

IN THE HIGH COURT OF JUSTICE

000038

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMPETITION LIST (ChD)

Before: Mr Justice Roth

11 August 2020

B E T W E E N:

Claim No. CP-2018-
11 Aug 2020



CP-2018-000038

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, SA**
- (8) TELEFONICA O2 HOLDINGS LIMITED**

Defendants

DISCLOSURE AND DIRECTIONS ORDER

UPON the Directions Order of Mr Justice Roth dated 19 March 2020 ordering (amongst other things) that the parties (i) produce and exchange schedules setting out the form of disclosure they propose to give herein ("**Disclosure Schedules**"), and (ii) thereafter exchange comments on one another's Disclosure Schedules;

AND UPON the parties having exchanged Disclosure Schedules on 4 May 2020 and their comments on the same on 22 May 2020;

AND UPON the Consent Order dated 30 March 2020 providing for the creation of a confidentiality ring (the “**Confidentiality Ring Order**”)

AND UPON certain amendments to the parties’ disclosure proposals (as set out in the Disclosure Schedules or otherwise) having been agreed in correspondence between the parties prior to and following the exchange of comments on 22 May 2020;

AND UPON the Claimant’s application dated 4 June 2020 for directions relating to the Defendants’ disclosure in these proceedings (the “**Claimant’s Application**”);

AND UPON reading the Third Witness Statement of Edward Patrick Greeno dated 4 June 2020 in support of the Claimant’s Application (“**Greeno 3**”);

AND UPON the First Defendant seeking disclosure of any central investment proposal document or pack dealing with the BC Partners Board’s consideration of the proposed acquisition of Phones 4u in 2011 (“**BCP Acquisition Papers**”);

AND UPON the Second Case Management Conference taking place on 2 and 3 July 2020;

AND UPON hearing Leading Counsel for the each of the parties (with the Fourth and Fifth Defendants being represented together and likewise the Sixth to Eighth Defendants);

AND UPON the Court considering, on paper, applications by the Second and Third Defendants for permission to appeal against paragraph 15 of this Order on various grounds (the “**Grounds**”);

IT IS ORDERED THAT:

1. The Disclosure Pilot regime for the Business and Property Courts (Practice Direction 51U) does not apply to these proceedings.

2. The parties shall by 4pm on 29 January 2021 give standard disclosure by list, save where disclosure is ordered to be provided earlier in paragraph 5 below.
3. For the purpose of CPR r. 31.7, the parameters of the parties' reasonable searches shall be as specified in this Order or as agreed between the parties.
4. Any requests for inspection or copies of disclosed documents shall be made within 7 days after service of the list and shall be responded to within 7 days of receipt. The parties shall provide disclosed documents for inspection in accordance with the provisions of the Confidentiality Ring Order.

Early disclosure

5. By 31 July 2020:
 - (1) The First Defendant shall give standard disclosure in respect of (a) EE statutory board meeting minutes, resolutions and supporting documents, (b) EE business review meeting minutes and supporting documents, and (c) EE executive management team meeting minutes. Such documents as are disclosed shall be treated as "Confidential Information" under the Confidentiality Ring Order pending the First Defendant's review for confidentiality.
 - (2) The Claimant shall disclose the BCP Acquisition Papers, with liberty to apply if and to the extent that reasonable and proportionate searches do not locate such papers.
 - (3) The Claimant shall give standard disclosure in respect of: (a) Phones 4u Limited's ("**Phones 4u**") final monthly board packs, prepared by its directors for BC Partners, over the period 1 October 2012 to 15 September 2014; (b) the final minutes of meetings of the board of Phosphorus Jersey Limited over the

period of 1 October 2012 to 15 September 2014; and (c) the final quarterly trading updates issued in the course of 2012 to 2014 by Phones 4u Finance plc, a parent company of Phones 4u.

Claimant's Disclosure

6. In respect of the Claimant's proposed searches of the PricewaterhouseCoopers LLP ("**PwC**") email data of (i) Robert Jonathan Hunt; (ii) Ian David Green; and (iii) Robert John Moran (together, the "**Individual Administrators' email data**"), as set out in the Claimant's Disclosure Schedule as '*Search 5 - Part A*' and as subsequently amended by agreement between the parties (the "**Claimant's Search 5 - Individual Administrators' emails**"):

- (1) Insofar as the Individual Administrators' email data between 1 August 2014 to 14 September 2014 is within its control, that data shall be searched by the Claimant as part of the Claimant's Search 5 - Individual Administrators' emails.
- (2) Insofar as such email data is not within its control, the Claimant shall:
 - (a) explain to the Defendants the basis on which the Claimant contends that the relevant email data is not within its control;
 - (b) by 30 August 2020, write to PwC to request its consent to conduct searches across the email data, such letter or letters and any letter or letters of response to be copied to, or otherwise forwarded to, the Defendants' solicitors;
 - (c) if and to the extent that PwC provides consent, include the email data within Search 5 - Individual Administrators' emails;

- (d) if and to the extent that PwC refuses consent, notify the Defendants of this in writing, providing the letter(s) received from PwC in response.
7. The Claimant shall by 4pm on 23 July 2020 notify the Defendants in writing of any objection on grounds of privilege to providing inspection or copies of the report or return prepared by its administrators pursuant to the Insolvent Companies (Reports on Conduct of Directors) Rules 1996 (the “Statutory Report”). To the extent that such document is within its control for the purpose of CPR 31.8, the Claimant shall disclose the Statutory Report by a date to be agreed between the parties, and in any event no later than 11 September 2020.
8. The Claimant shall, as part of standard disclosure, serve on the Defendants a witness statement from an appropriate individual describing in reasonable detail any realisations made by the Claimant’s administrators in respect of the Claimant’s assets. For the purpose of the preceding sentence, ‘in reasonable detail’ shall mean with such detail as is reasonably necessary to enable a Defendant to bring an application for specific disclosure, if so advised, in respect of any of the assets described in the witness statement.

Defendants’ Disclosure

9. By 4pm on 31 July 2020, the Second Defendant, the Fourth and Fifth Defendants and the Sixth Defendant shall provide to the Claimant lists identifying the addressees of ‘Document Hold Notices’, as defined in paragraph 6.2 of Greeno 3.
10. By 4pm on 31 July 2020, the Second Defendant shall provide to the Claimant a ‘Participant Hit Report’, as defined in Greeno 3, identifying the emails sent by its disclosure custodians to persons in any of the other Defendants in the period 1 September 2012 to 31 October 2014.
11. The Second Defendant shall include Mr Fridbert Gerlach as a custodian in its standard disclosure searches.

12. The Second Defendant's date range, for its standard disclosure, shall:
 - (1) for its custodians who were members of the EE board, be the duration of their board membership, plus the two months before and the two months after that period in each case; and
 - (2) for Mr Fridbert Gerlach, cover the period of his position in the area management team covering the UK within the date range of 1 June 2012 to 31 October 2014.

13. The Fourth and Fifth Defendants shall each carry out unfiltered searches of email communications from each of their custodians to, cc or bcc any employees of the First to Third and Sixth to Eighth Defendants who used the following domain names for the period 1 June 2012 to 31 October 2014, and vice versa:
 - a. @ee.co.uk
 - b. @everythingeverywhere.com
 - c. @o2.com
 - d. @orange.com
 - e. @orange-ftgroup.com
 - f. @telefonica.com
 - g. @telefonica.es
 - h. @telekom.de

14. The Claimant shall, by 4pm on 31 August 2020, send to each of (1) the Second Defendant; (2) the Third Defendant; (3) the Fourth and Fifth Defendants; and (4) the Sixth to Eighth Defendants a list of up to four custodians to whom the request referred to at paragraph 15 below shall be sent (the "**Personal Material Custodians**").

15. Each of (1) the Second Defendant; (2) the Third Defendant; (3) the Fourth and Fifth Defendants; and (4) the Sixth to Eighth Defendants shall, by a date to be agreed between the parties, write to the Personal Material Custodians to request access, upon the giving of undertakings by each Defendant's e-Disclosure provider in the form set out in the Schedule to this Order, or as otherwise agreed between the parties, or ordered by the Court, to their personal mobile telephones and emails for the purpose of conducting a reasonable search for work related communications over the relevant period only for documents or messages relating to the business of the relevant Defendant or Phones 4u or CPW for subsequent disclosure review by the relevant Defendant in these proceedings.
16. The Second to Eighth Defendants shall provide to the Claimant copies of their letters referred to in paragraph 15 above and any replies.
17. If the parties are unable to agree a time period within which the Second to Eighth Defendants are to undertake the steps pursuant to paragraph 15 above, the parties have liberty to make a written application for this time period to be determined by the Court.
18. Save as set out above, the Claimant's Application is dismissed.

Publicly-available documents

19. A party is not required to search publicly accessible repositories and/or disclose a document obtained from searches of such repositories unless the party wishes to rely on it. However:
 - (1) A party is required to disclose documents meeting the test for standard disclosure which are found in its non-publicly accessible repositories notwithstanding that such documents may be (or have been) publicly available;
 - (2) The Claimant shall conduct reasonable searches for and give standard disclosure of any debt analyst and rating agency reports covering the performance of Phones 4u's publicly

traded debt notwithstanding that such documents may be (or have been) publicly available; and

- (3) Witnesses of fact and expert witnesses shall not be precluded from referring to and exhibiting publicly available documents even if such documents have not been disclosed pursuant to this paragraph.

Permission to appeal

20. The Second and Third Defendants are granted permission to appeal against paragraph 15 of this Order on all of the Grounds.
21. The time for the Second and Third Defendants to file any Appellant's Notice is extended to 4pm on 7 September 2020.
22. The time for the Sixth to Eighth Defendants to apply to the Court of Appeal for permission to appeal against paragraph 15 of this Order is extended to 4pm on 7 September 2020
23. Paragraph 15 of this Order is stayed:
 - (1) as regards the Second and Third Defendants, until determination of their appeal by the Court of Appeal;
 - (2) as regards the Sixth to Eighth Defendants, until 7 September 2020 and, if they submit an application for permission to appeal pursuant to paragraph 22 of this Order, thereafter until determination of their application or, if permission is granted, their appeal by the Court of Appeal.

Directions

24. By 4pm on 30 July 2021, the parties shall exchange signed statements of witnesses of fact and hearsay notices where required by CPR 33.2.
25. Pending the Court's determination as to the nature and duration of the trial to take place, a trial shall meanwhile be listed to commence

on 7 June 2022, with a time estimate of eight weeks, to include three days of pre-reading.

Costs

26. Costs of the Case Management Conference shall be costs in the case.

Liberty to apply

27. There shall be liberty to apply.

Service

28. This Order shall be served by the Claimant on the Defendants.

Dated this day of 2020

Service of the Order

The Court has provided a sealed copy of this Order to the serving party, Quinn Emanuel Urquhart & Sullivan UK LLP (Solicitors for the Claimant), at 90 High Holborn, London WC1V 6LJ (ref: EPG/AF/NBS/JBU/WB/NG/06267-00001).

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Draft SCHEDULE: FORM OF UNDERTAKING

We, [*e-Disclosure provider's name*], being the e-Disclosure provider of [*relevant Defendant/Defendants*], undertake to the Court as follows:

1. In accordance with the Order of Mr Justice Roth dated [*date*], a copy of which we have been provided with, we will take custody of and/or image any personal mobile telephone devices and emails of [*insert names of the relevant custodians selected by the Claimant*] provided to us or to which access is provided to us by those individuals for the purposes of searches for work-related communications, which will then be delivered to the [*relevant Defendant*] for disclosure review in these proceedings.

2. We will search the devices and emails or images referred to in paragraph 1 above only for documents and messages relating to the business of [*relevant Defendant/Defendants*], Phones 4u Limited or Carphone Warehouse Limited for the purpose of these proceedings.
3. We will not disclose to [*relevant Defendant/Defendants*] or [*its/their*] solicitors any content on the devices or in the emails referred to in paragraph 1 above other than that responsive to the search referred to in paragraph 2 above.
4. On completion of the search and of taking images of any documents and messages falling within the scope of paragraph 2 above, we will return the devices and/or emails to the individuals who provided them and delete/destroy any copies we retain of data not falling within paragraph 2 above.