Appeal ref: A2/2020/2034

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

The Hon. Mr Justice Nicol [2020] EWHC 2911 (QB)

B E T W E E N:

John Christopher Depp II

Claimant/Appellant

- and -

(1) News Group Newspapers Limited
(2) Dan Wootton

Defendants/Respondents

RESPONDENTS' RESPONSE TO APPELLANT'S APPLICATION FOR PERMISSION TO ADDUCE FURTHER EVIDENCE

INTRODUCTION

1. The Appellant applies for permission to appeal the Order of Nicol J of 16 November 2020 dismissing his libel action for the reasons given in the reserved judgment handed down on 2 November 2020, the judge having refused permission. He further seeks permission to put before the court evidence that was not before the lower court. In order to do so he must:
   1.1. Obtain permission pursuant to CPR 52.21(2)(b) to rely on that evidence in support of his application for permission to appeal; and
   1.2. Obtain permission pursuant to CPR 52.17 to amend his appeal notice.

2. The Appellant made an application under CPR 52.21(2)(b) dated 14 January 2021 (38 days after the date on which he submitted his appeal notice, and 24 days after he lodged his

skeleton argument). He has not however issued any application for permission to amend his appeal notice, and no draft amended appeal notice has been provided.

3. In summary, the Appellant contends that the "fresh" evidence relating to the donations supports a theory that Ms Heard was a 'gold-digger'; and that the 'gold-digger' thesis explains why Ms Heard had over the course of her 5-year relationship with the Appellant carefully constructed a 'hoax' to demonstrate that he had committed multiple acts of violence against her. It is also said by the Appellant that the "fresh" evidence would have undermined Ms Heard's credibility with the inevitable result that the judge would have reached a different decision about the 12 assaults (out of the 14 pleaded assaults) he found the Appellant to have perpetrated.

4. The Respondents' position is set out in the fourth witness statement of Jeffrey Smele dated 24 February 2021, and is in summary that:

   4.1. The evidence is not "fresh" at all, since it <u>could</u> have been obtained with reasonable diligence for trial;
   4.2. The "fresh" evidence (which the Respondents accept is apparently credible insofar as it shows that Ms Heard has not yet finished making her pledged payments to the charities) only goes to a highly peripheral and unpleaded matter, and is of no relevance to the pleaded issues (i.e. the 14 assaults) that Nicol J had to decide;
   4.3. The evidence would have had no impact on Ms Heard's credibility had it been before the trial judge, since it does not demonstrate that Ms Heard or any of the Respondents' witnesses lied;
   4.4. The evidence therefore comes nowhere close to satisfying the ***Ladd v Marshall*** [1954] 3 All ER 745 criteria;
   4.5. The application to admit the evidence should therefore be refused, along with any application to amend the appeal notice;
   4.6. The application for permission to appeal should be dismissed, since, *per* CPR 52.6(1), the appeal has no real prospect of success and there is no other compelling reason for an appeal to be heard.

LEGAL PRINCIPLES: APPLICATION FOR PERMISSION TO ADDUCE FURTHER EVIDENCE

5. The starting point is that an appeal court will not generally receive evidence which was not below the lower court, although the appeal court has a discretion to receive such evidence pursuant to CPR 52.21(2)(b).

6. Although the court's discretion is not restricted to cases where special grounds can be shown, as was the case before the introduction of the Civil Procedure Rules, the three criteria stated in ***Ladd v Marshall*** remain matters which the court must consider in the exercise of its discretion (***Hertfordshire Investments Ltd v Bubb*** [2000] 1 WLR 2318 at 2325) and, while the criteria are no longer primary rules, they *"effectively occupy the whole field of relevant considerations to which the court must have regard"* (***Terluk v Berezovsky*** [2011] EWCA Civ 1534 at [32]).

7. The criteria in ***Ladd v Marshall*** are that: (i) the evidence could not have been obtained with reasonable diligence for use at the trial, (ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and (iii) the evidence must be such as is presumably to be believed; it must be apparently credible, though it need not be incontrovertible.

8. As Mummery LJ explained in ***Transview Properties Ltd v City Site Properties Ltd*** [2009] EWCA Civ 1255,

> [22] That permission [to adduce fresh evidence] should only be granted if, in accordance with the overriding objective, it is just to admit evidence on appeal which was not produced at trial. <u>The party bringing forward more evidence on an appeal must have a very good reason for not having obtained it in time to use at the trial</u>. It is usually too late, after the trial is over, to produce evidence to an appellate court, which is not itself equipped to try or to re-try cases.
>
> [23] In the exercise of its discretion to admit fresh evidence the court has to consider carefully all the relevant factors, such as whether the evidence could, by reasonable efforts, have been obtained for use at the trial; whether the fresh evidence is apparently credible; and whether, if given, it would probably have an important influence on the outcome of the case. The interests of the parties and of the public in

fostering finality in litigation are significant. The parties have suffered the considerable stress and expense of one trial. The reception of new evidence on appeal usually leads to a re-trial, which should only be allowed if imperative in the interests of justice. As Hale LJ said in ***Hertfordshire Investments Ltd v Bubb*** [2000] 1 WLR 2318 at 2324C

> ….It is in the interests of every litigant and the system as a whole that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed.

(emphasis added)

9. In considering the first of the ***Ladd v Marshall*** criteria, whether evidence could have been obtained within reasonable diligence, no distinction is to be made between the knowledge of the lay client and that of his various lawyers: ***Evans v Tiger Investments Ltd and Anor*** [2002] EWCA Civ 161; [2002] 2 BCLC 185 at [39].

10. Evidence from a witness who was not called at trial will not satisfy the first of the criteria if the witness had given enough information for a draft witness statement to be prepared, as this could have been adduced as hearsay (see for example ***Transview Properties*** at [71]-[74]).

11. Where, as here, it is said that the fresh evidence casts doubt on the credibility of a witness, a stricter test applies. It may only be adduced where the court is satisfied that it *"must have led a reasonable jury to a different conclusion from that actually arrived at in the case*" (emphasis in original) (***Braddock v Tillotson's Newspapers Ltd*** [1950] 1 KB 47 at 56 per Cohen LJ). In the same case, in which the appellant's application to adduce fresh evidence of the previous convictions of a very significant witness for the defendants was dismissed, Tucker LJ said (at 53) that:

> if … this Court is to depart from its invariable practice of confining such evidence to the relevant issues and is to admit fresh evidence directed solely to credit, I am of opinion that such a course would, if ever, only be justified where the evidence is of such a nature, and the circumstances of the case are such, that no reasonable jury could be expected to act upon the evidence of the witness whose character had been called in question. It would, in my view, be wrong for this Court to admit fresh evidence directly solely to credit, merely because there is a possibility, or merely a reasonable probability, that such evidence would result in a different verdict. (emphasis added).

12. In the absence of deliberate deception, the ***Ladd v Marshall*** test will rarely be satisfied where the fresh evidence goes merely to credit, for such evidence will not normally satisfy the second requirement of leading to the conclusion that the decision appealed against was probably wrong (***Hamilton v Al Fayed (No. 2)*** [2001] EMLR 15 at [34]).

13. The approach in ***Braddock*** was followed by the Court of Appeal in the similar case of ***Ali v Ellmore*** [1953] 1 WLR 1300, where the alleged fresh evidence concerned the credit of two of the defendants and did not relate to an issue in the case.

14. One exceptional case in which the court has permitted fresh evidence to be adduced which is directed purely to the credibility of a witness is ***Meek v Fleming*** [1961] 2QB 366, to which Ms Rich refers at paragraphs 87-90 of her fifth witness statement. In ***Meek,*** a claimant claimed damages for assault and wrongful imprisonment, and his "*virtually unsupported*" evidence was in direct conflict with that of the defendant police officer (at 367). The claimant successfully applied on appeal to adduce fresh evidence that the police officer had previously been demoted in rank for giving false evidence in a previous similar incident, a fact which had not been disclosed to the court at trial.

15. In ***Meek***, Holroyd Pearce LJ stated (at 378) that "*where … the fresh evidence does not relate directly to an issue, but is merely evidence as to the credibility of an important witness, this court applies a stricter test. It will only allow its admission (if ever) where the evidence is of such a nature and the circumstances of the case are such that no reasonable jury can be expected to act upon the evidence of the witness whose character had been called into question*" (per Tucker LJ in ***Braddock***) or "*where the Court is satisfied that the additional evidence must have led a reasonable jury to a different conclusion from that actually arrived at in the case*", per Cohen LJ in ***Braddock*** at 56.

16. Willmer LJ in ***Meek*** referred (at 382) to "*the <u>exceptional nature</u> of the present case … in which the character of the parties was of peculiarly vital significance*" (emphasis added). Pearson LJ concluded (at 383) that "*the fresh evidence only affects the credit of the defendant and does not relate directly to any issue in the case. Accordingly it would not*

be right to order a new trial unless there is <u>some feature of paramount importance</u> outweighing a grave disadvantage of protracting the litigation" (emphasis added). He found such an "*exceptional*" course in that (at 384):

> the main issue at the trial was whether the evidence of the plaintiff or the evidence of the defendant should be believed as to what happened in the passage at the police station. If the purport of the fresh evidence had become known in the course of the trial, it would have shown both that the defendant had taken part in the deception of a court in the matter for which he was demoted, and also that he was at the trial of this action participating in another deception of a court.

17. In ***Boodoosingh v Ramnarace*** [2004] UKPC 9, the defendant appealed against a judgment finding him liable for assault and battery following a shooting. The defendant sought to adduce fresh evidence allegedly showing that the claimant had lied at the trial with regard to his loss of earnings claim, by falsely stating that he had not worked following the shooting when in fact he had. The claimant submitted that this lie required not merely a fresh look at the special damages award but a rehearing of the entire claim on the premise that *"the issue of liability turned on the credibility of the rival protagonists and these lies, it is submitted, went to the heart of the respondent's and his brother's credibility"* (at [16]). The Privy Council dismissed the appeal. Lord Brown of Eaton-under-Heywood said:

> [25] Does this fresh evidence entitle the appellant to succeed on this appeal? In their Lordships' view, plainly not. In the first place it appears to fall well short of the *"strong prima facie case of wilful deception of the Court"* of which Lord Hodson spoke in ***Skone v Skone***. But in any event, even supposing that the Board were satisfied on the basis of such inadequate material that the respondent and his brother had indeed intentionally misled the trial judge by overstating the extent of his earnings loss, it is far from obvious that this would justify the setting aside of the entire judgment. It is not as if the appellant seeks merely some reduction in the special damage award to reflect the likelihood that the plaintiff undertook some casual work during the claimed period of loss, or even indeed the setting aside of the entire special damage award. Rather it is an all or nothing appeal, the argument being that the exaggeration of the special damage claim undermines the respondent's credibility also on the issue of liability and so casts doubt on the entirety of the judgment.
>
> [26] Perjury, assuming it to have been committed, is, of course, a serious matter and always unacceptable, irrespective of the particular circumstances in which it is committed and the particular issue to which it goes. No court will ever condone it. But that is by no means to say that if any part of a judgment is procured by perjury the whole judgment will necessarily be set aside. Plainly that would be a wrong approach.

So much, indeed, is readily apparent from the brief citations already given from the judgments in ***Meek v Fleming***. As Holroyd Pearce LJ put it: *"In every case it must be a question of degree, weighing one principle against the other"*. (The competing principles being, of course, on the one hand the finality of litigation and, on the other, the undesirability of a party benefiting from his deceit.) In Pearson LJ's words, "It would not be right to order a new trial unless there is some feature of paramount importance outweighing the grave disadvantage of protracting the litigation".

[27] Even were the appellant on this appeal able to demonstrate to the necessary standard of proof that the respondent to some extent deliberately inflated his loss of earning claim, their Lordships conclude that it would not be right to set aside the entire judgment. So far as the issue of liability was concerned, this was not, it must be observed, a close run case. Rather, all the probabilities favoured the respondent's account of the shooting and the trial judge, having (in the Court of Appeal's words) "*properly analysed the evidence*", found for the respondent in resounding terms, comprehensively rejecting the appellant's evidence. It is simply not realistic to suppose that, had the judge come to realise that the respondent was deliberately exaggerating his loss of earnings claim, he then would or might have reached the opposite conclusion on the issue of liability. … In short, even giving the appellant the benefit of every doubt with regard to the effect of the fresh evidence, this cannot sensibly be regarded as materially undermining the respondent's case on liability.

18. In ***Khetani v Kanbi*** [2006] EWCA Civ 1621, Lindsay J (with whom Thomas and Chadwick LJJ agreed) explained that satisfaction of the ***Ladd v Marshall*** criteria is a necessary but not a sufficient condition for the admission of fresh evidence. In that case, the application was dismissed notwithstanding that it satisfied those criteria because, while the appellant had taken steps prior to the trial to try to obtain documentary evidence, the documents did not arrive in time and the trial went ahead without them. The Court of Appeal held that it was an abuse of process for a party deliberately to proceed without certain evidence and then after losing the case to seek to adduce that evidence on appeal: see in particular [29] per Lindsay J and [40] per Chadwick LJ,

[29] For my part, I accept Mr Christensen's description of the approach taken by the claimant as being one of her making an election. The claimant had elected, in the days immediately before the trial began and as it began and throughout the early oral evidence, not only to proceed without the documents (at first, should they not arrive in time but then, despite their not having arrived) and did so conscious that that represented a risk, one which the claimant was content to run, that if the documents did not arrive then the judge would necessarily be constrained to decide the case without them. Moreover, that election had been coupled with a refusal to agree an adjournment in order to get the documents until the complete tactical change on day

2 when the claimant then herself sought that which she had previously opposed. In the absence, as here, of a convincing explanation on evidence to the contrary, I would categorise as an abuse of process conduct by which a party, deliberately and conscious of the risk involved, elects to proceed without certain evidence and, moreover, resists adjournment in order that that evidence should be got in yet then, after losing the case, seeks to have access to that evidence on appeal. The satisfaction of ***Ladd v Marshall*** is a necessary but not a sufficient condition for the reception of new evidence; it does nothing to licence abuse of process and thus, even on the assumption that, for the reasons I have given, the ***Ladd v Marshall*** test is satisfied, I would, for my part, here set aside Jacob LJ's ruling …

…

[40] I agree with Mr Justice Lindsay's observation that a party who, having deliberately and with knowledge of the risk involved elected to proceed without evidence which he (or she) knew was likely to exist and could probably be obtained, seeks to adduce that evidence in an appellate court, can properly be said to be seeking to abuse the litigation process …

SUBMISSIONS

Charity donations

Could the Appellant have obtained this evidence for the trial with reasonable diligence?

19. The answer to this question is yes.

20. The question of whether or not Ms Heard had fulfilled her pledges to the two charities had been a preoccupation of the Appellant since 2016, and had been a matter which his very well-funded team of professional advisors had been very actively investigating well before this trial began in July 2020, including in the libel claim he is bringing against Ms Heard in the US. The Appellant or his legal or business advisors:

    (a) knew from 2016 that Ms Heard's donation to the charities was going to be paid in multiple instalments rather than as a lump-sum payment;[1]

[1] Letter from Mr White to Children's Hospital at JR1 page 5, referring to *"multiple scheduled installments to honor the full amount of Ms Heard's $3,500,000 pledged gift"*.

(b) suspected that Ms Heard would not make the payments as in the words of the Appellant she was a *"scumbag gold-digger".* For example the Appellant texted his nurse on 18 August 2016 saying, *"She won't donate ONE PENNY!!!! Did you notice that it was a non disclosed charity??? She's been pushing Art of Elysium for years!!!! And, what about battered women??? No Way she'll give a dime to anyone!!! Thank fuck she's gone!!! Makes me sick to think of how hard I tried to make it work… Now… Honestly, I wouldn't touch that fucking whore with a Hazmat suit on!!! What scum. I fucking hate her!!!"*;[2]

(c) asked questions about whether the payments had been made;[3]

(d) had in June 2019 been sent a letter by the Children's Hospital saying that *"since the first installment, CHLA Foundation has not received further installments";*[4]

(e) asked Ms Heard to admit in the US proceedings that *"you did not donate the entirety of your divorce settlement with Mr. Depp to charity"*;[5]

(f) deposed one of Ms Heard's witnesses (Ms Sexton) about her knowledge of the charity donations;[6]

(g) applied for subpoenas against the two charities;[7]

(h) publicised the donations issue by tweeting that there were *"7 million questions"* to ask about Ms Heard's donations and releasing a statement to the media that there was a *"trail of unanswered questions"* about Ms Heard's relationship with the ACLU;[8]

(i) obtained and disclosed to the Respondents the Children's Hospital Honor Roll of Donors 2017, along with other documents relating to the donations or Ms Heard's relationship with the ACLU;[9]

(j) required those documents to be added to the trial bundle as these were said to be *"documents which our client intends to rely on"* at the trial;[10] and

---

[2] Appellant's text messages in August 2016, JS5 pages 11-12.
[3] Cross-examination of Mr White, JS5 page 13.
[4] JR1 page 15.
[5] JS5 page 22.
[6] JS5 pages 37-38.
[7] JR1 pages 159-183 (Children's Hospital) and 184-208 (ACLU).
[8] JS5 pages 46-56.
[9] Mr Smele's 4th witness statement at [27].
[10] Mr Smele's 4th witness statement at [28] and JS5 pages 71-109.

(k) generally left no stone unturned to pursue this claim: the Appellant's costs of this claim alone (i.e. not including his costs of the US claim, which concerns very similar issues) exceed £2.4 million.[11]

21. During the trial, the Appellant's counsel did not in the event rely on any of the documents relating to the donations which his solicitors Schillings had required to be added to the trial bundle expressly for that purpose, but asked Ms Heard other questions relating to her finances (whether she had refused to sign a pre-nuptial or post-nuptial agreement).[12]

22. Against this background, it is ludicrous to suggest that the further evidence which the Appellant now seeks to adduce could not with reasonable diligence have been obtained before the trial and that it simply *"never occurred"* to the Appellant to cross-examine Ms Heard about this issue. He could have sought, and in all probability obtained, that evidence before the trial. He even brought a third-party disclosure application against Ms Heard shortly before the trial started, but chose not to seek disclosure of documents relating to the donations issue.[13]

23. Further or alternatively, even if all of the ***Ladd v Marshall*** criteria are satisfied, to admit this evidence would be an abuse of process for the same reasons as in ***Khetani v Kanbi*** (above). Having on 29 May 2020 applied for the subpoenas against the charities but the documents still not having arrived, the Claimant elected to proceed with the trial on 7 July knowing that the judge would necessarily be constrained to decide the case without them. Having done so, and having chosen not even to rely at trial on those documents relating to the donations which *were* in his possession or control and were in the trial bundle, it is not open to him to use the documents now obtained as a result of the subpoenas to seek a re-trial. This is particularly so in circumstances where no explanation has been given as to why the Appellant waited until 29 May to apply for the subpoenas despite having signalled his intention to explore the donations issue several months earlier in his

[11] Mr Smele's 4th witness statement at [31].
[12] Ms Rich's 5th witness statement at [18].
[13] Mr Smele's 4th witness statement at [30].

November 2019 *"Requests for Admission"* document and in the December 2019 deposition of Ms Sexton.

Would the evidence probably have had an important influence on the result of the case?

24. The answer to this question is, emphatically, no.

25. Given the wealth of evidence, including corroborative documentary and photographic evidence, that was before the trial judge on the issues he had to decide – namely whether the Appellant had beaten Ms Heard on 14 pleaded occasions – it is plainly wrong to suggest that the information that Ms Heard had not yet finished paying $7 million to charity would have made the slightest difference to the outcome of this case.

26. The only possible relevance of Ms Heard's donations to charity was in connection with the theory suggested by the Appellant predominantly in paragraph 14 of his second witness statement (and see also paragraphs 16 and 19)[14] to explain why Ms Heard would have invented her allegations of abuse and would have created contemporaneous evidence to support her account (such as messages) going back to the early years of their relationship. This theory was that Ms Heard was a gold-digger.

27. The 'gold-digger' theory was so peripheral to the Appellant's case that he never even pleaded it. Moreover during the course of the trial the Appellant's counsel expressly abandoned any suggestion that Ms Heard was a 'gold-digger'.[15] This was unsurprising: the 'gold-digger' theory was, simply, absurd, for the reasons given by the judge.

28. But even leaving that to one side, Ms Heard's actual use of the divorce settlement money was logically incapable of having any bearing on the question of whether the Appellant assaulted Ms Heard during the course of their relationship. It would not have proved the 'gold-digger' theory, since even if the judge had known that Ms Heard had not yet finished making the payments, he would not have been bound to conclude that she was a 'gold-

[14] The Appellant's 2nd witness statement will be included in the bundle for the hearing; paragraph 14 of the witness statement is quoted in the Respondents' chronology at JS5 page 4.
[15] Mr Smele's 4th witness statement at [39] to [40].

digger': her intention to pay the money to the two charities was not and is not challenged, and a proportion of her pledges have already been fulfilled. And even if the judge *had* found Ms Heard to be a 'gold-digger', he would not have been bound to find that her allegations of assault were a 'hoax'.[16]

29. As to the credibility of Ms Heard, this was not such a close run case in which, had this evidence been revealed at the trial, it would have had such an overwhelming impact on Ms Heard's credibility that *"no reasonable* [judge] *could have acted upon* [her] *evidence"* that the Appellant assaulted her, or that the *"additional evidence must have led a reasonable* [judge] *to a different conclusion from that actually arrived at",* that *"the character of* [Ms Heard] *was of peculiarly vital significance"* and/or that there is *"some feature of paramount importance outweighing the grave disadvantage of protracting the litigation"* (see paragraphs 11-16 above).

30. The Appellant's contention about credibility amounts to nothing first because it does not demonstrate Ms Heard to be a liar: her evidence in her statement was not that she had finished making all the payments, but that *"the entire amount of my divorce settlement was donated to charity",* and this is not false. A 'donation' is not the same as a 'payment', and the term encompasses money which has been pledged but not yet paid, as the charities in question accept: see Mr Smele's 4th witness statement at [42]-[48].

31. Moreover, even if the judge had concluded that Ms Heard "lied" about the donations, this would have been a lie about an extremely peripheral matter, and not about any pleaded incident. The judge explored a number of matters relating to Ms Heard's credibility in considerable detail, and, after a painstaking analysis of the evidence on each line of attack, rejected every one. It is simply inconceivable that a finding of dishonesty in relation to this one minor point would have influenced the judge in any significant way, let alone influenced him to such an extent that he would have inevitably reached a different conclusion on the 12 pleaded incidents of violence which he found had occurred.

[16] See further paragraph 578 of the Judgment.

32. In sharp contrast, and to take but one example, the Appellant admitted at the trial that he **<u>had not even read</u>** his own witness statement before signing it, and his admission for the first time under cross-examination that he had or may have head-butted Ms Heard during the incident on 15 December 2015, when his witness statement had denied doing so, was devastating (see Judgment at [431]). Amongst extensive other documentary evidence, there was an audio recording of a conversation in San Francisco in which the Appellant said to Ms Heard, *"I head-butted you in the fuckin' … forehead. That doesn't break a nose"* (at [429]) and the judge ultimately concluded at [455(iii)] that:

> Mr Depp assaulted Ms Heard. This included head-butting her, as he admitted in the course of his cross-examination, but in my view, it was not the accidental blow which he admitted. That was not what he said in the San Francisco recording and, although I recognise that I must be careful not to attribute too much weight to such out of court remarks, the deliberate nature of the head-butt fits with the other evidence of what took place that evening. I also agree with the Defendants that it is of some significance that Mr Depp did not say to David Heard that he had headbutted his daughter, but accidentally.

33. Set against context such as this, the Appellant's suggestion that if only Nicol J had known that Ms Heard had "lied" about her donations to charity, he would have been bound to disbelieve her evidence that the Appellant had assaulted her, and would have found for the Appellant at trial, is fanciful. Any "lie" about the donations would have needed to be set against the abundance of evidence, including documentary evidence and corroborative evidence from third parties including the Appellant himself, that the Appellant <u>had</u> assaulted Ms Heard. Unlike in ***Meek***, this was not a pure "he said/she said" case in which Ms Heard's evidence was "*virtually unsupported*". As the judge noted at [93], there were some 13 lever arch files of documents in the trial, and he was persuaded of Ms Heard's account not least because (at [577]):

> There is a multiplicity of emails, texts and messages and diary entries in the papers before me. I have quoted some. Some, but by no means all, are from Ms Heard. I recognise, of course, that previous statements by her are not independent evidence of the truth of the allegations, yet they are not, on the other hand, inadmissible or irrelevant for that reason. There are also as I have shown sometimes statements from third parties which do corroborate her.

Jennifer Howell

34. This evidence, too, is far from "fresh". Ms Rich says at [83] that *"we"* received Ms Howell's declaration *"at the end of the trial before Mr Justice Nicol, after the parties had closed their cases and the Respondents' closing speech had begun",* i.e. during the course of 27 July 2020. However the Appellant's US lawyer, Mr Waldman, had received Ms Howell's declaration the day before, on 26 July (Ms Rich's witness statement at [66]). Even at that stage, the Appellant could have sought to adduce Ms Howell's declaration as hearsay evidence, but elected not do so. No distinction can be made between the knowledge of the Appellant, Schillings, Mr Waldman, or any other of the Appellant's US lawyers for these purposes: ***Evans v Tiger Investments Ltd and Anor*** (above).

35. Ms Howell's witness statement is also of, at best, very limited evidential value. She was not present to witness any of the 14 pleaded incidents of violence. Her evidence consists merely of hearsay, including double hearsay. It is totally unrealistic to suggest it would have made any difference at all to the judge's conclusions.

Conclusion

36. Both the application for permission to adduce "fresh" evidence, and the application for permission to appeal, should be rejected. The appeal, whether with or without the "fresh" evidence, has no real prospect of success.

SASHA WASS QC

ADAM WOLANSKI QC

CLARA HAMER

24 February 2021