Neutral Citation Number: [2025] EWCA Civ 164

Case No: CA-2025-000163

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
MRS JUSTICE STEYN
[2024] EWHC 142 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2025

Before :

LORD JUSTICE POPPLEWELL
LORD JUSTICE PHILLIPS
and
LORD JUSTICE WARBY

- -

Between :

NOEL ANTHONY CLARKE	**Appellant /Claimant**
- and –	
GUARDIAN NEWS & MEDIA LTD	**Respondent /Defendant**

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- -

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

Hearing date: 20 February 2025

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Judgment Approved by the court for handing down (subject to editorial corrections)

LORD JUSTICE WARBY :

1. Yesterday we heard a challenge to an order made by Mrs Justice Steyn ("the judge") at the Pre-Trial Review ("PTR") of this action on 20 January 2025. When I saw the application for permission to appeal on 13 February 2025 I thought it required further argument. As the matter was clearly urgent, I directed that the application for permission to appeal be listed for hearing before a full court this week, with the appeal to follow if permission was granted. One reason for taking that course was the unusual nature of the order, a matter to which I shall return.

2. Now that we have heard argument on behalf of the applicant and the respondent, I would grant permission to appeal. But for the reasons that follow I would dismiss the appeal.

The background

3. The applicant is Noel Clarke, a well-known actor, screenwriter, producer and director ("the claimant"). He brings this action for libel and breach of data protection rights against Guardian Newspapers Ltd ("the publisher") in respect of eight articles published in *the Guardian* newspaper.

4. Seven of the articles were first published between 29 April 2021 and 27 May 2021 and the eighth on 28 March 2022. The claim form was issued on 29 April 2022 and served on 26 August 2022. The general subject-matter of the publications is indicated by the headline to the first article complained of: "*Sexual predator: actor Noel Clarke accused of groping, harassment and bullying by 20 women*."

5. The claimant's case in libel is that the publications complained of caused him very serious reputational harm. He claims general and aggravated damages and special damages for substantial financial loss. He alleges that the publications led to the cancellation of all his ongoing and upcoming work contracts, "wiped out" the value of his production company Unstoppable, and caused his ejection from that company and forced him to relinquish his 35% shareholding.

6. The defamatory meanings of the articles were decided at a preliminary issue trial on 1 November 2023. In summary, the first seven articles were held to mean that "there are strong grounds to believe that the claimant is a serial abuser of women, that he has, over 15 years, used his power to prey on and harass and sometimes bully female colleagues, (including) engaging in unwanted sexual contact… and sexually inappropriate behaviour". The eighth article was held to mean that "there are grounds to investigate allegations against the claimant of groping, harassment and bullying".

7. The publisher defends these meanings as substantially true (section 2 of the Defamation Act 2013). In support of that defence, the publisher gives details of the alleged experiences of 22 women, some identified by name and others by pseudonyms. Further and in the alternative the publisher relies on the defence provided for by section 4 of the 2013 Act, contending that the statements complained of were on matters of public interest, they were the product of "detailed and thorough journalistic investigation" and the publisher reasonably believed that their publication was in the public interest (section 4 of the 2013 Act). In his Reply, the claimant takes issue with both those defences. He addresses one by one the allegations of the 22 women. The theme of his

case is that he "did not behave as alleged". In response to the public interest defence the claimant denies the publisher's pleaded case as to its belief. He is critical of the journalistic process, contending that the publisher conducted a flawed investigation, failed to afford the claimant a proper opportunity to comment, and made basic avoidable errors.

8. The issues in the data protection claim follow similar contours to those in the defamation claim. The claimant complains that most of the personal data in the articles complained of was special category data because it related to his sex life and sexual orientation. He alleges that in processing the data in the articles the publisher acted in breach of the UK GDPR and the Data Protection Act (DPA) 2018 because the processing was not lawful, fair or transparent. He makes a positive case that the data were inaccurate because (among other things) "the claimant did not do what he is accused of having done... where that data consists of allegations of misconduct by the claimant". The claim for compensation is identical to the claim for damages in libel. The publisher denies liability for breach of the UK GDPR and the DPA 2018 on the basis that the articles were accurate and subject to the statutory exemption for journalistic material which the publisher reasonably believes should be published in the public interest. The claimant's Reply relies on his case of inaccuracy and his plea in response to the public interest defence in libel.

9. On 11 June 2024 a trial of all the issues on liability and remedies was fixed to begin on 3 March 2025 with a time estimate of six weeks. Disclosure and inspection were given on 3 October 2024, though there was some additional disclosure up to a date in January 2025. Witness statements were exchanged on 5 December 2024. The claimant served 15 statements. The publisher served 34, of which 28 are relied on in support of the defence of truth. It was and is anticipated that almost all of these 49 witnesses will be called to give evidence. A PTR was fixed for 20 January 2025.

10. On 31 December 2024 the claimant filed an application to strike out the publisher's defence in its entirety or alternatively the whole of the public interest defence on the basis of abuse of process ("the Strike Out Application"). A witness statement from the claimant's solicitor was filed in support. It explained the basis for the application. The allegation was, in summary, that the publisher's Head of Investigations (Paul Lewis), the two main journalists who wrote the articles complained of, and possibly others had committed the common law offence of perverting the course of justice, in two ways: (i) by deleting evidence relevant to the allegations complained of in the knowledge that these would form the subject of litigation; and (ii) by engaging in the "fabrication" of correspondence to replace the deleted communications. These allegations reflected one ingredient of the draft case of conspiracy. On 6 January 2025 the claimant asked for the PTR to be used for the purpose of deciding the Strike Out Application and other, as yet unissued applications.

11. On 8 January 2025, the claimant filed the application with which this appeal is concerned ("the Amendment Application"). The Amendment Application seeks permission to join a further six defendants and to re-amend the claim by adding a new cause of action against all seven defendants for conspiracy to injure by unlawful means, expanding his claim for special damages to claim more than £70 million, and adding a claim for exemplary or punitive damages.

12. In broad summary, the new case which the draft amendments seek to advance is that the eight articles were one of the products of a conspiracy to injure the claimant. The primary means adopted were (to quote the claimant's summary) "creating and/or corroborating and/or relaying and/or reporting false and fabricated allegations of rape, sexual assault, other sexual or other misconduct and false and/or exaggerated claims of sexual harassment". The conspiracy was put into effect by libelling the claimant in the manner complained of, taking part in a malicious anonymous email campaign to impede his receipt of a BAFTA award, and perverting the course of justice by attempting to procure his prosecution. The alleged conspirators are the publisher, the six proposed new defendants, and others. The proposed new defendants are Mr Lewis, a former worker at Unstoppable, a film production worker, a film director, and two actors. Exemplary damages are claimed on the basis that the wrongdoing was engaged in deliberately, oppressively, and with reckless disregard for the claimant's rights, the wrongdoers having calculated that the benefit to them would be greater than their exposure to compensatory damages.

13. Notice of intention to make the Amendment Application had been given to the publisher on 23 December 2024, when the draft was sent to it and consent to the amendments invited. On the same day letters before action, but not the draft pleading, were sent to the six proposed additional defendants. When issued, the application was served on the publisher but not on the proposed new defendants. A copy of the proposed amendments was provided to them on 15 January 2025.

14. On 10 January the claimant applied for an extension of time for service of the trial bundles until 21 days after the PTR, that is to say three weeks rather than eight weeks before the trial. By an order dated 13 January 2025 the judge refused the claimant's request of 6 January and directed that the PTR would deal with the trial management issues and with directions in respect of the other applications. On 14 January 2025 the defendant served six witness statements in response to the Strike Out Application. On the same day the claimant served a further substantial witness statement in support of the Amendment Application.

15. On 15 January 2025 the claimant applied for an order varying the judge's order of 13 January, so that the PTR would be used to hear the Strike Out Application and the Amendment Application. By order dated 16 January 2025 the judge refused that application. She reasoned that it would not be fair to add such substantial applications to the issues to be addressed at the PTR., though she accepted that the Strike Out Application should be heard urgently, envisaging a hearing in the week commencing 27 January. The judge's reasons referring to the Amendment Application stated, "I am not prepared to list that application for determination at the PTR" as it was too late to do so and "the appropriate course remains to hear submissions at the PTR regarding the directions I should give".

16. At the PTR on 20 January 2025 the judge addressed a variety of case management issues, including but not limited to the question of directions for the hearing of the Strike out Application and the Amendment Application. On the question of the Amendment Application she heard argument from Counsel for the parties and Counsel for the proposed new defendants. It was common ground that if the Amendment Application was allowed it would be impossible for the trial of the full claim to go ahead. The key issue was whether the judge should give directions for determination of the application before trial. The claimant argued that this should be done, proposing a

contest between the claimant and the publisher with directions for the exchange of evidence and written argument leading to a hearing between 27 and 31 January 2025. The publisher and the proposed additional defendants argued that the Application should be adjourned.

17. The judge did not accept the claimant's submissions. At the end of the hearing she made a detailed case management order containing five directions of relevance to this appeal. First (by paragraph 1), she directed that the trial would now proceed on the issues of liability only ("the Liability Trial"). Secondly (by paragraph 6) she directed that the Strike Out Application be listed for one day on 29 January 2025. Thirdly (by paragraph 13) she directed that the listing of the Amendment Application be adjourned to a date to be fixed after the resolution of the Liability Trial. Fourthly (by paragraph 14), the judge directed that if the claimant intended to proceed with the Amendment Application he must serve it and all supporting documents on all the proposed new defendants within seven days of judgment being handed down after the Liability Trial. Finally (by paragraph 16) the judge directed that the proposed new defendants should have their costs of attending the PTR to be subject to detailed assessment forthwith.

18. On this appeal the claimant challenges the judge's decision to hear argument on behalf of the proposed new defendants and paragraphs 13, 14 and 16 of her case management order.

The Strike Out Application

19. On 29 January 2025 the judge heard the Strike Out Application. By a reserved judgment dated 5 February 2025 ([2025] EWHC (KB)) she dismissed the application on the grounds that "the defendant has not perverted or attempted to pervert the course of justice, and ... such limited pre-action deletion of documents as has occurred is not such as to preclude a fair trial of the claim" ([79]). Her reasons included that the evidence did not show that litigation was reasonably contemplated ([70]), the deletion did not have a tendency to pervert the course of justice ([71]), there was no intention to pervert the course of justice ([72]), and the "extremely serious allegation of fabrication ... has no foundation" and "should not have been made and publicly aired" ([75]-[76]).

20. We were told that this judgment is subject to appeal and that the claimant also intends to apply to the judge to re-open the Strike Out Application on the basis of evidence that was not before her but is said to show that the publisher did contemplate litigation at the time of the destruction and that she was misled on that question. As matters stand, however, the Liability Trial remains set to proceed on 3 March 2025.

The Amendment Application: the judge's reasoning

21. The judge explained her reasoning in a short extempore judgment. The material parts can be summarised as follows.

    (1) The Amendment Application should have been served on the proposed new defendants because that is what the rules of court require. In this context the judge referred to CPR 19.4(2)(b)(ii), CPR 23.1 and 23.4, and three first instance decisions illustrating "the practice in other cases": *Molavi v Hibbert* [2020] EWHC 121 (Ch), *Gaia River SA v Behike Ltd* [2020] EWHC 2981 (Comm), and the libel case of *Vardy v Rooney* [2022] EWHC 304 (QB).

(2) Further and alternatively, the proposed new defendants "ought, in fairness and in the interests of justice, to have an opportunity to respond" to the Amendment Application.

(3) Allowing the proposed new defendants "a reasonable period to read into a very substantial case" and taking account of the need to prepare reply evidence skeleton arguments and hearing bundles, the application "could not fairly be listed until about five or six weeks' time". That would lead to it coinciding with the trial, which would be "completely unsatisfactory".

(4) Even accepting that the claimant needed to consider the defendant's disclosure before formulating the amendments and making the Amendment Application that application was late, given that about 99% of the disclosure had been given on 3 October 2024.

(5) Granting the application would inevitably result in an adjournment of the trial.

(6) An adjournment of the trial would "seriously prejudice the defendant" and would be "likely to cause serious distress to third parties". Numerous witnesses were due to give evidence in relation to allegations of sexual harassment and sexual misconduct and had been anxiously awaiting the trial. Adjournment of the trial would also give rise to a risk that the court would not necessarily have the benefit of all those who were currently prepared to give evidence.

(7) These factors were not outweighed by any prejudice to the claimant in not determining the application at that stage. There was a clearly pleaded and self-contained libel and data protection claim against the publisher that could be properly determined at a trial in March. Mr Millar KC was right to submit on behalf of the publisher that, at that trial, the claimant would be able to put his case of fabrication and conspiracy to the publisher's witnesses.

(8) It would not be fair to the respondents to hear the Amendment Application in the meantime. There was no benefit to doing so and much to be said against it. It was plainly in accordance with the overriding objective for the trial to go ahead.

The appeal

22. There are three grounds of appeal.

23. Ground 1 is that the judge was wrong in law to adjourn the hearing of the Amendment Application until after the conclusion of the trial. It is said that the decision was arrived at in breach of the rules of natural justice, that it was illogical, and that it will stifle the claimant's legitimate claim in unlawful means conspiracy.

(1) The second ground of appeal is that the judge was wrong in law to find that the proposed new defendants had standing, and a right to be served with the Application. It is argued that on a proper construction of CPR 19.4 proposed defendants do not become respondents until after the court makes an order to join them to proceedings. Accordingly, the claimant had no obligation to serve them with any papers and remains under no such obligation until after such an order is made.

(2) The third ground of appeal is that, for essentially the same reasons, the judge was wrong to hear argument from the proposed new defendants and wrong to make an order that the claimant pay their costs of attending the Pre-Trial Review.

Assessment

24. It is convenient to take grounds 2 and 3 first, and together. My first impression was that the judge was right to find that the rules require an application of this kind to be served not only on any existing party to the litigation but also on a proposed additional defendant. But the opposite view is certainly arguable, as is clear from the judgment of Phillips LJ, which I have seen in draft. It is a point of wider importance and in another case it would merit detailed investigation. I do not however think it matters in the present case.

25. That is because even if the judge was wrong about the true interpretation of CPR 19 and 23 there is no doubt that she had a discretion to hear the proposed additional parties at the Pre-Trial Review and to decide whether, as a matter of case management, they should be served with the Amendment Application and participate in the hearing to determine that application. This court would only interfere if it found that the decision-making process involved an error of law or principle or the decision arrived at was one that no reasonable judge could have reached on the material before her. The claimant has identified no such error. As for the judge's conclusions, so far from being perverse, it seems to me that there is much to be said for them. If the application went ahead against the publisher in the absence of the proposed additional defendants and an order was made for their joinder they would be served. They would then be entitled to apply to set aside. Allowing them advance notice of the application and a voice at an early stage was capable of avoiding duplication and saving costs and time, and well within the ambit of the judge's case management powers. By the end of the hearing before us, I understood Mr Williams to have accepted this.

26. That deprives ground 3 of any force. The judge's decision to award costs to the proposed additional defendants did not turn on her disputed conclusions about the interpretation of the Civil Procedure Rules. It was a discretionary decision based on her legitimate decision to hear argument from the proposed additional defendants, coupled with the outcome of the hearing on the relevant issues. Again, no arguable error of law or principle has been identified. It cannot be and is not argued that the judge's decision was irrational. An appeal against the costs order would therefore be hopeless in isolation.

27. The real issue is whether there is any merit in Ground 1. That has been the focus of the argument and calls for rather closer attention. In support of this ground of appeal Mr Williams made four main submissions. I take them in what seems to me a logical order.

28. The first main submission was that the existing claims and the proposed amended claims are "inextricably linked, intertwined and within the same factual matrix" such that they cannot fairly be determined separately. I readily accept that there are considerable overlaps between the claims as they stand and the proposed amended claims. One of them is that, as Mr Williams put it, "the defamation was ... the mere instrument" of the "concerted design" alleged. That much is obvious. I am sure the judge was alive to all of this. This headline submission seems to me however to beg

the question of whether the undoubted overlaps and links between the claims mean that the judge's approach or decision were wrong in law.

29. Mr Williams' second main submission was more consequential. He argued that the judge's approach was in breach of natural justice because it denied the claimant a fair opportunity to present the Application. In the skeleton argument the judge was said to have placed the claimant's side "in the impossible position of trying to make arguments on the substantive merits of the Application" at the PTR when they had reasonably assumed that they would not be required to do so and much of the relevant material was not before the court. This appears to me to be ill-founded. The judge's previous orders made clear that the PTR would consider what directions should be given for the hearing of (among others) the Amendment Application. The question of whether that application had been unduly delayed was a potentially relevant factor. The claimant had a fair opportunity to file evidence and to advance argument on that issue and took it. The claimant filed a witness statement addressing the issue, Mr Williams' skeleton argument shows that he expected to have to address that question.

30. Nor am I persuaded by the complaint in the skeleton argument that it was unfair for the court to deal with the matter without considering "key documentation relating to allegations, supported by robust evidence, of criminal wrongdoing". Such matters are relevant to the grant or refusal of permission to make a late amendment. But when deciding at the PTR what directions to give, including whether to adjourn the Amendment Application, and if so for how long, the judge was not concerned with the substantive merits of the proposed new claims. She was yet to hear argument on the Strike Out application, which made allegations of perverting the course of justice. She clearly did not make any finding or assumption adverse to the claimant on that or any other issue at the PTR. Her approach assumed that the Amendment Application and the case advanced in the proposed amendments might both have merit. That was entirely appropriate. The decision under appeal did not of itself have any bearing on the claimant's ability to argue the Amendment Application at the appropriate time, or on the likely outcome.

31. The third main submission of Mr Williams was the most consequential. It was that the judge's approach was in breach of natural justice because it denied the claimant a fair opportunity to present his substantive case of conspiracy to the court for adjudication. Adjourning the Amendment Application meant that the conspiracy claim "would essentially never see the light of day" due to the operation of the *res judicata* principle and an inability to cross-examine on the conspiracy claim in the course of the Liability Trial. At that trial cross-examination would only be permissible in relation to the matters that were already in issue and not to other matters raised by the proposed amendments; the range of witnesses available for cross-examination would be narrower; the resulting judgment would be final and conclusive on the factual matters it determined; unless successfully appealed those findings would remain binding even if the claimant was later allowed to amend and pursue the claim for conspiracy; and for well-known reasons, an appeal against findings of fact would be extremely difficult. In a supplemental skeleton argument Mr Williams added that the adjournment deprived the claimant of the prospect of full vindication.

32. The fourth main submission was a weaker version of the third, the argument being that even if the factors just mentioned would not give rise to a breach of natural justice they would cause the claimant serious prejudice, because they would make it "nigh on

impossible" for him to have recourse to justice on the amendment or joinder after trial. It was contended that the judge failed to grapple adequately with this aspect of the matter or to give it any or any sufficient weight.

33. These twin facets of the claimant's argument deserve consideration. But they face a number of difficulties. Most obviously, they fail to confront the reality of the situation as it presented itself at the PTR. Plainly, the trial date could not be kept if all the additional parties were joined and all the proposed amendments were made. As I have said, the judge's conclusion that the proposed additional parties should have notice of the Amendment Application was a legitimate case management decision. As the judge recognised, it may have been possible to address the Amendment Application in full before the trial date, but we have no grounds for disagreeing with her conclusion that this would take five to six weeks to prepare. She was plainly right to say the process would "hugely disrupt" trial preparation and "of itself put the trial date at risk". It is hard to see the point of engaging in such an exercise when it would be fanciful to expect the proposed additional defendants to prepare to defend the trial of a claim for £70m and exemplary damages for conspiracy within a few weeks after service of the proceedings upon them.

34. It would have been wholly unsatisfactory to deal with the Amendment Application as against the existing defendant only, leaving over the remainder. It is highly doubtful that this could have been managed before the trial. Moreover, substantial time and effort was going to be devoted to the Strike Out Application, itself a substantial piece of pre-trial work. Even if a pre-trial hearing of the Amendment Application as against the publisher could have been managed, it is impossible to see how there could have been a trial of the whole case as amended within a few weeks or even days later. The usual processes of pleading a Defence, a Reply, giving disclosure and exchanging witness statements could not possibly have been completed in that time. Nobody ever seems to have suggested that it was even desirable to have a trial of the amended claims against the publisher alone, the outcome of which would be binding only the parties to that trial.

35. The only realistic options were, therefore, (1) to adjourn the trial for many months so that the Amendment Application could be prepared, heard and determined in full and, to the extent it was successful, the substantial further trial preparation necessary could be undertaken; or (2) to adjourn the hearing of the Amendment Application until after the trial, and restrict the scope of the trial to issues of liability for libel and data protection. Nobody was contending for option 1. But that is not the reason why the judge adopted option 2. She conducted an assessment of the prejudice which each option would or might cause and carried out a balancing exercise. She was entitled to conclude, in the terms that she did, that option 1 would cause substantial prejudice to the publisher and third parties. The question then comes down to whether the judge was entitled to conclude that this prejudice coupled with the lateness of the application outweighed any prejudice that the claimant would suffer by reason of the adjournment.

36. I have already stated my opinion on the issue of lateness. In short, the claimant had a full and fair opportunity to address that issue and on the material before her the judge was entitled to reach the conclusion that she did. In my judgment the same is true of her assessment of the prejudice that the claimant would suffer if the Amendment Application was adjourned and her evaluative conclusion that this was outweighed by

the other factors to which she referred. Mr Williams has not persuaded me that the judge's assessment involved an error of law.

37. I accept that it is very likely, if not inevitable, that a trial of the issues as they stand would yield findings of fact with an important bearing on the fate of the Amendment Application and the conspiracy claims. To take the most obvious example, the court's findings on the issue of truth would clearly have a major impact. To the extent the court accepted the claimant's case on that issue he would have achieved vindication and at the same time established a key ingredient of his conspiracy claim. To the extent the court found for the defendant on the issue of truth that would show that vindication was not deserved. Mr Millar KC submitted that such a finding would in and of itself defeat the conspiracy claim, as it would mean the claimant had no "unlawful means" on which to rely, at least as against the publisher. It is unnecessary to resolve that issue. It is enough to conclude that a finding of truth would deal at least a significant blow to the conspiracy claims.

38. Similarly, a finding in favour of the publisher's section 4 defence would be significant for the claimant's conspiracy case. Again, Mr Millar would say that proof of this defence would be destructive of any case of unlawful means. It would surely mean, at least, that the claimant would have difficulty establishing the wrongful intent required to prove a case of conspiracy, or a case for exemplary damages. If the section 4 defence failed that could, depending on the reasons, provide a significant boost to the conspiracy claims. To establish the section 4 defence the publisher must prove not only that the statements were on matters of public interest (which is not admitted) but also that it had an honest and objectively reasonable belief that publishing them was in the public interest (which is denied). The court's findings of fact on these elements of the defence would seem likely to bear on issues raised by the conspiracy claims.

39. These points are illustrative examples of the interlinked and overlapping character of the existing claims and those which the claimant wishes to add by amendment. But none of them supports the twin submissions I am now addressing. That is because none of them is an example of a situation where the claimant would suffer unfair prejudice. Indeed, they tend to show that the Liability Trial could be a beneficial short cut to a conclusion on many of the issues raised by the proposed amendments. There would only be substantive unfair prejudice, as it seems to me, if the fact-finding process at the Liability Trial was itself unfairly prejudicial to the claimant in some way that would be avoided by a trial that encompassed all the issues which he now wishes to raise.

40. So, to show that the judge's decision to adjourn the Amendment Application was wrong in law or unduly prejudicial as alleged it is not enough for the claimant to show that there is an overlap or link between the current case and that which is proposed. That does not assist him. What has to be shown is, rather, (a) that the introduction of the amendments would so transform the case that it would be a denial of natural justice to make findings of fact in the existing case and then translate them into the amended case; or (b) that there is a risk that the adjournment would work unfairness of that kind, of which the judge failed to take any or any proper account. That, I think, is the nub of the argument on the claimant's behalf.

41. I can understand the thrust of the underlying argument. The effect of the judge's decision is, in the end, to provide for a second preliminary issue trial, with the possibility of up to two further trials, one on liability for conspiracy and the second on

remedies. The authorities warn that the short cuts that preliminary issues afford can be treacherous. One reason is that it can be hard precisely to delineate the boundaries between different issues in a case. It is theoretically possible that if the proposed amendments were made, and further disclosure was given, material would emerge that assisted the claimant's case on the existing issues or undermined the publisher's case on those issues. Additional witnesses might be called. It is also possible, theoretically, that the scope and range of cross-examination at the Liability Trial would be somewhat less than it would be at a full trial encompassing the existing issues and those that are proposed by way of amendment. The claimant has however fallen a long way short of establishing that the judge's decision offends the principles of natural justice, deprives him of any chance of a fair trial of his conspiracy claim, or removes his chances of legitimate vindication.

42. We have not been presented with any argument that relies on the prospect of further relevant disclosure if the amendments were made. The claimant's central complaint is that he will be unfairly muzzled at the Liability Trial because the scope for cross-examination will be unduly restricted, compared with what would be possible at a full trial of all the issues which the claimant wants to pursue. Mr Williams invited us to conclude that the publisher and the judge were both too generous to his client on that question. He submitted, by reference to authority, that he would only be entitled to cross-examine at the Liability Trial on matters strictly relating to the pleadings as they stand. I think Mr Williams is being unduly pessimistic.

43. There are of course restrictions on what may legitimately be asked in cross-examination. This must depend on the issues raised by the statements of case. But the range of matters that can bear on a given issue can be quite wide. In addition, questions going to the witness's general credit are permissible. The limits of what is permissible in any given case are best set out by the trial judge in the course of the trial. Here, the issues between the parties include the truth of what was said, and whether those responsible for the offending publications honestly and reasonably believed it was in the public interest to publish it. Mr Millar made a persuasive case that it is in principle open to the claimant to put it to the 22 women to be called in support of the defence of truth, that they are telling lies and that the reason is that they were parties to a conspiracy or arrangement to tell lies to injure the claimant. The claimant does not require the "whole edifice" of the conspiracy case for that purpose. Mr Millar also argued powerfully that the claimant can put to the witnesses to be called in support of the public interest defence that they are lying about their state of mind, and the reasons for that can be put. It is obviously relevant in this context that the proposed amendments are based on documents which the publisher has disclosed on the basis they are relevant to the existing issues.

44. A further point made by Mr Williams in argument before us was that he will have fewer witnesses to cross-examine at the Liability Trial, as these will not include all the proposed new defendants. I am unable to see the force of this. It is trite that a claimant alleging conspiracy must prove his case by convincing evidence. He is not entitled to proceed on the footing that his case may be improved by evidence called by the defence or that something might turn up in cross-examination. Nor was any basis provided to us for concluding that either of those things would be likely to happen at a trial of the conspiracy claim. We have no idea what witnesses would be called by the proposed

additional defendants nor any grounds for concluding that those witnesses would give evidence supportive of the claimant's case.

45. In the end, the decision to adjourn was a case management decision. The primary responsibility for evaluating the matters to which I have referred and weighing them up against competing considerations rests with the judge at first instance. This court's function is one of review. If the judge makes no error of law, takes the relevant factors into account, does not overlook any relevant matters and reaches a tenable conclusion it is not for this court to substitute its own assessment.

46. This decision was taken by one of the judges in charge of the Media and Communications List, who was the designated trial judge, at the pre-trial review of this substantial action, with which she was already very familiar. The judge took into account the claimant's submission that adjournment of the Amendment Application until after the trial would work or risk injustice of the kind that has been argued before us. I am quite satisfied that she well understood the extent of the overlap between the various claims. She referred in terms to the scope for cross-examination at the Liability Trial. I do not consider the claimant has identified any material point that was left out of account by her. As I read her judgment, the judge accepted that there might be some prejudice to the claimant but concluded that it would not amount to a denial of justice nor was it sufficient to outweigh the substantial prejudice that would be caused to others by adjourning the trial. I can see no basis for this court to interfere with that conclusion.

Conclusions

47. For these reasons I would, as I have said, grant permission to appeal but dismiss the appeal. In my opinion the judge's approach was fair and her procedural assessments were all legitimate. I recognise that the merits of the judge's decision on the Strike Out Application may be revisited. That is not a matter for us at this stage. Subject to that, the appropriate course is for this case to proceed to the trial of the liability issues that arise from the statements of case as they stand. The claimant can pursue the Amendment Application if so advised after judgment on those issues, in accordance with the directions given below.

48. I add only this. I would not want it to be thought that an order of the kind we are considering will often be an appropriate response to a late application to add new parties or to amend the pleadings. One reason I directed a hearing of the application for permission to appeal in this case, and a reason for giving permission to appeal, is that the order under challenge is most unusual. The usual course of action, and the one that is normally appropriate, is to hear and decide the application. The principles are well-established. That approach could have been adopted in this case. And, as Phillips LJ observed in the course of argument, the claimant's real complaint is that the judge was wrong in principle to adjourn this application rather than hear and decide it forthwith. Some judges might have done so. However, the judge considered whether to hear the application prior to the Liability Trial and assessed the pros and cons of doing so in the light of her evaluation that it could only properly be listed to be decided in respect of all the proposed defendants, not the publisher alone, and after they had had an opportunity to be heard; and that such a listing would itself endanger the trial date. Those were evaluative judgments she was entitled to make, and in the unusual circumstances of this case the judge's decision to adjourn the application was not outside the generous ambit of her case management discretion.

LORD JUSTICE PHILLIPS:

49. I agree that permission to appeal should be granted, but the appeal dismissed, for the reasons given by Warby LJ, save for one point.

50. I do not agree with the Judge that it is a requirement that applications to add a new defendant under CPR 19(2) are served on that proposed new party. As provided by CPR 19.4, no application at all is required unless the claim form has been served, demonstrating that the party concerned with the application is the existing defendant who has been served, not the proposed new party, who has no interest as to whether the claim form has been served or not. The reference to "respondent" in CPR 23.1 and 23.4 is to the existing party or parties. To say that it must be a reference to the proposed new defendant is a "bootstraps" argument.

51. It is also notable that proposed defendants to a part 20 claim have no right to be served with the application form permission to make such a claim, where such permission is required: see CPR 20.7(5).

52. The point is of some importance, particularly when a proposed new defendant is out of the jurisdiction. An application to join a new defendant (combined with a without notice application to serve them out of the jurisdiction) cannot sensibly itself be served on the proposed defendant out of the jurisdiction, with a right for that defendant to oppose their joinder. It is not clear what the basis for service out of the jurisdiction would be prior to joinder to the proceedings and the process could cause significant delay in joining a new defendant, potentially giving rise to issues with limitation.

53. The court can, of course, direct that proposed new defendants be served with the application to join them, and this may be good practice in later stages of proceedings. But to regard any such practice as indicative of a requirement applicable at all stages of proceedings is, in my judgment, a mistake.

LORD JUSTICE POPPLEWELL:

54. I also agree that permission to appeal should be granted and the appeal dismissed for the reasons given by Warby LJ. In relation to the procedural point addressed by Phillips LJ I would prefer not to express any view because the point does not need to be decided and we heard no oral argument on it.