Appeal Ref: A2/2020/2034

Appeal Ref: A2/2029/2034A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

BETWEEN:

JOHN CHRISTOPHER DEPP II	**Applicant/ Appellant**
-and-	
NEWS GROUP NEWSPAPERS LTD (1) **DAN WOOTTON (2)**	**Respondents**

APPLICATION TO ADDUCE FRESH EVIDENCE:
APPELLANT'S REPLY SUBMISSIONS OF 3 MARCH 2021,
PURSUANT TO PARA (3) OF ORDER OF 1 FEBRUARY 2021 (AS AMENDED)

References (CB/x) below are to the Core Bundle filed for the Application for PTA. A replacement skeleton with references to the Fresh Evidence Bundle (FEB) will be filed once a paginated bundle for the hearing is lodged.

These submissions include brief references, de bene esse, to two short witness statements in reply for which permission is yet to be given:

- *Sixth Witness Statement of Ms Rich, 2.3.21*
- *Third Witness Statement of Mr Edward White, 1.3.21*

Ms Heard's charity claim

The Law and related observations

1. Although the precise language varies from case to case, it is clear that in general terms '*very strong grounds*'[1] must be made out for the admission of fresh evidence, having regard to the public interest in finality in litigation. A key threshold consideration, especially germane in the context of evidence '*going simply to credit*', is whether there is '*a strong prima facie case of wilful deception of the court*'[2]. Further, assuming a deception of the court, the Appellant must also establish that '*there is a real danger that this affected the outcome of the trial*'[3] or that '*it may reasonably have done so*'[4].

2. ***Braddock v Tillotson's Newspapers Ltd*** [1950] 1 KB 47 does not however establish the yet higher jurisdictional hurdle for fresh evidence as to credit contended for in paragraph 15 of the Respondents' submissions, and certainly not in a case where the Court has been deceived. In ***Braddock***, there was no deception of the Court, and there was no link between the credit evidence and the evidence given by the relevant witness. It was a case of unrelated historic dishonesty of unknown date. A feature of many of the pre-CPR (and pre-Article 6) civil cases in this area is that they arise from jury trials with no reasoned judgment.

3. Evidence may go '*simply to credit*' or may have some more direct bearing on the issues before the Court. The latter, and the degree of connection, is obviously relevant to the materiality requirements. In summary the Court's discretion under CPR 52.21 has '*to be exercised in light of the overriding objective*' while recognising that the *Ladd v Marshall* criteria '*effectively occupy the whole field of relevant considerations*': ***Terluk v Berezovsky*** [2011] EWCA Civ 1534 at [32]. Also, the extent to which a witness's credibility in the

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[1] 'A very good reason indeed' or 'strong grounds' are the formulae used by Hale LJ in ***Hertfordshire Investments Ltd v Bubb*** [2000] 1 WLR 2318 at 2324C and 2325H respectively.

[2] ***Boodoosingh v Ramnarace*** [2005] UKPC 9 at [19]-[21], [25]

[3] ***Hamilton v AL-Fayed (No 4)*** [2001] EMLR 15 at [34](2). This was addressing fresh evidence '*going simply as to credit*'.

[4] The formula used in ***Meek v Fleming*** [1961] 2 QB 366 at 379.

general sense is central, will also vary. Here, to adopt the description applied in ***Meek v Fleming***, it '*was of peculiarly vital significance*'[5]. An unusual feature of this case is that the deception strengthened Ms Heard's credit in an exceptional way, and also carried a subliminal message which was to the discredit of the Applicant (that she would not take his money because he was a 'wife-beater' - addressed in paragraph 9 below) in the context of his alleged misconduct as further addressed below.

4. The requirements of reasonable diligence are not a '*counsel of perfection*'; and the *Ladd v Marshall* considerations, though important, '*are not to be taken as a straitjacket*' (***Singh v Habib*** [2011] EWCA Civ 599 at [14]). The mere presence of a suspicion that evidence may be false is self-evidently different to actual evidence which tends to prove that it is.

Falsity and honesty

5. The Respondents' contention[6] that Ms Heard's original evidence is and was '*not false*' is very surprising. The ordinary meaning of her written statement was plain. That was clearly how the Judge understood it (J577 at CB/5/A176), when he accepted "*Ms Heard's evidence that she had given that sum [i.e. $7m] away to charity*". The Respondents' closing submissions would have been equally so understood by the Court (JR 5th WS at 19 & JR1 page 158: FEB pages). The instalments argument might be material if Ms Heard had pledged her entire settlement and had honoured that pledge. In real terms, however, she did neither. A pledge is not the same as giving money[7]. The fact that the divorce settlement was made in instalments, which were completed by 1st February 2018, does not explain why Ms Heard would only 'pledge' to the ACLU to give money over 10 years or have any impact on her failure to honour that pledge. The unanswered letter at JR2 page 16 is of particular importance.

6. As to honesty, in the context of Court evidence, a witness can ordinarily be taken to intend to convey the plain meaning of his or her testimony. There is no responsive evidence from

[5] ***Meek*** at p382.

[6] RSA paragraph 30 and J Smele WS at 42-48.

[7] The '*pledge*' to the ACLU was (it seems) never signed. There is no pledge document for the Children's Hospital.

Ms Heard herself or through Mr Smele on her behalf. Her strenuous opposition to disclosure in the United States is fully detailed in the evidence and speaks for itself. The explanation offered by her US Attorney does not reflect the reality which the documents disclose, nor the chronology. Further, Ms Heard did not correct her evidence about having donated her entire divorce settlement to charity despite the fact that she must have known that the subpoenas had been issued in the US proceedings and despite, around the same time, making other corrections to her evidence in these proceedings[8].

Reasonable diligence

7. At the time of trial, the Applicant had his suspicions about Ms Heard's evidence (it was a remarkable claim) but he had *no* evidence to support them. An order for third party disclosure against a witness in this jurisdiction in these circumstances had no realistic prospect of success for obvious reasons. Nor, it is submitted, would the trial have been adjourned on the speculative basis that the US subpoenas might return relevant material. Ms Heard took every available step to suppress the evidence.

8. The Respondents rely on a letter dated 14 June 2019 from the Children's Hospital addressed to Mr Edward White (the Applicant's business advisor) which refers to Ms Heard's failure to make any payments[9], but the letter was never received by Mr White: J Rich 5th WS at 33[10]. Had it been, Mr White would obviously have referred it to the Applicant's legal advisers. The Respondents' Leading Counsel's cross-examination of Mr White (J Smele 4th WS at 11) takes the matter no further, although why those questions were asked is unclear.

[8] AH 6 WS dated 4.7.20 and AH 7 WS dated 6.7.20 (in which she made substantial changes to her account about March 2013)

[9] J Smele 4th WS at 10, Rs' submissions at para 20(d).

[10] J Rich 5th WS at 33. Subject to the Court of Appeal's permission to admit it, Mr White's short witness statement confirms this evidence.

Materiality

9. The evidence presented a wholly exceptional act of philanthropy, which would have deeply impressed any reasonable person. Her public statements expressly stated that the ACLU donation had victims of domestic violence specifically in mind (see, for example, JS5 pages 79-81, which were in the trial bundle). The subliminal message of the charity claim was in any event clear: Ms Heard would not wish to keep any of the Applicant's money, because he had subjected her to serious violence. The evidence presented, and was obviously intended to present, her in the strongest terms as both virtuous and a victim.

10. A principal element in the Applicant's wider complaints about the Judgment relates to the Judge's failure to engage with evidence to Ms Heard's discredit, to his uneven treatment of the contemporary documents when relevant to matters directly in issue and to his uneven treatment of un-pleaded allegations as between the Applicant and Ms Heard. There is a striking lack of criticism of Ms Heard throughout the judgment.

11. By way of a more specific example, a feature of the last alleged assault (incident 14), which led to the divorce, was almost immediate contact between Ms Heard and her publicist (see J499iv at CB/A154), followed by an article which she procured concerning that incident in response to meet her concern that '*she was being characterised as a gold-digger*' (J527 at CB/A160).

12. Significantly the Judge's adoption of Ms Heard's evidence on the charity claim appears in a concluding section headed '*Stepping back and considering the evidence as a whole*'.

13. By the same token the Applicant submits that had the truth about the charity claim emerged at the trial, it would have materially affected the Judge's consideration of Ms Heard's evidence as a whole and that the criterion addressed in the opening paragraph of these submissions is satisfied. On the Applicant's case the fresh evidence exposes a calculated and manipulative lie, designed to achieve a potent favourable impression from the outset.

14. Taking two examples, had the Judge known of that calculated and manipulative lie, it would necessarily have affected how he viewed:

a. the evidence of Ms Heard's 'disclosure' to Ms Sexton in August 2019, made only shortly before Ms Heard called Ms Sexton to be deposed in the US proceedings, about the very grave alleged assault in Australia over four and half years earlier and some 3 years after the divorce, addressed in the Confidential Judgment at [15]-[16] and in the confidential section of the Applicant's main Skeleton Argument. The Judge plainly placed material weight on that evidence in the most serious context.

b. the documentary evidence relating to the alleged assault in July 2015 on the train in Malaysia which was a self-serving handwritten note by Ms Heard which the Judge relied upon as corroboration of her account [J390-J391] & [J396(iv)]

15. Although there were matters potentially against the Applicant on general credibility, Ms Heard's fabrication of evidence which enhanced her own credit can be said for that reason to make the potential for injustice the greater.

Jennifer Howell's first witness statement

16. The Applicant accepts that this evidence was available at the trial, albeit after the evidence had closed. The evidence (FEB/4) is significant[11], but qualified to a degree as to timing. As against the Respondent, it is also hearsay. Standing alone, the Applicant accepts that the demanding criteria outlined above present a considerable obstacle. This application will not be pursued at the hearing.

ANDREW CALDECOTT QC
DAVID SHERBORNE
KATE WILSON

[11] Most importantly paragraph 12.