephone call.

56. It is important to note that the need for a letter with the list was apparently Mr Blundell's, for the purposes of dealing with a point at the sentencing hearing. It does not look like a letter contrived between the two lawyers – Mr Crone would have no

reason to contrive it, and therefore any "sanitisation" would not be likely to be at his insistence.

57. When the final form of the letter was provided on 19th January it was obviously a carefully worded letter which expressed its purpose. It remained a letter which Mr Mulcaire's team wished to have for their purposes, but it is in this context noteworthy that it does not actually say that the retainer payments were for lawful work, which is what Mr Blundell had said he wanted. So Mr Crone did not go that far. It describes the lawful work which the contract required. Mr Sherborne described this letter as an attempt to mislead the criminal court by emphasising the lawful content of the contract at the expense of not referring to unlawful activities, which suited the defendant at the time because it enabled the focus to be on Mr Mulcaire alone and to lessen the possibility of drawing other journalists into the orbit of his unlawful activities, but the letter was written at the request of Mr Blundell who wanted a description of lawful work, and not at the request or initiation of someone at the defendant.

58. One further matter must be borne in mind. The writing of the letter, and the agreeing of what is said to be a sanitised list, is unlikely to have figured among the "options" in the Mr Mulcaire options memo. The request for the letter came after the memo was created, and the letter itself was probably provided before Mr Hinton had got back to Mr Crone after the memo was provided (see the email exchange with Mr Coulson on 18th January, at which point Mr Crone had not heard back from Mr Hinton). Accordingly, even if (as Mr Sherborne suggested) the letter was produced in order to assist a misleading of the court, chronologically that is unlikely to have appeared as an unlawful option.

59. So turning back to whether it can be established that Mr Crone was instructed to come up with a scheme to effect an unlawful or improper purpose, or that Mr Crone gave advice in order to achieve that, one has only very limited material. Mr Mulcaire was a problem, and it is likely that the defendant wished to achieve silence from him on certain aspects. But that does not demonstrate a strong prima facie case for iniquity. By the same token, if that is what the advice was about, that does not present a strong prima facie case of iniquity either. The list and letter do not strengthen the claimants' case in this respect because it was an exercise being conducted in parallel with Mr Crone's advice to his principal. They may demonstrate that the defendant wished to co-operate with Mr Mulcaire, but again that does not clearly connote iniquity.

60. Nor is the claimants' case strengthened by the subsequent references to Mr Mulcaire and his pay. The emails do tend to demonstrate that it was decided to keep his pay going until after the sentencing hearing (though according to Mr Mulcaire's Employment Tribunal application they did not actually do that), but again that is consistent with a desire not to antagonise him. It does not go far in seeking to demonstrate that the advice given by Mr Crone promoted iniquity.

61. I return to the description of the nature of the advice which is set out in general terms in Ms Mossman's witness statement (see above). There is nothing in the facts which goes very far to contradict the apparent good faith description of the advice described in that witness statement. Of particular significance is the reference to external lawyers and their advice. It is not suggested that they were promoting iniquitous

conduct, so the memo cannot have been entirely iniquitous, and that is another obstacle for Mr Sherborne.

62. It follows that, in the case of the Mulcaire options memo, Mr Sherborne has not established a strong prima facie case of relevant iniquity, and his application fails. I have considered whether there is a prima facie case that one or more of the options in the options paper involved something unlawful, and while that is possible that, too, has not been established to the level of a strong prima facie case.

63. The case in relation to the Post-it notes is clearer. When one bears in mind the likely creation date of those notes it is very difficult to associate them with the main badge of iniquity relied on by Mr Sherborne in relation to the Mulcaire options memo. It is not easy to imagine why they would relate to the email of 9th January, and Ms Mossman says that they do not relate to the list (though that is not quite the same thing), but if they somehow relate to the piece of paper on which they were stuck then one has to bear in mind the date on which the piece of paper was printed – 31st January 2007. By that time the sentencing hearing had passed. If the list ever had a relevance, and might have been a badge of iniquity, then that relevance had passed too. Mr Crone was expecting a conversation with the employment lawyer, presumably about the employment claim (though it was not resurrected until after Mr Mulcaire came out of prison), and the notes may or may not have related to that. However, that is speculation. What it is not realistically possible to do, bearing in mind the timing, is to relate the notes to some form of iniquity, or at least the iniquity relied on by Mr Sherborne. It is certainly not established to the level of a serious prima facie case.

64. Accordingly, this part of Mr Sherborne's application fails as well. The claimants invited me to see the documents so that I could rule on privilege. The defendant indicated that it was content for me to view the Post-it notes. In the light of my reasoning above I do not think it is necessary or appropriate for me to see either of those documents. Even if there is some doubt about one or more of the Mulcaire options, that does not open the door sufficiently to justify privileged material being exposed to the eyes of the court even if it would not necessarily go to the other side. Likewise there is nothing to raise a sufficient question-mark about the content of the Post-it notes to justify the exceptional course of the court viewing those documents.

Conclusion

65. It follows that the claimants' application fails.