



Neutral Citation Number: [2021] EWCA Civ 423

Case No: A2/2020/2034

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

Nicol J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

and

LORD JUSTICE DINGEMANS

Between :

JOHN CHRISTOPHER DEPP II

Appellant

- and -

NEWS GROUP NEWSPAPERS LTD

DAN WOOTTON

Respondents

Andrew Caldecott QC, David Sherborne and Kate Wilson (instructed by Schillings International LLP) for the Appellant
Sasha Wass QC, Adam Wolanski QC and Clara Hamer (instructed by Simons Muirhead & Burton LLP) for the Respondents

Hearing date: 18th March 2021

Approved Judgment

Lord Justice Underhill (giving the judgment of the Court):

INTRODUCTION

1. On 2 November last year Nicol J handed down judgment dismissing a claim for libel brought by Johnny Depp, the actor, against News Group Newspapers Ltd and one of its journalists (“NGN”). The claim arose out of an article in *The Sun* which accused Mr Depp of being a wife-beater. NGN’s defence was that the allegation was true because Mr Depp had on numerous occasions physically assaulted his then wife, Amber Heard: fourteen separate incidents were pleaded, covering a three-year period between early 2013 and May 2016. The Judge found that Mr Depp assaulted Ms Heard on all but two of those occasions. Ms Heard was the principal witness for NGN, and the Judge largely accepted her evidence. There are before us an application for permission to appeal against that decision and an application for permission to rely in support of the appeal on evidence which was not before the Judge but which is said to cast serious doubt on Ms Heard’s credibility.
2. The hearing before Nicol J lasted for over three weeks. He heard evidence from Mr Depp and Ms Heard but also from a large number of other witnesses. Both parties also put in evidence a wealth of more or less contemporaneous material which was said to support the accounts of one or other of the protagonists. This included texts, e-mails, photographs and tapes of conversations between Mr Depp and Ms Heard.
3. Nicol J’s judgment, which includes a short confidential annex, runs to some 130 pages. For the purposes of these applications we need do no more than summarise its structure and its overall conclusions: it can of course be read in full (with the exception of the annex) on the BAILII website, the citation being [2020] EWHC 2911 (QB). After dealing with various introductory matters, at paras. 109-186 the Judge examines a number of points relied on by Mr Depp, apart from the fourteen incidents, as reflecting badly on Ms Heard’s credibility (“the credibility issues”). His conclusion was that none of them carried substantial weight. At paras. 191-205 he found that neither Mr Depp or Ms Heard had a record of violent behaviour. He then proceeded, from paras. 206-573, to consider in turn each of the incidents relied on by the defence. In relation to each he summarised the evidence in great detail and reached a conclusion as to whether he found that Mr Depp had indeed assaulted Ms Heard (otherwise than in self-defence): as we have said, he made such a finding in all but two of the cases. At paras. 574-583 he stepped back and considered the evidence as a whole: that exercise confirmed the conclusions that he had reached about the individual incidents.
4. Although in one sense the Judge’s conclusion involved him accepting that Ms Heard was a credible witness, it is important to appreciate that he did not proceed by making some overall assessment of her credibility which he then fed into his conclusions on the individual incidents; indeed, as noted above, he found that various submissions made on behalf of Mr Depp challenging her general credibility did not assist him. Rather, in relation to each of the fourteen incidents he relied essentially on the evidence relating specifically to that incident. In most of the cases he did not have to rely only on choosing between the competing testimony of the two protagonists, because there was contemporaneous evidence of the kind to which we have referred at para. 2; also, Mr Depp made various admissions which were relevant to the overall probabilities. By way of illustration:

- (1) Throughout the period in question Mr Depp, as he admitted, frequently took quantities of illegal drugs and drank excessively. The Judge found, with considerable support from the contemporaneous evidence, that when under the influence of drink and drugs he was liable to moods of extreme anger and jealousy and could behave highly destructively. (The Judge found that Mr Depp himself often referred to this aspect of his personality as “the monster” – see paras. 177-186 of the judgment.) A particularly dramatic example of his behaviour under the influence of drink and drugs is incident 8, covered at paras. 287-370. The contemporaneous evidence shows that in that case Mr Depp did extensive damage to a house which he had rented and wrote offensive graffiti about Ms Heard (shown in photographs), some in paint and some in his own blood. While it does not necessarily follow that angry and jealous behaviour of this kind would involve physical violence against Ms Heard, the Judge evidently regarded it as making her allegations more likely to be true.
 - (2) There are several instances of Mr Depp acknowledging in contemporaneous texts, either to Ms Heard or to third parties, that he had been out of control through drink and drugs and had behaved very badly. He does not explicitly admit acts of assault against Ms Heard, but again the Judge regarded the admissions as making it more plausible that he did in fact commit such acts (and also that he might not be able to remember what he had done). Examples are the texts to Ms Heard and to his friend Paul Bettany following incident 4 (see paras. 251 and 244). As regards that incident, there were also texts from a member of Mr Depp’s staff to Ms Heard referring to how badly Mr Depp had behaved, including that he had kicked her (see paras. 254-258).
 - (3) In relation to incident 12 there was photographic and medical evidence of injuries suffered by Ms Heard: see para. 455 (iv) and (ix)-(xi).
 - (4) Although generally in his evidence Mr Depp maintained his position that on none of the pleaded occasions had he assaulted Ms Heard, he did in cross-examination accept that in incident 12 he had head-butted her (see para. 455 (iii)), though he claimed that he had done so accidentally.
 - (5) In relation to several of the incidents Ms Heard wrote about them near-contemporaneously to her family or friends or in a diary.
5. We emphasise that we are in the foregoing paragraph seeking only to show how the Judge made use of extensive contemporaneous evidence and admissions. We are not attempting a comprehensive summary of the evidence.

THE APPLICATION FOR PERMISSION TO APPEAL

6. Under this heading we will consider the application for permission to appeal without reference to the further evidence, which we will address separately. Before we turn to the grounds of appeal, we should make two preliminary points, which are well-known to lawyers but which not all readers of this judgment might otherwise understand.
7. First, the losing party in a civil appeal is not entitled to appeal as of right. They can only do so if they can show either that the appeal would have a real prospect of success or that there is some other compelling reason for it to be heard.

8. Secondly, on an appeal the Court does not hear the evidence again. That means that in a case like the present, where the decision is based on the judge's findings about disputed questions of fact, it is not easy to overturn those findings on appeal. That is not only because the trial judge has had the advantage of seeing the witnesses giving their evidence. As Lewison LJ put it at para. 114 of his judgment in *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:

“Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. ... The reasons for this approach are many. They include

- (i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
- (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
- (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
- (iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
- (vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.”

9. The submissions made on behalf of Mr Depp acknowledge the difficulty which, for those reasons, he faces in challenging Nicol J's findings, but it is argued that there were fundamental flaws in his approach to the fact-finding exercise. Those flaws are expressed in a number of ways in the grounds of appeal (although there is a considerable degree of overlap). In the skeleton argument they are given the overall heading “lack of reasoned decision-making, failure to test evidence and failure to test the credibility of witnesses” and are developed in a number of individual complaints about particular aspects of the Judge's reasoning. Mr Andrew Caldecott QC, in his well-judged oral submissions on behalf of Mr Depp, focused on three of those complaints in particular as the best examples of what he said were the errors in the Judge's approach.
10. Mr Caldecott's first complaint concerned the treatment of what he said were clear admissions by Ms Heard, recorded in taped conversations, that she had more than once herself been the aggressor in incidents of physical violence between her and Mr Depp. He accepted that even if that were the case it would not necessarily mean that Mr Depp had not been the aggressor on other occasions. But he said that the admissions were

important because it was Ms Heard's evidence throughout that she never initiated any physical violence against Mr Depp (as opposed to responding to violence from him): if that was untrue it was bound to put in question the credibility of her evidence about what happened. He referred to two conversations in particular.

11. The first is a two-hour conversation between Mr Depp and Ms Heard which took place on 26 September 2015. Their relationship was by that stage in trouble, and by agreement they recorded some of their conversations to assist with therapy. The conversation was acrimonious, and it was referred to in the trial as "argument 2". In the course of the conversation Ms Heard appears clearly to acknowledge that she had started a physical fight the previous evening, when she says she gave Mr Depp a "proper slap" in the face. She also appears to accept that on one occasion she had thrown "pots and pans" and a vase at him, though not so obviously that she was the initial aggressor: Mr Caldecott said that this was a reference to incident 8, although we are not sure that that is clearly so. (The skeleton argument also relies on the fact that in argument 2 Ms Heard accuses Mr Depp of running away from fights; but, as Mr Caldecott accepted, it is clear that the parties used the term "fights" to refer to verbal rows and that Ms Heard's complaint was that Mr Depp tried to avoid conversations where she wanted to discuss their problems.)
12. The second conversation was covertly recorded by Ms Heard in San Francisco in July 2016, shortly after the end of the relationship. We do not have a full transcript, but the conversation was clearly emotional. Mr Depp refers in it to an incident when she "hay-makered" him, and she does not deny it. The incident which he was referring to was incident 13, which had occurred three months earlier. That incident, unlike the one on the night before argument 2, was one in which Ms Heard had alleged that Mr Depp assaulted her: the Judge accepted her account (see para. 476 of the judgment).
13. The admissions apparently made in these tapes were relied on in the closing submissions on behalf of Mr Depp at the trial as one of the general matters adversely affecting Ms Heard's credibility, and the Judge addressed the point at paras. 169-176 of his judgment. At paras. 174-175 he said:

"174. In her evidence, Ms Heard said that she did sometimes throw pots and pans at Mr Depp but only to try and escape him and as a means of self-defence. She also said at times in Argument 2 she was being sarcastic.

175. In my view no great weight is to be put on these alleged admissions by Ms Heard to aggressive violent behaviour. It is trite to say, but nonetheless true, that these conversations are quite different to evidence in court. A witness giving evidence in court does so under an oath or affirmation to tell the truth, the whole truth and nothing but the truth. Questioning can be controlled by the judge. Questions which are unclear can be re-phrased. If a question is not answered, it can be pressed (subject to the court's control) and if still unanswered may be the proper object of comment. None of those features applied to these conversations which, in any event, according to Ms Heard had a purpose or purposes different from simply conveying truthful information."

When he came to deal with incident 13 the Judge referred back in terms to these paragraphs: see para. 476 (v). If Ms Heard's apparent admission to throwing pots and pans and a vase does indeed relate to incident 8, the Judge does not expressly refer to it in that context; but he clearly had argument 2 in mind because he referred to it at para. 356, and it is clear that his observations in para. 175 would apply equally in the context of any admissions made in relation to that incident.

14. Mr Caldecott submitted that the reasoning in para. 175 showed a fundamentally flawed approach to fact-finding because it gave an unjustified special priority to the status of witness evidence. It is well-recognised in the case-law, and is in accordance with common sense, that it can be very difficult to choose between disputed versions of events given in court without the assistance of contemporary, or near-contemporary, documents (which would include tapes) showing what the witnesses in question said or did at the time. The tapes were, he said, valuable evidence of precisely that kind; yet the Judge was declining to attach weight to them simply because they did not constitute evidence given in court. He also said that the Judge's approach in this regard was inconsistent, because in many other instances he placed great weight on contemporaneous materials when making a finding against Mr Depp.
15. We do not believe that that is a correct understanding of what the Judge was saying in para. 175. He was plainly not advancing a general proposition that statements made in contemporaneous material should not be given any significant weight in assessing the truthfulness or reliability of the witness evidence simply because they do not themselves constitute evidence given in Court. Not only would that be contrary to established authority well-known to any judge but it is also contrary to his own practice elsewhere in the judgment, as we have noted at para. 4 above and as Mr Caldecott himself points out. In our view it is clear that the Judge was making a more specific point about the weight to be attached to these particular statements because of the particular circumstances in which they were made. What was relied on was admissions about past events (though in the case of argument 2 one was very recent). Argument 2 was a very long, unstructured and acrimonious conversation undertaken at least partly for therapeutic purposes. As the Judge points out, there is in that context no-one to intervene to clarify – for example – whether a remark is to be taken literally, as opposed to being made sarcastically, or whether a failure to respond to an accusation means that it is accepted, or to what incident a particular statement refers. That seems to me an entirely legitimate observation. The San Francisco conversation was not of the same character, but it was equally loose and emotional.
16. It does not follow that any admissions made in such a conversation should be ignored, but what to make of them in a particular case must be a matter for the trial judge, in accordance with his or her assessment of the witnesses and the totality of the evidence. We see no prospect that on appeal this Court would second-guess the Judge's conclusion that "no great weight" was to be attached to any admissions made, or arguably made, by Ms Heard in these two conversations. (We should mention for completeness that there was a third taped conversation referred to in the skeleton argument as containing a similar admission by Ms Heard that she had initiated a violent incident. It is very doubtful whether that is a fair reading of it, and Mr Caldecott did not refer to it in his oral submissions; but even if it does our conclusions above apply equally.)

17. We would add that, even if the Judge ought to have taken at face value Ms Heard's apparent admission that she had been the aggressor on the evening before argument 2 (contrary to her evidence that that had never been the case), we do not believe that that would have led him to take a different view of her evidence about the pleaded incidents of violence by Mr Depp. As we have said, his findings about those incidents were made on the basis of the evidence specifically relating to them, with special attention to the contemporaneous evidence. A judge will very often accept the substance of a witness's evidence without accepting every word of it. Nicol J was not uncritical about Ms Heard's evidence. For example, he found that she exaggerated as regards at least one aspect of incident 8, when she described herself as being "in a hostage situation" (see para. 370 (xxii)); and his findings about the details of some particular incidents do not seem always to correspond to her account of them. That approach is illustrated also by his treatment of evidence on which Mr Depp sought to rely about an incident which is said to have taken place in the Bahamas in December 2015 in which Ms Heard assaulted Mr Depp first, and without his responding in any way. The Judge excluded that evidence because it was unpleaded (see para. 458), but he said at para. 581 that it would not have affected his conclusions even if he had taken it into account. It is contended in the skeleton argument that that was unreasonable. We do not agree: it illustrates that the Judge recognised that the fact that Ms Heard might on occasion have assaulted Mr Depp did not preclude him from finding that he assaulted her on the numerous occasions relied on by the defence.
18. Mr Caldecott's second complaint refers to a finding which the Judge made in the confidential annex to his judgment about a particular assault by Mr Depp on Ms Heard in the course of incident 8. We will likewise deal with it in a confidential annex to this judgment. For the reasons that we give there, we do not believe that there was any arguable error in the Judge's approach.
19. Mr Caldecott's third complaint concerns incident 2, when Mr Depp is said to have assaulted Ms Heard after becoming angry at her for hanging in her home a painting by a former lover, Tasya van Ree. Ms Heard initially said that this occurred on 8 March 2013, and her sister, Whitney Henriquez, gave evidence supporting the same date. But she later said that the date must have been later in March: at one stage she said it was on the 21st but her eventual evidence was that it was the 22nd. She said that she had been confused because there had in fact been a number of assaults in March. There were associated discrepancies in her sister's evidence. In his closing submissions for Mr Depp at the trial his counsel, Mr David Sherborne, submitted a detailed schedule of the evolution of Ms Heard's and her sister's accounts and submitted that the only reasonable conclusion for the changes in them was that they were fabricated. He also, Mr Caldecott told us, made three particular points – (a) that although it was now being said that there had been a number of assaults in March only one was pleaded; (b) that only one assault in March had ever been put to Mr Depp in cross-examination, which was fundamentally unfair if it was now being said that there were more; and (c) that Ms Heard's new evidence of there having been a number of assaults undermined a crucial element in her original evidence, namely that the assault was particularly memorable "because it was unlike anything I had experienced with him until that point".
20. The Judge, having summarised the relevant evidence in painstaking detail, including the discrepancies, addressed Mr Sherborne's submissions at para. 225 (viii). He said:

“Mr Sherborne submitted that it was significant that Ms Heard had originally given a different date for Incident 2 and that she and her sister had been caught out in a lie which had led them to change their story and split Incident 2 into two separate incidents (three in the case of Ms Henriquez). He submitted that I should therefore conclude that there was no assault by Mr Depp on Ms Heard as she had alleged in Incident 2. Mr Sherborne in his closing submissions referred to other alterations in the details of this incident. I was not persuaded by this submission. I accept Ms Heard’s explanation for how she originally came to give the date of 8th March. Ms Heard said that Mr Depp inflicted a number of assaults on her in March 2013. Only one is pleaded, but I accept that is why in some respects Ms Heard’s account was confused. I accept Ms Henriquez’s explanation that she had merged the two different incidents regarding Ms van Ree’s paintings.”

21. Mr Caldecott submits that that paragraph fails adequately to address the points being made by Mr Sherborne. We do not accept that. The finding that the Judge made related to the pleaded assault, which was the one put to Mr Depp: he simply found it to have occurred on a different date. The fact that there were other assaults earlier in the month is not necessarily inconsistent with Ms Heard’s statement that the assault in question was unlike anything she had experienced before – that depends on how serious they were; but in any event errors of that kind are very common when even a truthful witness is recalling events which occurred some years previously, and it was not necessary for the Judge to say more than that she was confused.
22. Mr Caldecott submitted that the three complaints on which he focused all had a common element, namely that Ms Heard’s evidence had been accepted by the Judge “too glibly without proper forensic examination of the inherent probabilities and the contemporary documents”. For the reasons that we have given we do not believe that that is a fair criticism.
23. Those three complaints were only advanced as a selection of the examples given in the skeleton argument. We have read and considered all of those complaints, and in our view Mr Caldecott has indeed chosen the best examples for the case that he sought to advance. It would in those circumstances be disproportionate for us to go through the remainder: it is enough to say that they do not bear out the general criticisms made of the Judge’s approach. We should, however, briefly respond to the pleaded grounds.
24. Ground (1). This raises essentially the criticism made by Mr Caldecott which we have quoted at para. 22. We do not accept it. In relation to each incident the Judge sets out in scrupulous detail the evidence that supported the rival accounts. It was neither necessary nor possible that he perform a nice analysis of every disputed element in that evidence, but in relation to each incident it is always clear why he has reached the conclusion that he does.
25. Ground (2). It is said that the Judge did not make findings in relation to every detail of Ms Heard’s allegations as pleaded, and a schedule showing his supposed failings in this regard is attached to the skeleton argument. But that misunderstands the nature of his task. The issue that he had to determine in relation to each incident was whether Mr

Depp had (unlawfully) assaulted Ms Heard, which is what mattered for the purpose of substantiating the allegation that he was a wife-beater.

26. Ground (3). It is said that the Judge did not properly assess Ms Heard's credibility. To the extent that the complaint is that he did not start with an overall assessment of her credibility before considering the individual incidents, that is so but it is not a criticism: see para. 4 above. If the complaint is simply that he should have made a different assessment of the weight of this or that part of the evidence which was said to contradict her account, that is not a viable ground of appeal: see para. 8 above.
27. Ground (4). This is the same as Mr Caldecott's second complaint, which we have considered above.
28. Ground (5). This appears to raise essentially the same point as ground (3).
29. Ground (6). The complaint here is that although the Judge's rejection of the evidence of Mr Depp and many of the witnesses called by him meant that they must have been lying he does not say so in terms nor give reasons for his conclusion. As to that, there are many reasons other than deliberate dishonesty why a witness might have given evidence which the Judge was unable to accept, and it was not necessary for him to make specific findings in each case. What matters is that it is, as we have said, sufficiently clear in relation to each incident why the Judge reached the conclusion he did.
30. Ground (7). Unlike most of the other grounds, this relates to a single specific alleged error, relating to the Judge's rejection of the evidence of an LAPD officer who had attended the scene shortly after incident 14. A hearsay statement from him was put in under the Civil Evidence Act 1995 which contradicted the account of Ms Heard and another witness. At the request of the defence he was required to attend (by videolink) for cross-examination but in the end they chose not to cross-examine him. The Judge did not accept the officer's evidence. He gave his reasons in great detail at para. 573 (iv) of his judgment. He is said to have failed properly to apply section 4 (1) of the 1995 Act, which prescribes the approach to hearsay evidence. We can see no error. At the conclusion of para. 573 (iv) he expressly acknowledged that this was a case where the witness had been tendered for cross-examination, which is a relevant factor under section 4 (2) (a), but he said that that did not affect his foregoing reasoning, which had nothing to do with the hearsay character of the evidence but depended on what he regarded as substantive problems about it.
31. In conclusion, we do not believe that the grounds of appeal, as developed in the skeleton argument and in Mr Caldecott's oral submissions, show that the proposed appeal has any real prospect of success.
32. It is submitted in the grounds of appeal and skeleton argument, though the point was not developed by Mr Caldecott, that the facts that the trial was exceptionally high-profile, that the outcome was devastating for Mr Depp and that, it is said, the result has "wider repercussions" for alleged victims of domestic violence or those accused of it constitute a compelling reason for the appeal proceeding irrespective of the prospects of success. We are satisfied that those reasons cannot, whether separately or together, justify the exceptional course of allowing the appeal to proceed even if it has no real prospect of succeeding.

33. We would accordingly refuse permission to appeal, subject only to the application for permission to adduce further evidence.

THE FURTHER EVIDENCE APPLICATION

34. The background to the application for permission to adduce further evidence is the belief expressed by Mr Depp that Ms Heard had in the course of their marriage generated various pieces of evidence – texts, e-mails and photographs – showing him in a bad light so that she could deploy them in order to obtain a favourable financial settlement in the event of a divorce. In his witness statement and his oral evidence he referred to the evidence in question as a “hoax” and her motive as being to compile an “insurance dossier” (i.e. against the breakdown of the marriage): we will call that the “hoax/insurance thesis”. Underlying that thesis was a belief that Ms Heard had married him, as he put it in his witness statement of 12 December 2019, “with the agenda ... to progress her own career and/or to benefit financially” and “to take from me everything worth taking” – in short, that she was a gold-digger, which is how he described her to a friend in a contemporary text.
35. In her third witness statement, dated 26 February 2020, Ms Heard responded to the allegation in Mr Depp’s witness statement that she had married him for financial gain. One of the points that she made was that “the entire amount of my divorce settlement was donated to charity” (para. 4). Although those are the only details that she gives, it is accepted that the reference was to a sum of \$7m which was the cash element in the divorce settlement, payable in instalments between August 2016 and February 2018. Immediately following the settlement, Ms Heard had made a public announcement that “the amount received in the divorce ... is being donated” and that it would be divided equally between the Los Angeles Children’s Hospital (“the CHLA”) and the American Civil Liberties Union (“the ACLU”).
36. It is clear that Mr Depp believed from the moment that Ms Heard made her public announcement that she did not intend to give the \$7m to charity. In March 2019 he started defamation proceedings against her in the US, and in the course of those proceedings his US lawyers have made various attempts to obtain evidence about what payments she has in fact made: among other things, on 29 May 2020 they applied for subpoenas against the CHLA and the ACLU. It is clear also that he and his solicitors were interested in exploring the issue in these proceedings. An application by Ms Heard in the US for an extension of time for disclosure of documents relating to the donations was resisted by Mr Depp’s lawyers (albeit unsuccessfully) on the basis that the documents were needed for the purpose of the English proceedings; and his solicitors also required documents relating to Ms Heard’s claim to have donated the \$7m to be included in the trial bundle.
37. In the event, however, despite the scepticism of Mr Depp and his lawyers about whether the \$7m had been paid, Ms Heard’s evidence in her witness statement was not challenged in cross-examination. Further, Mr Sherborne told the Judge that it was not part of his case that she was a gold-digger. On day 6 of the trial there was a discussion about whether Mr Depp should give financial disclosure on the basis that it was relevant to the question whether the divorce settlement had been less than Ms Heard was entitled to: Ms Sasha Wass QC, who was NGN’s leading counsel (alongside Mr Adam Wolanski QC), said that that would “emasculate the claimant’s case for motive for the hoax and for the allegation that Ms Heard is a gold-digger”. Mr Sherborne in response

said that it was “not suggested by Mr Depp that that [i.e. “the insurance dossier”] was anything to do with being a gold digger”. A little later, he said:

“Your Lordship does not need to worry about this, because you only need to decide, did Mr Depp hit Ms Heard or not? How Mr Depp pieces that together after the event in his own mind is another matter.”

He went on to repeat that the issue of the “hoax” and of whether Ms Heard was a gold-digger were not connected.

38. At para. 577, after referring to the hoax/insurance thesis, the Judge said:

“[Ms Heard] was, according to this scenario, nothing more than a gold-digger. I have in the course of this judgment given reasons why I do not accept this characterisation of Ms Heard. Looking at the evidence as a whole, I come to the same conclusion. 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. I had evidence as to what Ms Heard had received as a result of the divorce settlement. ... The principal element of that settlement was payment to her by Mr Depp of US \$7 million. Ms Heard’s evidence that she had given that sum away to charity was not challenged on behalf of Mr Depp and the joint statement issued by Mr Depp and Ms Heard as part of the Deal Point Memorandum acknowledged that this was her intention ... I recognise that there were other elements to the divorce settlement as well, but her donation of the \$7 million to charity is hardly the act one would expect of a gold-digger.”

He continued, at para. 578:

“As Ms Wass said in her closing submissions, if Ms Heard had been constructing a hoax there are various measures which she might have taken, but which she did not ... I agree that those points add further force to the conclusion I would anyway have reached, which is to reject the ‘hoax’ or ‘insurance policy’ thesis.”

39. The further evidence which Mr Depp now wishes to adduce goes to the question of whether Ms Heard had indeed given the \$7m to charity. The evidence consists of a witness statement from his solicitor, Ms Rich, exhibiting various documents obtained in, or generated by, the US proceedings since the judgment in this case – principally documents received from the CHLA on 18 December 2020 in response to the subpoena served on it and documents received from Ms Heard by way of discovery on 4 January 2021. We need not give the details because there is no dispute as to their overall effect. They show that while Ms Heard has pledged \$3.5m to the ACLU, payable over ten years from 2016, and appears also (though this is not quite so clear) to have pledged the same amount to the CHLA, most of that money has not so far been paid. The only

amounts that the evidence which we have seen clearly shows that she has paid are \$100,000 to the CHLA and \$450,000 to the ACLU. The documents refer to some other substantial payments associated with her, though not clearly donated by her; but even if these are taken into account the total is under \$2m. The evidence also contains a transcript of a hearing in the US proceedings on 18 December 2020 in which her lawyers state that she has pledged the full amounts to the CHLA and the ACLU; that “a significant proportion” of those pledges have been fulfilled; and that there is a “multi-year process” through which she can pay the balance, which she “certainly intends to do” although it may take some time. The lawyers appear to suggest that the process of making payment in full has been delayed by the costs that she has had to incur in defending Mr Depp’s claim against her in the US, although Ms Rich observes that those proceedings were not commenced until at least a year after Ms Heard had received full payment of the divorce settlement.

40. If the statement in Ms Heard’s witness statement that the \$7m “was donated” to charity (paraphrased by the Judge as that she “had given that sum away”) is to be understood to mean literally that the full \$7m had already been paid, that is clearly contradicted by the further evidence, and her statement was accordingly misleading. We need not decide whether that is in fact a fair reading of what Ms Heard says.
41. There was no dispute before us that, in accordance with the well-established “*Ladd v Marshall* principles” (as glossed in *Terluk v Berezovsky* [2011] EWCA Civ 1534), further evidence should only be admitted for the purpose of an appeal (a) if it could not have been obtained with reasonable diligence for use at the trial; (b) if it would probably have had an important influence on the result of the case; and (c) if it is credible. We will take limb (b) first.
42. The starting-point must be that whether Ms Heard had given a misleading impression about her charitable donations was in itself nothing to do with the case which the Judge had to decide. It was only relevant to the extent that it shed light on the question whether Mr Depp had committed the alleged assaults. As to that, the question of the charitable donations had only come up, fairly peripherally, in the context of the hoax/insurance thesis. The Judge makes clear in the first half of the passage which we have quoted from para. 577 of his judgment that he rejected that thesis for the reasons which he had already given in the course of his detailed consideration of the individual incidents: that is, he was satisfied that the various pieces of contemporary evidence generated by Ms Heard and which supported her account were genuine. He also at para. 578 accepted Ms Wass’s further reason for rejecting the thesis. That being so, the question whether Ms Heard was in any sense a gold-digger was irrelevant, which is of course entirely in accordance with the stance adopted by Mr Sherborne. That point is reinforced by the fact that Ms Heard was not cross-examined about this part of her evidence.
43. Mr Caldecott made it clear, however, that he was not seeking to adduce the further evidence on the basis that it would have directly affected the Judge’s rejection of the hoax/insurance thesis. Rather, his submission was that the apparent fact that Ms Heard had donated the entirety of her divorce settlement to charity was bound, or was at least very likely, to have influenced the Judge’s assessment of her overall credibility. At the most general level it suggested that she was a good person and was therefore unlikely to have made up a false story about the alleged assaults. More specifically, Mr Caldecott pointed out that in her public announcement Ms Heard had said that the

payment to the ACLU was “with a particular focus to stop violence against women”, which was calculated to reinforce the impression that she was herself a victim of such violence; but he was constrained to accept that although the text of that announcement was in the trial bundle no reference had been made to it at trial, and it was impossible to know if the Judge had read it (the bundle amounted to thirteen lever-arch files). He also emphasised that the question was not simply whether the Judge had been influenced by the evidence of Ms Heard’s apparent philanthropy but also whether he would have been influenced by discovering that she had made what he said were misleading statements, both in her evidence and in her public statements, about how much had in fact been paid.

44. We do not accept that there is any ground for believing that the Judge may have been influenced by any such general perception as Mr Caldecott relies on. In the first place, he does not refer to her charitable donation at all in the context of his central findings: on the contrary, he only mentions it in a very particular context, as explained above, and after he had already reached his conclusions in relation to the fourteen incidents. We appreciate, however, that that by itself is not a complete answer to Mr Caldecott’s submission. The real answer is that it is clear from a reading of the judgment as a whole that the Judge based his conclusions on each of the incidents on his extremely detailed review of the evidence specific to each incident. As noted at para. 4 above, in the case of many of the incidents there were contemporaneous evidence and admissions beyond the say-so of the two protagonists, which cast a clear light on the probabilities. In an approach of that kind there was little need or room for the Judge to give weight to any general assessment of Ms Heard’s credibility, which is notoriously a more difficult and uncertain basis for deciding on disputed facts. It is pure speculation, and in our view very unlikely, that he gave any weight to general considerations about her character of the kind suggested by Mr Caldecott.
45. Nor, to address Mr Caldecott’s further point, do we believe that the Judge would have reached a different conclusion if it had been established before him that Ms Heard had given a misleading impression about how much of the \$7m which she said that she had donated to charity had in fact been paid. Again, that is essentially because, as we have said, his focus was squarely on the evidence relating to the alleged assaults themselves. But we would add that he was already aware that Ms Heard was capable of exaggeration: see para. 17 above. We also note that he had, in the “credibility issues” section of the judgment found that Ms Heard had been convicted of making a false statement to the Australian customs authorities but decided that that was of marginal relevance to the determination of the issues before him (see paras. 116-126).
46. That conclusion means that it is unnecessary to decide whether, as Mr Wolanski submitted, the effect of the decision of this Court in *Braddock v Tillotson’s Newspapers Ltd* [1950] 1 KB 47 is to establish as a matter of law that fresh evidence going only to credit should not be admitted unless it “must” have led to a different conclusion.
47. It follows that the application to admit the further evidence must be refused on the basis of limb (b) of *Ladd v Marshall*. Accordingly we need not decide whether Mr Depp can satisfy limb (a) – that is, show that the evidence could not with reasonable diligence have been obtained for use at the trial. But we have to say that we doubt whether he can. Since the point is not determinative we will take it shortly.

48. Ms Rich's evidence about what had been done to obtain evidence that Ms Heard had not paid the full \$7m focused on the steps taken in the US litigation. Mr Caldecott submitted that we should only be concerned with the period beginning with Ms Heard's witness statement of 26 February 2020, because until then her claim to have donated the proceeds of her divorce settlement to charity had not arisen in the English proceedings. We are inclined to think that that is right, though we need not express a concluded view. On that basis the issue of the subpoenas against the CHLA and the ACLU on 29 May 2020 was reasonably prompt, and Ms Rich gave evidence about the difficulties in obtaining early answers to them. (It is not clear, however, how soon documents relating to this issue were first requested from Ms Heard herself.)
49. However, to our minds the real difficulty for Mr Depp as regards limb (a) is that Ms Heard was not asked anything about her donation to charity in the course of cross-examination. Even in the absence of the documents now obtained, there would have been nothing improper in Ms Heard being asked whether the totality of the \$7m had in fact been paid (as opposed to simply pledged). If she had said that it had not, and had given such figures as she was able to, it could then have been put to her that her witness statement, and the public statements that she had made (which were in the trial bundle), gave a misleading impression. No doubt she would have disputed that, and it would have been for the Judge to make up his mind (if he thought it relevant). We accept that if she had lied and said that the full amount had been paid (though that would have been an enormous risk) it would not have been possible to take the matter further without the documents. But what matters for present purposes is that the question was never put to the test because she was never asked. The situation is not on all fours with any of the *Ladd v Marshall* cases to which we were referred. However, the underlying principles are based on fairness, and we should take some persuading that it was fair of Mr Depp to seek now to pursue the question of her having made misleading statements about her charity donations when a decision had been made not to ask her about it at trial.

CONCLUSION

50. We would accordingly dismiss both Mr Depp's application for permission to adduce further evidence and his application for permission to appeal. As we have said, it is not easy to persuade this Court to overturn the findings of a trial judge on purely factual questions. We do not believe that there is a real prospect of it being prepared to do so in this case. The hearing before Nicol J was full and fair, and he gave thorough reasons for his conclusions which have not been shown even arguably to be vitiated by any error of approach or mistake of law.