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Client Alert

Is Your Phone Only 4U? Court of Appeal Orders Parties To Request Personal Devices From Employees

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In a recent judgment in a claim brought by Phones 4U (in administration), the Court of Appeal has ordered the defendants (o2, Vodafone and EE) to request their employees and former employees to provide their personal mobile devices to IT consultants to enable those devices to be searched for information potentially relevant to the proceedings.[1] This follows a number of cases that have made it clear that work-related information which is stored on an employee's personal device is considered to be within the control of a party and thus disclosable in court proceedings.[2]

The increasingly prevalent use of personal devices and private messaging apps, such as WhatsApp, to conduct business raises a number of fundamental questions:

1. Where work-related information is stored on an employee's personal device, is it still within the control of a party to litigation?
2. If so, should employees be asked to produce their personal devices?
3. If so, how can personal information be protected and what is a proportionate approach to searching personal devices?

As discussed below, the English courts have answered the first two questions in the affirmative and, therefore, employees may wish to consider maintaining separate devices for work and personal use or limiting business communications to emails which will already be available on central servers. Parties to actual or potential litigation may also want to seek access to personal devices at an early stage to understand whether potentially useful or prejudicial material is contained on them – and the Court of Appeal's judgment provides a blueprint for doing so in a way that protects the privacy of the individuals whose devices are being accessed.

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1 Phones 4U Limited (In Administration) v Deutsche Telekom & others [2021] EWCA Civ 11.

2 See Fairstar Heavy Transport NV v. Adkins [2013] EWCA Civ 886 and Pipia v BGEO Group Ltd (formerly known as BGEO Group PLC) [2021] EWHC 86 (Comm), both discussed below.

Work-related information on personal devices – is it disclosable?

In Phones 4U, the underlying case relates to a claim brought by Phones 4U, the defunct mobile phone shop, against the mobile network operators, o2, Vodafone and EE, for allegedly exchanging information and/or making commitments with the aim of putting Phones 4U out of business, in breach of section 2 of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**"). Phones 4U sought evidence of the alleged exchanges or commitments from personal devices of employees and former employees of the network operators.

Under CPR Part 31.8(2), a document will be in a party's control if *"(a) it is or was in his physical possession; (b) he has or has had a right to possession of it; or (c) he has or has had a right to inspect or take copies of it*".

In Phones 4U it was common ground before the Court of Appeal that work-related emails and messages that were sent from, or received by, employees and former employees on their personal devices were within the control of their respective employers for the purposes of CPR Part 31.8, which limits a party's duty to disclose "documents" (which includes information stored electronically) in litigation to those "*which are or have been in his control*".The common ground between the parties to Phones 4U follows two earlier cases in which it was found that an employer had a right to call for work-related documents from its employees and former employees:

- In the January 2021 High Court decision in Pipia v BGEO Group Ltd[3], which concerned disclosure under the Disclosure Pilot Scheme, the defendant admitted that two key witnesses had used their personal phones to discuss work-related matters that were central to the dispute. The first of these witnesses was formerly employed as the defendant's CEO and it was held that he had both a contractual duty, under an express term of his employment contract, and a fiduciary duty to the defendant at common law to provide access to his personal devices. However, it was held that the defendant did not have control of the information on the second former employee's personal devices in circumstances where that individual had been employed by a subsidiary.[4]

- In the 2013 Court of Appeal case of Fairstar Heavy Transport NV v. Adkins[5], to which the Court of Appeal referred in Phones 4U, it was similarly held that the claimant employer was entitled to an order requiring the defendant, its former CEO, to give access to work-related emails on his personal computer. It was held that the nature of the relationship between the company and its former CEO as principal and agent gave rise to a right to inspect any documents which the company deemed relevant to its affairs.

In light of these cases and the common ground between the parties in Phones 4U, it seems reasonably clear that, under English law, work-related documents held by a current or former employee will be considered to be within the control of the employer (and thus potentially disclosable), even where they are stored on an employee's personal device.

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3 Pipia v BGEO Group Ltd (formerly BGEO Group Plc) [2021] EWHC 86 (Comm).

4 This follows the well-known dicta of Lord Diplock in *Lonrho v. Shell* [1980] 1 WLR 627 at pages 635-6: (a) that *"in the absence of a presently enforceable right [to obtain the document from whoever actually holds it] there is … nothing in [RSC] Order 24* [the predecessor to CPR 31] *to compel a party … to take steps … to acquire one in the future",* and (b) that, even if consent were likely to be obtained from the third party, the defendants were not *"required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of documents in the ownership and possession of that other person*".

5 [2013] EWCA Civ 886.

Should employees be asked to produce their personal devices?

This was the key question which the Court of Appeal had to decide in Phones 4U. At first instance, Mr Justice Roth had ordered the relevant defendants to write to a number of employees and former employees to request them to give certain e-disclosure providers (IT consultants) access to their personal mobile devices. The IT consultants were then to search the devices for potentially responsive material.

The defendants appealed against this decision. They argued that, in circumstances where the personal devices themselves were not in the control of the defendants, the judge did not have jurisdiction to ask the relevant employees and former employees to produce such devices voluntarily.

The Court of Appeal dismissed this argument. It emphasised that "*Disclosure is an essentially pragmatic process aimed at ensuring that, so far as possible, the relevant documents are placed before the court at trial to enable it to make just and fair decisions on the issues between the parties.*"[6]

It held that there are no limitations in CPR Part 31.5 which explain how the process of disclosure is to be undertaken[7] nor who can be asked to participate in the process of searching for relevant documents. Therefore, in circumstances where it was at least reasonably possible that work-related documents were held on the personal device of an employee or former employee', it was within the Judge's power to make the order that he did.

The Court of Appeal also noted that the fact that disclosable documents are mixed with non-disclosable confidential documents is not "*a basis for declining to permit inspection, extraction and copying of relevant material*".[8]

What is a proportionate approach to the searching of personal devices?

As set out above, Mr Justice Roth ordered the defendants to write to the relevant custodians and request that they voluntarily produce their personal devices to the IT consultants engaged by the defendants. "*The expressed purpose was to enable those consultants to search for work-related communications relating to the employer's business that would be passed to the relevant defendant for a disclosure review to be undertaken. The IT consultants were to undertake to the court to search the devices and emails for responsive material, not to disclose any other material to the defendant or its solicitors, and to return the devices and emails to the Custodians, and to delete or destroy any copies.*"[9]

The Judge also included a rider to his judgment that stated that he did not "*consider that the Defendants, in writing to request access to the devices, should tell their custodians that they are entitled to refuse the request*".[10]

The Court of Appeal found that having a third-party IT consultancy (or, indeed, an independent firm of solicitors) review the personal devices and apply search terms for potentially relevant material was a proportionate method to obtain potentially relevant and important material, while protecting the rights of the relevant individuals to privacy under Article 8 of the Human Rights Act 1998. The Court of Appeal was also unconcerned by the GDPR "*because it is clear that any data processing that is undertaken by the IT consultants will indeed (i) be with the consent of the Custodians as data subjects under article 6.1(a) of the*

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6 Phones 4U, [25].

7 In cases to which the Disclosure Pilot Scheme does not apply.

8 Phones 4U, [29], quoting the judgment of Colman J in Yasuda Ltd v. Orion Underwriting Ltd [1995] QB 174.

9 Phones 4U, [2].

10 Phones 4U, [62].

GDPR, and (ii) be necessary for the IT consultant as data controller (if that is what it is) to undertake "for compliance with a legal obligation to which the controller is subject" under article 6.1(c)"."

The Court of Appeal, however, disagreed with the Judge's rider. It noted that this rider had "*unlevelled a playing field that was otherwise level*" and considered that the Judge should have "*avoid[ed] suggesting outside the order what was not within it*".[11] There was not, however, any obligation upon the defendants to tell the custodians of their right to object.[12] Instead, if the custodians had asked whether they were obliged to comply, the defendants simply could have said that they were not.

Conclusion

These cases show the courts increasingly taking a pragmatic approach to dealing with disclosure issues under CPR Part 31. In particular, where work-related documents are within the control of the party, it is reasonable to expect that a court will adopt a creative approach to the collection of these documents. Although the Phones 4U case was a competition case, and therefore outside of the Disclosure Pilot Scheme, we would expect a similar approach to be adopted under that scheme.

In relation to personal devices, as already noted above, it is likely that employees will be increasingly asked to produce these devices if they have been used for work-related purposes, and litigating parties may wish to consider making such requests early on in the process so as to identify any potentially relevant documents. It remains to be seen, however, what approach a court or the parties will take if employees simply refuse to produce their personal devices. As discussed in the Court of Appeal's Phones 4U judgment, it may be that it is then necessary to seek third-party disclosure orders against the relevant employees.

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11 Phones 4U, [32].

12 Phones 4U, [48].

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