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Case No: CO/5697/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2015

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
MRS JUSTICE NICOLA DAVIES

- -

Between:

Her Majesty's Attorney General	**Claimant**
- and -	
The Condé Nast Publications Limited	**Defendant**

- -
- -

Andrew Caldecott QC and **Aidan Eardley** (instructed by **Treasury Solicitor**) for the **HM Attorney General**
Adrienne Page QC and **Adam Wolanski** (instructed by **Wiggin LLP**) for the **Defendant**

Hearing date: 2 July 2015

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Approved Judgment

Lord Thomas of Cwmgiedd, CJ:

Introduction

1. Between 28 October 2013 and 25 June 2014 the trial of R v Edmonson & Others took place at the Central Criminal Court before Saunders J and a jury. The trial, popularly known as the "phone hacking trial", involved well-known defendants including Mrs Rebekah Brooks, a sometime editor of the *News of the World*, a publication owned by News International Ltd, Mr Andy Coulson, a former deputy editor and then editor of the *News of the World*, and others, including Mr Clive Goodman, Mrs Cheryl Carter (Mrs Brooks' personal assistant) and Mr Brooks (Mrs Rebekah Brooks' husband). The trial attracted a very large amount of media coverage by way of conventional court reporting.

2. In March 2014, as some of the defendants in the trial were giving evidence, the defendants to these proceedings (Condé Nast), published the April 2014 issue of *GQ* magazine. It was in circulation between 4 and 28 March 2014. The front cover trailed vividly an article under the headline:

"HACKING EXCLUSIVE!

MICHAEL WOLFF AT THE TRIAL OF THE CENTURY".

The contents page, accompanied by a photograph of Mrs Rebekah Brooks described the article as:

"Michael Wolff Up close and personal at the phone-hacking trial"

The article by Michael Wolff, under a very large photograph of Mrs Brooks, was entitled:

"The court without a king".

It was accompanied by sketches of the proceedings and other photographs. I set out some of the content of the article at paragraphs 18 and following.

3. On 21 March 2014, the solicitors for Mrs Brooks referred the article to HM Attorney General. It was drawn to the attention of the trial judge on 25 March 2014 when the judge made the observation that the article, "appears to me to be a *prima facie* contempt".

4. On 25 March 2014, the Treasury Solicitor wrote on behalf of the Attorney General to Mr Dylan Jones, the Editor in Chief of *GQ*, making clear that the Attorney General was considering whether the article was a contempt of court and requesting that appropriate steps be taken in regard to hard copies sold.

5. On 19 March 2015 this court granted HM Attorney General permission to apply for committal of the defendant for contempt under s.2(2) of the Contempt of Court Act 1981 which sets out what is known as the strict liability rule, namely that it is a contempt to publish, "a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced". The

contempt only applies to proceedings which are active but as the article was published during the course of the trial, it was not in issue that the proceedings were active.

6. The question for the court was whether the Attorney General had proved to the criminal standard of proof that, in the words of the section, there has been "a substantial risk" that the course of justice "will be seriously impeded or prejudiced".

7. It is clear from the numerous authorities that:

   i) The words "substantial risk" mean a risk which is more than remote or not merely minimal and that it must be judged at the time of publication.

   ii) In considering the test under s.2(2) the question is whether the publication would have given rise to a seriously arguable ground of appeal if the trial had been allowed to continue and proceeded to conviction. (See *Attorney General v Birmingham Post and Mail* [1999] 1 WLR 361 at page 371); this approach is the one to be followed (see *A-G v MGN* [2011] EWHC 2074 (Admin), [2012] 1 Cr App R 1 at paragraph 28).

   iii) The fact that there is some risk of prejudice by reason of earlier publications is not conclusive; if several newspapers publish prejudicial material, they cannot escape by contending that the damage has already been done. It is sufficient that the latest publication has afforded an additional or further risk of prejudice or exacerbated and increased that risk: see *A-G v Independent Television News* [1995] 2 All ER 370 at 381.

   iv) The test under s.2(2) generally satisfies the balance required under Article 10 of the Convention: see paragraph 32 of the decision in *A-G v MGN*.

8. In this case, the court is concerned with the following factual issues which arise in applying the clear and established principles to the facts of this case.

   i) What was the risk of the publication coming to the jurors' attention? This involves a consideration of the extent of the publication of the April 2014 issue of *GQ*.

   ii) Was there a risk of serious prejudice? Did the article itself contain material that was seriously prejudicial?

   iii) Could a jury have been relied upon to use their common sense to ignore it?

9. Before turning to the issues, it is right to record:

   i) Mr Wolff is a journalist based in New York who writes a regular column in *GQ* on the media industry. The court was told that Mr Wolff pitched an article on the "hacking trial" for the January 2014 edition of *GQ*. Mr Dylan Jones was of the view that such an article could not be published until after the trial, but he would pay for Mr Wolff to come to London and observe the trial. After the article had been written, Mr Wolff said he believed he had written it within the rules relating to contempt. Mr Jones still took the view that it would not be possible to publish it, but after taking advice that the article was not likely to contravene the strict liability rule, decided to publish it.

ii) We were told of the circumstances in which advice was given. A statement was provided to us outlining the advice. The fact that advice was given was relied on by Condé Nast as "telling". As the liability is strict and it is for the court objectively to assess the factors, it is not, in my view, appropriate in this case to refer to the advice, to give any details as to the source of the advice or set out my views on it. That is the view I have taken in this case, as it is also a factor that the provider of the advice was not aware of the course a court might take in making the advice public. I would simply add that this is not a precedent and the same course might not necessarily be the course taken in the future. However, the fact that advice was taken from a competent source (which in the circumstances I have set out it will not be necessary for me to identify) may be relevant to penalty.

iii) Mr Dylan Jones tendered his apologies "that the court's time and public resources are being expended in consideration of this matter". He gave the court an assurance that Condé Nast would never deliberately or recklessly have published matter that would prejudice court proceedings.

The risk of the article coming to the attention of jurors: the extent of the publication

10. The evidence of Condé Nast, as corrected and updated, was that:

i) The April 2014 issue of *GQ* had total sales of 90,573, comprising 38,305 newsstand sales, 24,199 subscriber sales, 6,137 digital edition sales and 21,898 multiple copy sales (sales to airline companies, hotels, waiting rooms and the like).

ii) It was estimated that 43,168 of the sales were in London, 13,755 from newsstands in London, 5,859 to subscribers in London, 1,622 digital sales to those living in London and 21,932 multiple copy sales were made in London.

iii) The article was not made generally available on line.

iv) On receipt of the letter from the Treasury Solicitor to which I have referred at paragraph 3, a recall request was made; 61 per cent of the newsstand supply was returned and destroyed.

11. The trial judge was told that the April issue of *GQ* was on sale at WH Smith and other places on newsstands where the front cover could easily be seen by anyone looking for a magazine. It was also clear from the evidence filed on behalf of Condé Nast that *GQ* was available to be read in waiting rooms at some offices, dental and medical surgeries, hairdressers and the like. Its readership was therefore likely to be significantly greater than the circulation.

12. I reject the contention made by Condé Nast that the headline on the cover was not prominent or unlikely to catch the eye of a person looking at magazines on a newsstand. It is plain, in my view, that the headline on the cover (in both forms that were placed before the court) positioned and type set vividly as it was, would, at the time the trial was taking place, have drawn the attention of that article to anyone involved in or knowing of the trial. That would include jurors and friends or relatives

of jurors who would have been well aware of their service on the jury and might mention it to a juror.

13. In these circumstances, what was the risk of the issue coming to the attention of a juror? It is necessary in particular to have regard to the circulation, the availability at waiting rooms and the like and the vivid nature of the headline. In my judgment, taking these matters into account, there was a significant risk that the article would come to the attention of a juror – the article was prominently featured on the front cover of *GQ*, it was available on much frequented newsstands, its circulation and its readership in London were substantial.

The content of the article

The scope of the allegations in the trial

14. Before turning to consider the content of the article, it is necessary to explain a little more about the issues at the trial. The principal charge against Mrs Brooks, Mr Coulson and other defendants was a conspiracy between October 2000 and August 2006 to intercept unlawfully mobile phone messages, popularly known as "phone hacking"; it related principally to the activities at the *News of the World.* It was not seriously in dispute that phone hacking had taken place at the *News of the World* on a significant scale. The issue was whether Mrs Brooks, Mr Coulson and others knowingly participated in phone hacking. Mrs Brooks had been editor of the *News of the World* from 2000-2003 when she was made the editor of *The Sun.* Mr Coulson had been her deputy editor at the *News of the World* and he had in 2003 succeeded her and remained editor until 2007.

15. There was no allegation in the indictment or suggestion in the opening speech for the prosecution that those more senior in the hierarchy of News International Ltd than the defendants had been involved. In particular no such allegation was made that Mr Rupert Murdoch, the Chairman and Chief Executive of News Corp (the ultimate owner of the *News of the World*) was involved in, let alone directed, the phone hacking. However, there was evidence at the trial about the contact between Mrs Brooks and others and the senior management of News International Ltd; for example, the jury had asked questions of the former Chief Financial Officer of News International Ltd through the judge about audits of the payments made to those who had carried out the phone hacking.

Mr Wolff's credentials as a media commentator

16. Mr Wolff was described in the article as being the winner of the 2013 EICA Media Commentator of the Year. He put himself forward in the article as someone who could speak about the issues with knowledge of Mr Rupert Murdoch and his companies and that he knew Mrs Brooks and Mr Coulson and their association with Mr Rupert Murdoch. Condé Nast described him in the submissions made to the court as someone who could not provide any inside information and was no more than a journalist who wrote in adverse terms about News International Ltd. However, although it is plain Mr Wolff was hostile to News International Ltd and Mr Murdoch and not an inside source, in my view he wrote the article as someone who was an experienced media commentator who could speak with knowledge and a degree of

authority. *GQ* published the article in that context; their submission to the court was an *ex post facto* attempt to belittle him and the article.

17. It was contended that the article was seriously prejudicial in a number of respects. It is sufficient to deal with four.

The article's description of the role of Mr Rupert Murdoch:

18. First, it was contended on behalf of the Attorney General that the article, published as it was at the point in time during which the defence case was being presented to the jury, implied that Mr Rupert Murdoch knew about the phone hacking, but that his role was being withheld from the jury as this suited both the prosecution and the defence. This was readily to be inferred from the following passages:

> "One word is seldom uttered in this trial "Murdoch".
>
> You might think that, by the way the narrative is unfolding here, Murdoch's association with the proceedings is mere inconvenience or happenstance.
>
> One might have thought, at least in an amateur legal analysis that either the defence or the prosecution - or both - would have put the old man on trial, however remotely.
>
> Just to utter the word "Murdoch" could, from the prosecution's perspective, have tarred the defendants. Indeed so powerful is the word that it may arguably be prejudicial in and of itself, or perhaps a distraction from the people actually on trial. The more guilt that might be ascribed to him, the less for the defendants.
>
> That might logically have been a defence ploy: to make the defendants victims of the far-off monster. On the other hand, arguably, the more you say the name Murdoch the more you ascribe a negative aura to all. Guilt by association
>
> ….
>
> And all the prosecution has to do is show that they did what they are said to have done, however more mundane it might appear without Murdoch having ordered them to do it."

19. It was submitted on behalf of Condé Nast that there was a vast amount of material published before the trial that implied the involvement of Mr Rupert Murdoch in phone hacking or its cover up. They referred for example to the BBC's episode of *Have I Got News for You* broadcast on 27 April 2012 and the reports in the *Daily Star*, *Guardian* and other publications in May 2012 after the publication of a Parliamentary Select Committee Report following the appearance of Mr Rupert Murdoch and Mr James Murdoch before the Committee.

20. However, that was a significant period of time before the trial. In my view, the implication of Mr Wolff's article published during the trial was obvious. It clearly

suggested that Mr Rupert Murdoch was a participant in the phone hacking; that for their different reasons, the prosecution and the defence did not want to make this case. That was a statement plainly prejudicial to the fair trial of the case. Furthermore, by implying that Mr Murdoch knew, it would be more difficult for those in the position of Mrs Brooks and Mr Coulson to contend that their knowledge was less than that of Mr Rupert Murdoch.

The article's description of the arrangements for the payment of defence costs

21. Second, it was contended on behalf of the Attorney General that the article implied that, as Mr Murdoch was paying the defence costs, this served his agenda of protecting his interests to the detriment of the public good:

> "Also, not incidentally, Murdoch is paying for much of this grand defence, by some estimates the most costly in British legal history. From the defence's point of view, there's only so much you'd want to bite the hand that feeds.
>
> And perhaps he is more useful in his absence. Without Murdoch as the anchor, it is natural to wonder just exactly why we are here. One unifying thread of the hacking investigation has surely been to get Murdoch – hacking being just the latest manifestation of Murdoch cynicism, arrogance and perfidy. But by removing Murdoch from this story line you are left with a potentially much smaller tale, mundane acts instead of epic ones. Just the usual nasty newsroom stuff instead of a vast, insidious conspiracy to undermine the public good."

22. Condé Nast pointed to numerous articles published in 2011-2012 where it had been made public that News International Ltd was paying for the defence of some of the defendants; they also pointed to the publicity that had been given to the challenge made in 2011 by Mr Coulson to the decision to stop paying his legal fees. Many of these articles remained on the internet. In November 2012, the success of Mr Coulson's challenge was reported on the London 24 website. For the reasons I have given I cannot accept this submission. All of this was long before the trial.

23. Furthermore it was submitted by Condé Nast that the fact that it was Mr Rupert Murdoch through News International Ltd who was paying for the defence was irrelevant. In many instances it might be, but the submission by the Attorney General is well founded. The clear implication of the passages set out was that the funding was for a base motive; that was highly prejudicial.

The article's description of the role of Mr Coulson

24. Third it was contended that the article implied that Mr Andy Coulson was a person who knew all about phone hacking and was simply carrying out Mr Rupert Murdoch's orders by hacking phones and then concealing the truth:

> "One evening outside the trial, I saw Andy Coulson, who I have always liked, across the room at a cocktail party. I manned up and greeted him, hoping I had not written such

> horrible things about him - but realising that in his role as a Murdoch surrogate I probably had. Coulson maintained a dignified manner, correcting me on a few points and carefully keeping his reserve about the trial and his fate. He was the noble figure. I was the heel. …
>
> Coulson has been transformed from factotum and apparatchik into a brooding and existential figure. The invisible man beside greater men now seems larger, straighter, handsomer. The clerk has bloomed. Being caught in such inexorable circumstances has given him gravitas. He is the ultimate keeper of the secrets. Does anyone know more than Coulson? His hypothetical book may well be the most valuable property in British publishing."

25. It was submitted on behalf of Condé Nast that this was no more than a musing on the position of a defendant; it was far-fetched to suggest that any factual allegation was being made. But it is again clear that the implication of the passage was what was set out on behalf of the Attorney General. It was seriously prejudicial.

The article's description of the role of Mrs Brooks

26. Finally it was contended that the article implied Mrs Brooks was a person who simply followed Mr Murdoch's orders and someone who would run her defence in such a way that she would in the future benefit from Mr Murdoch:

> "[Rebekah Brooks] has already banked a settlement of a reported £10.8m from Rupert Murdoch on her contract with News International, giving her vast wherewithal to contemplate a future of … well, whatever she wants. What's more, she obviously possesses all those traits that are said by *schadenfreude*–loving wags to have put her here. She is clever, sharp, winning, seductive, cunning – well prepared to do what is required. No, she is unlikely to retire. Even if worse comes to worst, she'll emerge soon enough. She could be Britain's Martha Stewart. But on the UK stage, she is even larger."

27. It was clear, as was submitted on behalf of Condé Nast, that the fact of the severance payment had been placed in the public domain in a number of articles. It was also mentioned in the evidence of Mr Brooks. However, the fact of the severance payment was not the gravamen of the passage. The gravamen was the implication that Mrs Brooks was a disreputable woman who would do whatever was required by Mr Murdoch. It was an improper attack on a defendant in the course of her trial and plainly seriously prejudicial.

The effect of the earlier media coverage

28. As is clear from what I have set out, there was extensive pre-trial publicity. It included publicity relating to the hacking of the phone of Milly Dowler which had received significant publicity at the trial of Levi Bellfield for her murder in 2011, the hacking of the phones of celebrities, and the appearances by Mrs Brooks at the

Leveson Inquiry and before a Parliamentary Select Committee. There had been extensive tweeting and blog comment. Books had been written about the events.

29. An application was made at the outset of the trial on behalf of Mrs Brooks, Mr Coulson and Mr Edmondson that the proceedings should be stayed as the pre-trial publicity had been so extensive. The judge accepted that the reporting could be described as antagonistic to the defendants. In his ruling of 28 October 2013, he posed the issue as to whether the jury would not be impartial as a consequence of the pre-trial publicity, taking into account the safeguards that could be put in place by way of direction and the conduct of the trial. He concluded that the jury, suitably directed, would be impartial; a jury would be fair and decide the case on the evidence.

30. It was submitted by Condé Nast that the material in the media to which I have referred in the preceding paragraphs must have been in the minds of the jurors and it was in any event available on line during the currency of the trial. I cannot, however, accept that the material in any way lessened the seriously prejudicial effect of the article in *GQ* which I have set out. The memories of the press reports in 2011 and 2012 would have faded. In any event even if some memory remained, the article in *GQ* could have afforded a further and additional risk of prejudice. The fact that the material might have been on line is not material; that is because any research by jurors on the internet would have been in direct breach of the judge's directions as significant publicity had been given to the consequences of internet research as a result of the decisions in *A-G v Dallas* [2012] EWHC 156 (Admin), [2012] 1 WLR 991, *A-G v Davey* [2013] EWHC 2317 (Admin), [2014] 1 Cr App R 1 and *S-G v McEvoy* [2014] EWHC 4788 (Admin). The judge told the jury at the outset of the trial that jurors had been sent to prison as a result of their conduct in conducting internet research. He concluded:

> "So it is important that I should warn you so that you know to disobey any of these directions can amount to a contempt of court, which is punishable by a sentence of imprisonment or a fine."

It is therefore unrealistic to think that the jurors would have conducted research on the internet.

Overall conclusion on serious prejudice

31. I am left in little doubt that the effect of the article read as a whole was very seriously prejudicial. I cannot accept the submission advanced by Condé Nast that the article was riddled with ambiguity and lacking in identifiable assertions or that it was difficult to search for its meaning. On the contrary, it plainly implied that Mr Rupert Murdoch was a participant in the phone hacking, that the defendants must have been aware of the phone hacking, that the defence was being funded by him and conducted on the defendants' instructions so as to protect his interests, but in a way that might also secure their acquittal. It was not mere comment or observation, but an article that made the clear implications about Mr Rupert Murdoch, Mrs Brooks and Mr Coulson I have set out.

32. The fact that Mrs Brooks and Mr Coulson were well known and that there had been significant pre-trial publicity were relevant factors. These factors did not however

provide any foundation for the view that a highly prejudicial article published during the trial would not cause a substantial risk of serious prejudice; on the contrary, the fact they were well known and there had been substantial hostile pre-trial publicity pointed to the real danger of reigniting the prejudice during the actual hearing of the trial and bringing back memories of what had faded.

Would the jury have in effect used their common sense to ignore it?

The directions to the jury

33. After the jury had been empanelled, they were directed by the judge at the outset of the trial about the way they should approach the task and how they should deal with publicity and reports of the case. He made clear to them that they should ignore any comment that they might come across about the case. He gave them a written summary of the directions. As is usual the jury were periodically reminded of those directions.

The timing of the publication

34. It is essential to bear in mind that not merely was the article published during the currency of the trial, but it was available to be read during the evidence of some of the defendants - Mrs Brooks (whose evidence began in February 2014, but who gave evidence until 12 March 2014), Mr Clive Goodman (13 March to 20 March 2014, when he became ill). Cheryl Carter (25 March to 27 March 2014), and Mr Brooks (28 March to 1 April 2014)

The continuation of the trial

35. As I have noted at paragraph 3, the article written by Mr Wolff was drawn to the attention of the trial judge. Condé Nast contended that Mr Edis QC, who appeared for the prosecution, had described the publication as an "irritating matter" and later as an opinion and comment piece that should not have been written.

36. It is clear, however, that Mr Edis QC made clear to the judge that the article should not have been published and was a contempt. The judge, a distinguished judge with the most extensive experience of difficult criminal trials, apart from expressing the view to which I have referred at paragraph 3, decided, after hearing counsel, and in the absence of an application to discharge the jury, that the better course was to say nothing specific to the jury. That was, in my view, an understandable and indeed the right course. He simply made a reference to the directions he had given at the outset of the trial about reading matters in the press.

37. Thus what was said at the trial and the course of action taken at the trial was completely consistent with the view that, on the material before the judge, the article constituted a *prima facie* contempt. It was for this court to decide, in the event the Attorney General brought proceedings, whether or not it was.

The submission of Condé Nast

38. It was submitted on behalf of Condé Nast that the jury would have been entirely uninfluenced by the article. It should at most be viewed as a small incident in a long

trial which could have had no impact on any juror who had read it. As had been pointed out at paragraph 274 of *Arlidge, Eady and Smith on Contempt* (4th edition) there had been an increasing trend to treat juries as responsible and capable of resisting extraneous influences. There was no risk that an application might have been made to discharge the jury, let alone there being a real risk it might succeed. This was demonstrated by the fact that no application was made.

My conclusion on this issue

39. In my judgment, it is of no materiality that no application was in fact made to discharge the jury. The trial had lasted 4 months; there were many considerations at that stage why an application was not made by those acting for the defence. That would not have affected their ability to advance the matter on an appeal.

40. As has been made clear on so many occasions (for example by Lord Taylor of Gosforth CJ in *ex p The Telegraph Group plc* [1993] 1 WLR 980 at 987 and by Sir Igor Judge PQBD in *R v B* [2006] EWCA Crim 2692) the court will always credit the jury with the ability and will to abide by the directions of the judge. In the present case, there would have been an expectation that the jury would have followed the directions to which I have referred.

41. *GQ* made clear to the court that it was a responsible publisher which prided itself in good quality and responsible journalism. I accept that it was perceived to be such. Indeed the article was presented on the cover as an ordinary court report. There was in my view nothing to alert the juror, until s/he began to read it, to the fact that the article was not conventional, fair and balanced reporting. A juror might well therefore have turned to the article; it would only on reading have been apparent to the juror that it was an article which set out the clear implications which I have summarised at paragraphs 16 to 32 above.

42. It was in my view unrealistic to expect a member of a jury who read the article to be uninfluenced by or to put out of his or her mind the contents of such an article published as it was during the trial. There would in my view therefore have been a seriously arguable ground of appeal that the jury should have been discharged.

Conclusion

43. Prior to the Contempt of Court Act 1981, publication of an article that pre-judged the outcome would generally have been treated as a contempt. The provisions of s.2(2) (as developed in the case law) provide for a step by step analysis which protects the freedom of the press and balances the public interest in ensuring a fair criminal trial

44. On that analysis, it is in my view clear that the article published in the April 2014 issue of *GQ* created a substantial risk that the course of justice in the trial of R v Edmondson and others would be seriously prejudiced or impeded. Condé Nast therefore breached the strict liability rule and was therefore in contempt of court.

Mrs Justice Nicola Davies

45. I agree.