Neutral Citation Number: [2025] EWCA Civ 187

Appeal No: CA-2025-000369
Case No: QB-2022-001397

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
MEDIA AND COMMUNICATIONS LIST
MRS JUSTICE STEYN
[2025] EWHC 222 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2025

LORD JUSTICE WARBY

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Between :

NOEL ANTHONY CLARKE	**Claimant/ Appellant**
- and –	
GUARDIAN NEWS AND MEDIA LIMITED	**Defendant/ Respondent**

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Philip Williams, Arthur Lo and Daniel Jeremy (instructed by **The Khan Partnership**) for the **Appellant**
Gavin Millar KC, Alexandra Marzec and Ben Gallop (instructed by **Wiggin LLP**) for the **Respondent**

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PTA DECISION

LORD JUSTICE WARBY :

1. This is an application on behalf of Noel Clarke (the claimant) for permission to appeal (PTA) against the decision of Mrs Justice Steyn to dismiss his application (the Strike Out Application) for an order striking out the entire defence of Guardian News & Media Ltd (the publisher) or alternatively striking out the publisher's public interest defence. The claimant also applies for permission to adduce fresh evidence on appeal and applies for a stay of the proceedings below until after the appeal has been decided.

2. I have considered all these applications on the papers and without a hearing. That is standard procedure for an application for PTA unless the judge considers (as I do not) that it is necessary or desirable to hold a hearing: see CPR 52.5 and Practice Direction 52C paragraph 15. I do not consider it necessary or appropriate to hold a hearing of the other applications.

Decision

3. I refuse the applications because (1) a challenge to the decision reached by the judge on the evidence before her would have no realistic prospect of success; (2) the "fresh" evidence, even if admitted, could not affect the outcome; (3) there is no other compelling reason for this court to hear an appeal; and (4) in the light of those conclusions there is no basis on which the court could stay the proceedings.

Background

4. The claimant complains of libel and breach of his data protection rights in eight articles first published between 29 April 2021 and 28 March 2022. The complaint relates to allegations of sexual impropriety, bullying and harassment. The main issues are whether the articles were substantially true or, if not, whether they are defensible as reasonable publications on matters of public interest. The issues are set out more precisely and in more detail in a judgment given by this court last Friday ([2025] EWCA Civ 164). So is the procedural history. For present purposes the key points are these.

5. The Strike Out Application was issued on 31 December 2024. It was based on allegations that the publisher's head of investigations and the two main journalists who wrote the articles complained of had committed the common law offence of perverting the course of justice by (a) deleting and thereby suppressing evidence relevant to the proceedings in the knowledge that the articles would be the subject of litigation and (b) fabricating correspondence to replace what had been deleted. The evidential foundation for the application was drawn from the publisher's disclosure, most of it provided in October 2024.

6. The application was heard on 29 January 2025. At the conclusion of the hearing the judge announced her decision to dismiss it. She gave her reasons in an 8,000-word judgment handed down on 5 February, [2025] EWHC 222 (KB).

7. The judge accepted that destruction of documents when litigation has not been commenced but is in reasonable contemplation can in principle amount to perverting the course of justice. But she held that mere deletion is not enough; people delete documents all the time for legitimate reasons. In order to justify the order sought it would be necessary for the claimant to establish not only that litigation was in

reasonable contemplation but also that "the document destruction amounted to perversion (or attempted perversion) of the course of justice and that this has prevented a fair trial from being possible" ([39] with emphasis added). To establish perversion of the course of justice it was necessary to prove on the balance of probabilities, but by cogent evidence "that the alleged wrongdoer had (i) done an act or series of acts (ii) which has or have a tendency to pervert; and (iii) which is or are intended to pervert (iv) the course of justice" ([40]-[41]).

8. The evidence showed that there had been deletion of electronic communications. The publisher's case was that this was not done to pervert the course of justice but in pursuit of its data minimisation policies at a time when there was no threat of litigation, although that was clearly a possibility. The judge reviewed the detail of the evidence and the submissions made about it. At [57] she identified three questions for decision: "whether the deletions or attempted deletions occurred when litigation was in reasonable contemplation, whether those acts have a tendency to pervert the course of justice, and whether the alleged wrongdoers intended to pervert the course of justice." In the paragraphs that followed, the judge gave detailed reasons for concluding that the answer to each of those questions was no: the three accused individuals did not have litigation in their reasonable contemplation at the time of the document deletion; the deletion did not have a tendency to pervert the course of justice; and the individuals did not intend to pervert the course of justice. She further rejected the allegation of fabrication, finding it to be without foundation. The allegation of perversion of justice therefore failed.

9. At [78] the judge held that the application also "independently, fails on the ground that such deletion of evidence as has occurred does not render a fair trial impossible. Far from it." The truth defence was mainly dependent on evidence from witnesses of fact (not the journalists). As for the public interest defence "thousands of documents have been served as well as substantial witness statements. The deletion of a small number of documents is a matter the court can consider, if and to the extent it is appropriate to do so."

10. The appellant's notice was submitted on 19 February and sealed by the court on Thursday 20 February. The core and supplemental bundle reached me on Wednesday 25 February. On the same day the respondent filed a brief statement pursuant to PD52C paragraph 19 setting out reasons why PTA should be refused. The claimant's formal application notice to adduce fresh evidence and stay the proceedings was filed separately on 25 or 26 February. The publisher's solicitors responded by letter dated 26 February. The trial of the claims is due to start next Monday 3 March with a time estimate of six weeks.

The grounds of appeal

11. The claimant's grounds of appeal fall under two main heads. In relation to the allegation of perverting the course of justice, it is argued that the judge erred by "made findings of fact which plainly cannot be sustained by the evidence before her" and erred in principle by reaching definitive conclusions on triable issues. In relation to the issue of fair trial the claimant contends that the judge "misdirected herself on the law in respect of her finding that the court must find both perversion and the impossibility of a fair trial before it may contemplate striking out ..."; and that she was in any event wrong to find that a fair trial remained possible.

Perverting the course of justice (Grounds 1 to 3)

12. The grounds of appeal correctly reflect the legal position, which is that an appeal to this court is not a re-hearing but a review. To succeed in an appeal on an issue of fact an appellant has to identify a material error of principle or a material factual finding that was not reasonably open to the judge on the evidence before her. In my judgment the claimant has no prospect of showing either of those things.

13. Ground 3 is that the judge was wrong in principle to make findings of fact, in the context of the Strike Out Application, on matters which were also issues in the trial. I can see no merit in this. The judgment on the Strike Out Application addressed the issues raised by that application and nothing more. The judge reached findings on the evidence before her to the relevant standard of proof. The claimant, who made the application and asked for findings on those issues, cannot complain of any of this. Nor can he complain of the way in which the judge expressed her conclusions. The extent to which, if at all, the judge's findings at the interim stage have an impact on the trial is a matter for separate consideration.

14. Ground 2 is that "the finding that there was no perversion of the course of justice was plainly wrong". That is an imperfect statement of the relevant issue and the judge's conclusion upon it. The question was correctly identified at [57] of the judgment, namely whether the acts complained of "have a tendency to pervert the course of justice". That is a question about the objective quality and likely effect of the acts complained of. Put another way, the issue is about the conduct element of the alleged offence (or *actus reus*). The judge's finding on that issue is to be found at [72], where she said this:

> "The allegation of perversion of the course of justice is made against Mr Lewis, Ms Osborne and Ms Stewart. I am unpersuaded that the deletion of documents they undertook had a tendency to pervert the course of justice. The nature of the threads is apparent from the two that survived the attempt to delete them. I bear in mind the importance of not pre-judging any issue which the court will ultimately have to determine in the course of the present proceedings, but on the face of it, it is hard to see how anything in those threads would be capable of changing the outcome of this case, in which there is a mass of other evidence that the court will need to consider in due course at trial."

15. I can see nothing in the grounds of appeal or skeleton argument that provides an arguable basis for disagreeing with these evaluative conclusions of the trial judge. Much of the argument advanced in support on this ground does not directly address the reasoning I have just quoted. It tends to focus rather on the journalists' state of mind about the prospects of litigation and their intentions (put another way, the mental element or *mens rea* of the alleged offence*)*, which are separate and distinct questions.

16. This means that the proposed appeal would inevitably fail for lack of proof of an essential ingredient of the abuse of process alleged. I shall nonetheless address the other grounds of appeal.

17. Ground 1 is put in various ways but comes down to a complaint that the judge did not properly address the question of whether the journalists had the necessary state of mind. The core submission is that "it was conceptually wrong for the court to simply assume that there was no subjective intention to pervert [the course of justice] simply because the journalists had not been told to preserve evidence." I cannot read the judgment as involving such an assumption. It is clear to me that the judge looked separately at the question of whether there was any breach of a rule or duty to preserve documents (and the associated question of what the journalists thought or should have thought about the prospect of litigation) and the issue of whether there was a subjective intention to pervert the course of justice: see in particular [77], [79]. I would not have given permission to appeal on this ground. Nor would I have given permission to appeal on the basis that the judge was not entitled to find as a fact that there was no intent to pervert the course of justice, which is what much of the argument on ground 2 appears to be driving at.

Fair trial (Grounds 4 and 5)

18. Having given careful consideration to the arguments advanced on the facts, I cannot see how the claimant could hope to persuade this court to second-guess the judge's assessment of whether the nature and scale of the document deletion is such as to make a fair trial impossible (Ground 5). This was a case with which the judge was already very familiar. She was deciding these issues after pre-reading the application documents and hearing a full day's argument, a few days after conducting the substantial Pre-Trial Review. She was in the ideal position to reach conclusions on those matters. Her reasons are rational, cogent and persuasive.

19. So, the claimant could only have succeeded on this aspect of the appeal by showing that in law the judge was bound, or at least entitled, to make a striking out order even though a fair trial was still possible (Ground 4).

20. The judge relied on three main sources for her conclusion: the judgment of Sir Andrew Morritt V-C in *Douglas v Hello! Ltd (No 3)* [2003] EWHC 55 (Ch) [2003] EMLR 29; the decision of this court in *Dadourian Group International Inc v Simms* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep 601; and the views expressed in Hollander on Documentary Evidence (15th ed, 2024). All these sources support the judge's conclusion on the law. In *Dadourian* the court held in terms that "... the court must always consider whether a fair trial is still possible. If so, it must not strike out the action or defence": [233].

21. The grounds of appeal seek to address the judge's reasoning in three main ways: by criticising this aspect of the decision in *Dadourian* as "not necessarily principled or well-reasoned"; by inviting us to prefer the reasoning of the Supreme Court of Victoria, Australia in *British American Tobacco v Cowell* [2002] VCSA 197 [175]; and by advancing an interpretation of paragraph [54] of the judgment of Chadwick LJ in *Arrow Nominees v Blackledge* [2000] CP Rep 59 which this court expressly rejected in paragraph [233] of *Dadourian*. This all seems hard to reconcile with the established rules of precedent. But the position is not quite as clear as it might seem. The claimant's skeleton argument refers to the decision of this court in *Masood v Zahoor* [2009] EWCA Civ 650, [2010] 1 WLR 746. That is a case decided after *Dadourian,* which considered *Arrow Nominees* (but not *Dadourian*). And I note that in *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004 the Supreme Court

approved *Masood v Zahoor*. It is better not to decide whether this point is arguable with a real prospect of success. I do not need to. My conclusions on Grounds 1 to 3 are fatal to the application, subject always to the fresh evidence application to which I now turn.

The fresh evidence application

22. The evidence consists of an audio recording of a conversation on or about 28 April 2021 between one of the journalists, Ms Osborne, and one of the female complainants. Ms Osborne said (among other things) that Mr Clarke was "probably going to sue us ..." and that "... the suing thing, you get everything scrutinised, your private conversations, so many conversations with women, there are 24 women we've spoken to now, I'm sure I said something that was a leading question at some point."

23. This evidence may of course assume significance at the trial. But it is not arguable that its admission for the purpose of the proposed appeal would be in the interest of justice.

24. The evidence was available to the claimant at the time of the hearing of the strike out application. The publisher had disclosed it and produced it for inspection as long ago as 3 October 2024. In that sense this is not 'fresh' evidence at all. I accept that it was not until after the hearing that the applicant's lawyers identified the part of the recording that is now relied on and attached to it the significance which it is now said to have. But it is hard to accept that it could not have been identified with the exercise of reasonable diligence before that. The claimant's legal team had three months in which to undertake a thorough examination of the publisher's disclosure.

25. Even if the delay was assessed as reasonable in all the circumstances of the case, there is, in my judgment, no prospect of the court concluding that this one item of undiscovered evidence might have had an important bearing on the outcome of the strike out application. The evidence is said to be of considerable weight "given the central importance of whether the journalists held a subjective belief in the real imminence of litigation". It is said to show two things: (a) that the journalist involved "clearly believed that litigation was likely and imminent" and (b) there was a strong preference on her part to avoiding litigation which "provided potent motivation for the suppression or manipulation of evidence." Whatever the merits of these contentions (and I think it better to say nothing on that topic) the decisive finding for present purposes is the one in paragraph [72] of the judgment that I have quoted above: that the journalists' conduct did not have a tendency to pervert the course of justice. This evidence has no bearing on that point.

Another compelling reason?

26. The point of law (Ground 4) may be of general interest but - assuming for this purpose that it is arguable with a real prospect of success - the Court of Appeal does not generally decide questions which are interesting but academic for the purposes of the case before it. There is nothing about this case that makes it a suitable vehicle for an academic debate. On the contrary, to consume the finite and valuable resources of the court and the parties on an issue that could not make a difference to the outcome of the appeal, and to do so on the eve of trial, or during the designated trial period, would be clearly contrary to the overriding objective.

Stay of proceedings

27. Refusal of this application follows inevitably from what I have said above.