



Neutral Citation Number: [2020] EWHC 1237 (QB)

Case No: QB-2018-006323

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2020

Before:

MR JUSTICE NICOL

Between:

John Christopher Depp II
- and -
(1) News Group Newspapers Ltd.
(2) Dan Wootton

Claimant

Defendants

David Sherborne Kate Wilson (instructed by Schillings LLP) for the Claimant
Sasha Wass QC, Adam Wolanski QC and Clara Hamer (instructed by Simons Muirhead
and Burton LLP) for the Defendants

Hearing date: 13th May 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NICOL

Mr Justice Nicol :

1. The trial of this libel action is presently due to start on 7th July 2020 with a 15-day time estimate. It was previously listed to start on 23rd March 2020 with a 10-day estimate, but it was necessary for that hearing to be adjourned.
2. I have set out the background to the action in previous judgments dated 6th March 2020 (on the Defendants' application for disclosure) – see [2020] EWHC 505 (QB); on 20th March 2020 (adjournment of the trial date) – see [2020] EWHC 1150 (QB) and on 4th April 2020 explaining why part of the trial had to be in private.
3. I have now held a hearing for directions. The major issue of controversy is whether the Claimant should be given permission to rely on the witness statements of two potential witnesses and to call those witnesses to give evidence at the trial. Those witnesses are David Killackey Snr and Kate James.
4. The application was issued by the Claimant's solicitors on 10th March 2020. It referred to four additional witness statements and witnesses. In addition to Mr Killackey and Ms James, these were Vanessa Paradis and Winona Ryder. However, shortly in advance of the hearing today, the Defendants indicated that they consented to late service of the witness statements of Ms Paradis and Ms Ryder and to them giving evidence on the Claimant's behalf at trial. It is not therefore necessary for me to say more about those two, save that I am also content to give the Court's consent, so far as that is necessary in relation to them.
5. I turn therefore to the other two witnesses - Mr Killackey and Ms James. Mr Sherborne, who represented the Claimant on this occasion, recognised that the Claimant needed relief from sanctions. The reason for this was that in the Directions Order which I had made on 6th March 2020 I had said that any further witness statements on which the Claimant wished to rely should be served by 4.00pm on Friday 6th March 2020. The witness statements of Mr Killackey and Ms James were served at 12.04am on 7th March 2020.
6. The procedure and criteria for approaching an application for relief from sanctions, as is well known, was set out by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926. There are three stages:
 - i) Assessing the seriousness or significance of the breach.
 - ii) Considering why the default occurred.
 - iii) Considering all the circumstances of the case and, in particular, the factors listed in CPR r.3.9(1)(a) and (b).
7. Mr Sherborne accepted that any breach of a court direction had a serious element to it, but, he submitted, the delay in serving the witness statements was relatively short. More importantly, since the trial had been adjourned from its original start date of 23rd March 2020, the Defendants had already had some 8 weeks since the witness statements were served and there would be a further 8 weeks before the adjourned trial was due to start. That would be sufficient time for any further disclosure which was required by the

parties as a result of the admission of this additional evidence and for the Defendants, if they wished, to serve evidence in response.

8. I agree with Mr Sherborne that, in view of the adjournment of the trial, future hearing dates are not imperilled by the breach and the conduct of the litigation has not otherwise been disrupted (or not to any serious extent).
9. I raised with Mr Sherborne whether it was right to focus on the 6th March date which I had set, rather than the original date for the exchange of witness statements which was in December 2019. His response, which I now accept, was that after December 2019 the pleadings had been further amended and there had also been further witness evidence from both the Claimant and the Defendants. My purpose in setting the 6th March date for the service of any further witness statements had to be seen in the context of a trial which was then due to start on 23rd March.
10. It is obvious that I must consider the application for relief from sanctions against the background of the circumstances as they exist now, rather than as they existed at the date of the breach. Ms Wass QC, who represented the Defendants, did not suggest otherwise.
11. The White Book says at paragraph 3.9.4,

‘If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.’
12. I note that some explanation for the delay is given by Jenny Afia, of Schillings, in her witness statement of 10th March 2020. She says at paragraph 8 of that statement,

‘The Claimant encountered practical difficulty in obtaining signed copies of each of the following witness statements [which included those of Ms James and Mr Killackey], due to the witnesses being in different time zones, undertaking various travel arrangements and having their own separate work commitments.’
13. By dealing collectively with several witness statements in this manner, it is fair to say that it is more difficult to assess the degree to which there is a justification for the delay in serving any individual witness statement. But I accept the submission from Mr Sherborne, in line with the note in the White Book, that this is of relative unimportance since I accept that the breach for which the Claimant seeks relief is neither serious nor significant.
14. As for the third stage, that, too will be of little importance since the breach can now be seen to be neither serious nor significant. I certainly recognise that Ms Wass submitted that the evidence of Mr Killackey and Ms James was not relevant or it was disproportionate to allow the Claimant to adduce it. However, it is better to address those issues directly since they would be material even if the witness statements had been served in time (and see paragraph 7 of my Directions Order of 6th March 2020).
15. I shall grant the Claimant relief from sanctions for the late service of the witness statements.

Mr Killackey

16. David Killackey is a mechanic. He says that he had worked for the Claimant since about 2010. He was also involved in a TV programme called 'Overhauled' in which typically vintage cars were remodelled as a surprise for their owners. In 2014 the Claimant asked Mr Killackey to see if a car belonging to Ms Heard (a 1968 Mustang) could be overhauled for the programme. Mr Killackey's suggestion to this effect was approved and the Mustang was overhauled in 2014. Mr Killackey's statement refers to a conversation which he found unsettling and which took place at some point in 2014 when he was explaining to Ms Heard how to operate the sound system in the car.
17. Mr Killackey's statement also refers to a time in June 2016 after Ms Heard and the Claimant had separated. He says that an employee of the Claimant told him to bill Ms Heard for the new work on Ms Heard's Mustang. He says that Ms Heard was upset by this and was verbally abusive to him. Mr Killackey's statement also refers to an incident in December 2016 when Ms Heard's father (David Heard) allegedly threatened him and verbally abused him.
18. Mr Sherborne submits that this is relevant evidence which the Claimant should be allowed to adduce. He submits that in paragraph 8a of the Re-Amended Defence the Defendants plead that 'Throughout their relationship the Claimant was controlling and verbally and physically abusive towards Ms Heard, particularly when he was under the influence of alcohol and/or drugs.' [This allegation is denied by the Claimant in his Re-Amended Reply].
19. Mr Sherborne submits that Mr Killackey's evidence shows that Ms Heard was not controlled and intimidated by the Claimant. He emphasises that the Defendants' pleading of the Claimant's controlling behaviour is general and not confined to the specific incidents of alleged violence. She says in her first witness statement that 'As our relationship progressed, I began to notice Johnny's increasingly controlling behaviour.' She gives an example (in paragraph 31 of her 1st witness statement) of what is said to have been the Claimant's controlling behaviour. She says the Claimant took her Mustang car and did not return it for 3 ½ years, meaning that she was dependent on his assistance for transport. Mr Sherborne submitted that the incidents which Mr Killackey describes do not support Ms Heard's description of herself as a controlled and intimidated woman and also show that Ms Heard was giving instructions for work on her Mustang less than 3 ½ years after it had been taken in 2014.
20. I am doubtful as to the relevance of Mr Killackey's evidence, but, in any event, I consider that any relevance it does have is so marginal that I will not give permission to the Claimant to adduce it.
 - i) I agree with Ms Wass that the behaviour of Ms Heard towards Mr Killackey says nothing or nothing of significance as to whether the Claimant's behaviour towards her was controlling or otherwise as she describes.
 - ii) Mr Killackey's statement speaks of Ms Heard giving instructions to him regarding further work on her Mustang in June 2016, but this was, as he says, after her relationship with the Claimant had come to an end. It may be that Ms Heard was without her Mustang for rather less than 3 ½ years as she says in her

witness statement, but I do not consider that I will be greatly helped by the resolution of precisely how long that period was.

- iii) The behaviour of Ms Heard's father towards Mr Killackey, even if it was as described by the latter, is irrelevant to any issue which I have to decide.

21. Consequently, I shall refuse the Claimant permission to rely on the witness statement of Mr Killackey or to call him to give evidence.

Kate James

22. Ms James worked as Ms Heard's personal assistant from about March 2012 until February 2015 when she was dismissed by Ms Heard.

23. Mr Sherborne submitted that Ms James could give relevant evidence on the following matters:

- i) She saw Ms Heard on a daily basis. Often Ms Heard was undressed or partially undressed. Ms James says that she never saw any sign of injury on Ms Heard. Mr Sherborne submits that this would be surprising if Ms Heard was subjected to the regular physical assaults which she alleges she was subjected to by the Claimant.
- ii) Ms James was able to witness the relationship between the Claimant and Ms Heard. She gives a contrary account to that of Ms Heard. She did not witness him being aggressive or controlling. On the contrary, she describes the Claimant as being kind.
- iii) In her third witness statement, Ms Heard says that she consumed only a limited amount of alcohol. Ms James paints a different picture. She also describes Ms Heard's use of drugs.
- iv) She gives evidence of Ms Heard's willingness to lie:
 - a) Regarding the immigration status of Savannah McMillan.
 - b) Regarding the alleged smuggling of dogs into Australia.

24. Ms Wass opposed the admission of Ms James' evidence. Ms Wass argued:

- i) Much of what Ms James had to say was irrelevant to the issues which I had to decide.
- ii) Ms James had been dismissed by Ms Heard. Ms James was a disgruntled ex-employee whose evidence was tainted by spite and which should be excluded in the interests of proportionality.
- iii) Ms James had no medical qualifications and yet she purported to express an opinion on Ms Heard's use of the drugs Provigil and Accutane.
- iv) The issues concerning Ms Heard's letter to the Department of Homeland Security and the alleged smuggling of dogs into Australia were contentious and,

if Ms James was able to give evidence in relation to them, would lead to satellite litigation.

25. Both Mr Sherborne and Ms Wass agreed that the issue which I had to consider was not all or nothing. In other words, it was open to me to give permission to the Claimant to adduce parts of the witness statement of Ms James and not allow him to adduce other parts. I agree that is so.
26. While I agree with Ms Wass that parts of Ms James' witness statement are either irrelevant or inadmissible or it would not be proportionate to allow the Claimant to adduce them, I accept Mr Sherborne's proposition that there are other parts which the Claimant should be allowed to adduce. Where I restrict the Claimant from adducing parts of her evidence, I make it clear that I am not intending to limit how the Defendants may cross examine Ms James. If the Defendants wish to cross examine her about her motives for giving evidence, they may do so. However, that may (I do not say will) have consequences for the way in which the Claimant may re-examine Ms James.
27. This being my view, I must consider the witness statement of Ms James. For most purposes, I can take her statement paragraph by paragraph, although occasionally I need to break the paragraphs down.
 - i) Paragraphs 1-6. These are introductory and may be adduced by the Claimant.
 - ii) Paragraph 7 - the redesign of Ms Heard's apartment. This is irrelevant or disproportionate and may not be adduced by the Claimant.
 - iii) Paragraph 8 - Ms Heard's change in the style of her clothes. This is irrelevant or disproportionate and may not be adduced by the Claimant.
 - iv) Paragraph 9 - Ms Heard taking photographs of Ms James' son. This is irrelevant or disproportionate and may not be adduced by the Claimant.
 - v) Paragraph 10 - Tipping off paparazzi and Ms James being sent to buy magazines. This is irrelevant or disproportionate and may not be adduced by the Claimant.
 - vi) Paragraph 11 - Ms Heard asking for designer clothing. This is irrelevant or disproportionate and may not be adduced by the Claimant.
 - vii) Paragraph 12 - Ms Heard's concern that the Claimant might leave her. This is irrelevant or disproportionate and may not be adduced by the Claimant.
 - viii) Paragraph 13 - Ms Heard humiliating Ms James in the presence of the handyman, Victor. This is irrelevant or disproportionate and may not be adduced by the Claimant.
 - ix) Paragraph 14 - Ms Heard being verbally and mentally abusive to Ms James. This is irrelevant or disproportionate and may not be adduced by the Claimant.
 - x) Paragraph 15 - Ms Heard's use of Provigil. Ms James is not able to give expert evidence and her evidence as to this is inadmissible. Ms James' evidence of the effect of Provigil on herself (when she took half a tablet) is irrelevant or

disproportionate. This paragraph may not be adduced by the Claimant. That also includes pages 1-2 of Exhibit KJ1.

xi) Paragraph 16

a) The effect of Provigil is similar to amphetamine. Ms James is not able to give expert evidence and her evidence as to this is inadmissible. It may not be adduced by the Claimant.

b) Ms Heard drank vast quantities of red wine each night. In her third witness statement Ms Heard says at paragraph 5,

‘Johnny says I often drank more than him, and that I am a regular/heavy drug user. That’s just not true, although of course I drank more than him during the brief periods when he was sober. If he was sober, then to be respectful, I would usually check with him that it was okay for me to drink wine in front of him. He would say yes and often insisted on pouring my wine.’

This part of paragraph 16 potentially responds to this evidence of Ms Heard and may be adduced by the Claimant.

xii) Paragraph 17 – Ms Heard’s use of Accutane. Ms James is not able to give expert evidence and this paragraph is inadmissible. It may not be adduced by the Claimant.

xiii) Paragraph 18 - Ms Heard took [magic] mushrooms and MDMA. In her third witness statement paragraph 6 Ms Heard admits taking these drugs. The evidence in paragraph 18 is therefore irrelevant. It may not be adduced by the Claimant.

xiv) Paragraph 19 – Ms Heard sending abusive texts to Ms James and being cross when Ms James sent her an SMS message. This is irrelevant or disproportionate and may not be adduced by the Claimant.

xv) Paragraph 20 – abusive messages to Ms James on her birthday. This is irrelevant or disproportionate and may not be adduced by the Claimant.

xvi) Paragraph 21 – Ms James saw no sign of a serious or messy fight when she called unannounced. The Claimant may adduce this evidence.

xvii) Paragraph 22 – Ms James never saw any sign of physical violence on either the Claimant or Ms Heard. I agree that this paragraph is relevant and the Claimant should be able to adduce it.

xviii) Paragraph 23 – Ms Heard was jealous. This is irrelevant or disproportionate and may not be adduced by the Claimant. The same goes for page 3 of Exhibit KJ1.

xix) Paragraph 24 –

a) Ms James’ impression of the Claimant. This is of some relevance and it is not disproportionate for the Claimant to adduce it.

- b) Ms James' son's impression of the Claimant and Ms Heard and the degree to which Ms Heard contributed to the Children's Hospital, Los Angeles. These are irrelevant or disproportionate and may not be adduced by the Claimant.
- xx) Paragraphs 25-26 – Ms Heard's letter to the Department of Homeland Security regarding Savannah McMillan and Exhibit KJ1 pages 4-5. I agree with Mr Sherborne that this incident is potentially relevant to Ms Heard's credibility. Because it concerned her credibility it was not a matter which had to be pleaded. The issue of potential relevance is whether Ms Heard said something to the Department which she knew was untrue. I agree with Mr Sherborne that this is relatively self-contained and the risk of satellite litigation does not persuade me that it should be excluded. The Claimant may adduce this evidence.
- xxi) Paragraphs 27-31 – The smuggling of dogs into Australia. The potential relevance of this issue is whether Ms Heard said something to the Australian authorities or court which she knew was untrue. There is an overlap with the objection which the Defendants have expressed to certain other passages in the witness statements served on behalf of the Claimant (for instance the witness statement of Kevin Murphy). I have directed that the Defendants' application to exclude those passages will be heard at a convenient point or points at the trial. It is sensible to defer similarly the issue of whether these paragraphs of Ms James' statement can be adduced by the Claimant until the Defendants' objections to the passages in Mr Murphy's witness statement can be resolved.
- xxii) Paragraph 32 and page 6 of Exhibit KJ1 - 2013 incident regarding providing altered certificates of when dogs were inoculated and whether there was a vet who could be 'greased'. Potentially this matter also goes to Ms Heard's credibility and the Claimant should be entitled to adduce it.
- xxiii) Paragraphs 33-37 – the effect on Ms James of working for Ms Heard. Save for the first two sentences of paragraph 36 (Ms Heard's dismissal of Ms James without notice) these paragraphs are irrelevant or disproportionate and may not be adduced by the Claimant. That includes pages 7-8 of Exhibit KJ1

Conclusion

28. I give the Claimant relief against sanctions for the late service of the witness statements of Ms James, Mr. Killackey, Ms Paradis and Ms Ryder.
29. I refuse to the Claimant permission to call Mr Killackey.
30. I give permission to the Claimant to call Ms James to give evidence to the extent set out above. I otherwise refuse permission the Claimant to call Ms James to give evidence otherwise as set out in her statement.