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The claims by Andy Coulson and Glenn Mulcaire against the News of the World's owners contain useful lessons for those negotiating, drafting and enforcing indemnities given by employers to their executives, explains Charles Wynn-Evans



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'The decisions in the Andy Coulson and Glenn Mulcaire cases demonstrate that employers need to consider the drafting and structuring of any indemnities carefully.'

Employees may seek indemnities from their employers in various situations. When an individual changes employers, particularly as part of a team move, the former employer may allege breach of fiduciary duty or restrictive covenants. The executive will wish to be covered for legal costs should litigation ensue, as well as for potentially significant additional liabilities for damages and adverse legal costs. An employee who is an additional respondent to discrimination proceedings brought against their employer may also seek an indemnity against any resulting compensation award, since liability for such awards is joint and several, and employment tribunals have no power to apportion liability between respondents (*London Borough of Hackney v Sivanandan & ors* [2011]).

A severance package, which is otherwise in full and final settlement of all claims, may need to confirm any agreed ongoing assistance from the former employer. If the departing employee is a director, it may also need to confirm the continued application of any relevant directors' and officers' liability insurance or indemnity in the articles of association of the relevant corporate entities. Where the individual will be involved in ongoing issues, such as an internal or regulatory investigation, and the outcome of this process could have personal consequences for them, such as prosecution or removal of approved person status, ongoing legal representation may be crucial. In this case, it may again be appropriate for the employer to meet this cost by way of an indemnity.

Recent judgments

In the separate judgments in *Coulson v News Group Newspapers Ltd* [2011] and *Mulcaire v News Group Newspapers Ltd* [2011], both handed down on 21 December 2011, the High Court considered various issues arising from indemnities granted by News Group Newspapers (NGN) to cover individuals' potential liabilities arising out of the phone-hacking controversy. The *News of the World's* former editor, Andy Coulson, lost his claim seeking to have the legal costs that he incurred during criminal inquiries paid under an agreement with NGN on liabilities arising from his editorship of the paper. There was also a dispute about the timing of reimbursement although this was resolved in short order: despite the lack of a specific provision, it was held that NGN was obliged to meet Mr Coulson's legal costs within a reasonable time of payment of those fees becoming due.

Meanwhile, Glenn Mulcaire, a private investigator formerly engaged by the *News of the World*, successfully brought proceedings to enforce an indemnity which he had agreed with the same organisation relating to the phone-hacking litigation in which he and NGN were both defendants (see box on p14).

Andy Coulson's indemnity

In Mr Coulson's proceedings, an indemnity for legal costs had been agreed shortly before the termination of his employment. In effect, this provided that, to the extent lawfully permitted, NGN would meet Mr Coulson's legal fees arising from his having to 'defend' or 'appear in' any 'administrative,

regulatory or quasi-judicial proceedings' as a result of having been editor of the *News of the World*. The dispute concerned whether this indemnity extended to legal costs incurred by Mr Coulson as a result of his arrest on charges of, and interview under caution about, conspiracy to intercept communications contrary to s79 of the Regulation of Investigatory Powers Act 2000 and making payments to police officers contrary to s1 of the Prevention of Corruption Act 1906.

Pursuant to this indemnity, NGN had met a number of Mr Coulson's fees following the termination of his employment. However, when Mr Coulson was arrested, NGN adopted the position that its obligation to meet his legal fees related solely to his participation in any proceedings by reason of the performance of his duties as editor of the *News of the World*. NGN decided that this only extended to his reasonable expenses arising from the Leveson inquiry and the investigations being conducted by the House of Lords Select Committee. However, it declined to meet any costs or expenses incurred in Mr Coulson's defence of or appearance in any criminal proceedings or other proceedings relating to alleged conduct outside the terms of his contract for employment.

The parties' arguments

Mr Coulson put forward various arguments in support of his claim, including that:

- the indemnity plainly required the reimbursement of legal costs incurred in all types of proceedings concerning his conduct as editor

of the *News of the World*, including the criminal proceedings;

- the list of proceedings covered by the obligation to reimburse costs was deliberately wide and therefore extended beyond formal proceedings

to proceedings in which the law may 'play a part', such as an arrest and interview; and

- there was no explicit limitation on the type of proceedings to which the indemnity would attach and therefore NGN was liable to meet fees arising out of proceedings that resulted from Mr Coulson's editorship of the *News of the World*.

NGN contended that the indemnity was intended to protect Mr Coulson from legal professional expenses arising from the 'ordinary occupational hazards' of having been an editor, for example, libel actions and press complaints. However, an investigation into his alleged personal criminal behaviour was argued not to be within the scope of the indemnity provision. Moreover, NGN argued that a police investigation did not constitute 'proceedings' and that the ex turpi causa principle should point against a construction that would allow Mr Coulson to recover legal costs consequent upon personal criminal liability.

NGN also referred to a provision in the agreement providing in effect that its terms were in full and final settlement of all claims against Mr Coulson. It argued that it could hardly have intended to meet Mr Coulson's fees arising from his own personal wrongdoing without

being able to pursue him for any losses incurred as a result of that very wrongdoing because it had settled all claims against him.

The decision

Supperstone J accepted that the indemnity was limited to the duties of the editor and that those duties only comprised lawful activities. It therefore could not have been intended that activities outside the scope of the editor's lawful responsibilities would be covered by the indemnity, let alone serious criminal activities for which the editor was alleged to be personally responsible. The judge also held that an arrest and interview under caution did not constitute judicial proceedings (or indeed administrative proceedings) which would attract the application of the indemnity. Consequently, the court rejected Mr Coulson's claims on two grounds:

- in terms of its proper scope, the indemnity was found not to cover criminal proceedings against him personally; and

NGN declined to meet any costs or expenses incurred in Mr Coulson's defence of or appearance in any criminal proceedings.

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- at the stage when Mr Coulson had been arrested and bailed but not charged, no proceedings had been commenced, so the indemnity did not engage.

Drafting guidelines

The decisions in the Andy Coulson and Glenn Mulcaire cases demonstrate that employers need to consider the drafting and structuring of any indemnities carefully, whether these are for new recruits, existing employees or those who are agreeing severance arrangements. First of all, employers need to consider whether the indemnity could be portrayed as demonstrating support for wrongful conduct or as evidence of breach in a restrictive covenant case. Then they need to focus on the detailed drafting, which will depend on the nature of the actual or potential dispute or proceedings but will often require them to consider:

- the precise scope of the indemnity;
- provisions on the timing of payment;
- the terminability of the indemnity; and
- obligations on cost control, co-operation, disclosure and the control of litigation.

The beneficiary of the indemnity will seek the widest permissible protection to ensure that the indemnity is legally binding. In turn, the employer will wish to ensure appropriate procedural safeguards to address costs, liability and reputational issues.

The position is further complicated if the individual is a company law director, in which case various provisions of the Companies Act 2006 will need to be considered. Section 232(1) provides that:

Any provision that purports to exempt a director of a company (to any extent) from any liability which would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.

Section 232(2) provides that:

Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or of an associated company, against any

The Glenn Mulcaire case

Mr Mulcaire had agreed a different indemnity with NGN. Conditional on various matters such as the provision of information, continued cooperation and confidentiality, he was indemnified for legal costs incurred in dealing with and defending proceedings in which he and NGN were joint defendants – effectively, the multiple claims brought by alleged victims of phone hacking. The dispute arose because NGN sought to terminate the indemnity after senior executives discussed its existence before the House of Commons Select Committee.

Mr Mulcaire succeeded in establishing that NGN had entered into a binding contractual obligation even though he had never countersigned the original indemnity letter. The basis for this was the various discussions over a period of time between Mr Mulcaire’s solicitors and NGN, which in essence demonstrated acceptance of the indemnity’s terms. This finding was supported, alternatively, by the conduct of those concerned in terms of paying fees, providing information and the like, all of which was consistent with there being a binding indemnity.

In the absence of an express provision to that effect, NGN failed to persuade the court that there was a power to terminate the indemnity on notice. Similarly, a provision which made the indemnity subject to there being no conflict of interest was also of no assistance to NGN since no conflict of interest in the technical legal sense had arisen between Mr Mulcaire and NGN (whom the judge described as being ‘as they always were, in it together’).

The issue of whether the indemnity was void because it was contrary to public policy was also addressed. As a general proposition of law, an indemnity against civil law or criminal liability resulting from the deliberate commission of a crime by the person to be indemnified is not enforceable by the criminal or their representatives. This principle was, however, held not to apply where the indemnity agreement was concluded after the criminal event that led to civil proceedings.

liability attaching to him in connection with any negligence default, breach of duty, or breach of trust in relation to the company of which he is a director is void.

The insurance of directors against these liabilities is permitted, however, (s233), as are ‘qualifying third party indemnity provisions’ (s234) and ‘qualifying pension scheme indemnity provisions’ (s235). A valid indemnity given to a director will therefore need to comply with the provisions of s234 to ensure that the indemnity does indeed constitute a qualifying third-party indemnity provision. Section 234 makes clear that its provisions relate to an indemnity against liabilities incurred by the director to third parties rather than to the company granting the indemnity or one of its associated companies. Moreover, the indemnity must not extend to financial penalties imposed in criminal or regulatory proceedings or to liabilities from defending civil or criminal proceedings or seeking relief where the director is found guilty, has judgment given against them or fails with their application for relief. Consequently, indemnities against legal costs may need to be structured as a loan

and to provide for repayment of sums already advanced and for cessation of the indemnity where the director’s defence is unsuccessful before a court.

It may also be necessary to consider the position under any applicable directors’ and officers’ liability insurance, as well as the company’s articles of association. These may need to be assessed to ensure that they apply and that any procedural requirements when notifying claims are properly complied with – and indeed may need to be reassessed by those organisations which wish to ensure that their executives are properly protected when they most need to be. The *Coulson* and *Mulcaire* cases demonstrate that, even though the law may limit the permissible scope of an indemnity, its detail and operation must be carefully structured and documented. ■

Coulson v News Group Newspapers Ltd [2011] EWHC 3482 (QB)
London Borough of Hackney v Sivanandan & ors [2011] UKEAT/0075/10/CEA
Mulcaire v News Group Newspapers Ltd [2011] EWHC 3469