Case No: QB-2018-006323

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MEDIA AND COMMUNICATIONS LIST**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 29 June 2020

Page Count: 38
Word Count: 16019
Number of Folios: 223

**Before:**

**MR JUSTICE NICOL**
**(VIA VIDEO)**

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**Between:**

**JOHN CHRISTOPHER DEPP II** — **Claimant**

**-and-**

**(1) NEWS GROUP NEWSPAPERS LIMITED**
**(2) DAN WOOTTON** — **Defendants**

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**MR DAVID SHERBORNE counsel** and **MS KATE WILSON counsel** (instructed by **Schillings International LLP**) appeared for the **Claimant**
**MR ADAM WOLANSKI QC and MS DAMER** (instructed by **Simons Muirhead & Burton LLP**) for the **Defendants**
**MR DAVID PRICE QC** appeared for **Miss Amber Heard**

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# PART PROCEEDINGS

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MR JUSTICE NICOL: Are we ready to proceed?

MR SHERBORNE: My Lord, we are.

MR JUSTICE NICOL: Good. There is has been a lot of correspondence since I distributed my draft judgment, which I understand has now been handed down. Mr Sherborne and Mr Wolanski, help me on what you see as the sequence of matters that we need to deal with this morning.

MR SHERBORNE: Could I begin by formally saying that obviously I appear with Ms Wilson for the claimant Mr Depp and, as I understand it, Mr Wolanski and Ms Damer appear for the defendants. I think Mr Price appears for Miss Heard.

MR JUSTICE NICOL: Just pause for a moment because I did not acknowledge whether Mr Price was present. Can I find out if he is ----

MR PRICE: Present, my Lord.

MR JUSTICE NICOL: Good. Welcome, Mr Price, thank you for appearing.

MR WOLANSKI: And Ms Damer for the defendants.

MR SHERBORNE: My Lord, shall I just outline then what is on the agenda and what is no longer on the agenda, if I can put it that way?

MR JUSTICE NICOL: That would be helpful, yes.

MR SHERBORNE: The first item is the claimant's application for relief from sanctions, following your Lordship's finding in the handed-down judgment. The second is the defendants have raised an issue over the costs of the hearing on Friday, and they do ask your Lordship to determine that today. We say it should be reserved until after the trial. That is the second item. The third is the claimant's application for permission to rely on the responsive evidence from Mr Murphy, which you will recall was on the agenda at the last hearing last week on Thursday. As I understand it, that was opposed but now the opposition to it is limited to one point, which I can deal with if that is persisted in. The fourth item is the claimant's application for third party disclosure against Miss Heard, and that is opposed by Miss Heard. Since Thursday, there has been an application for permission to rely on the further witness statement from Miss Heard received over the weekend. The claimants do not oppose that.

MR JUSTICE NICOL: Yes, thank you.

MR SHERBORNE: There is also the defendant's application to rely on the witness statement of Ms Pennington, one of Miss Heard's friends and that is not opposed by the claimant.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: Finally, there is a matter raised, I think, in the defendants' skeleton and a witness statement last night from the defendants' solicitor about some to-ing and fro-ing between American lawyers for Mr Depp and Miss Heard over documents handed by Miss Heard to the defendants which were believed to be covered by protective order. I was hoping that had been resolved, but it may be that your Lordship needs to consider that if the defendants regard it as being outstanding.

MR JUSTICE NICOL: Right. Of those, it would seem that the logical place to start is your application for relief from sanctions.

MR SHERBORNE: My Lord, yes.

MR JUSTICE NICOL: Since if I was against you on that, all the other matters would fall away.

MR SHERBORNE: My Lord, yes, exactly.

MR JUSTICE NICOL: All right, then it seems sensible for you to start with that application.

MR SHERBORNE: Can I start then with the ambit of the application? Your Lordship has found, to summarise your handed-down judgment, that the Australian texts should have been disclosed under part 31.6 of the CPR. That is the only breach which your Lordship was asked to decide. Your Lordship did not find any other breach. The reason for that is that the defendants expressly withdrew their intention to rely on any other complaints that there had been a breach. I say other complaints because your Lordship may recall that at 4 o'clock in the afternoon before the hearing, on the Wednesday before the Thursday of last week, the defendants issued an application notice for a declaration and served at the same time a lengthy witness statement making a further allegation of breach against the claimant in relation to the declaration by Mr Murphy provided to Miss Heard in relation to the criminal charges against her in Australia, and also a suggestion that the claimant's solicitor had given incorrect information to the court about the provenance of two recordings disclosed back in February before the pre-trial review.

Given how late they were raised, I suspect the defendants expressly did not ask your Lordship to take them into account as breaches, and so your Lordship did not make any finding in relation to them. Unfortunately, once again, late afternoon yesterday, the

defendants served another witness statement, a 26-page statement, with a 250-page exhibit, in which they sought to raise further allegations of breach and a number of other points. We have had yet further material the defendants have provided today. They want you to look at two further witness statements that were previously provided in this litigation by the claimant's solicitor and a transcript. We say that it is more than unfortunate that these are the defendants' tactics. I do mean tactics. If I have to deal with it, then I will, my Lord. Ms Afia was forced to put in another short statement, albeit, as I say, very short, at speed last night, in case your Lordship was persuaded to deal with these points. In my submission, this is not very satisfactory at all, especially as the defendants could have made their application for a breach, or for breaches, based on all of these, but they chose not to do so. It is not just unsatisfactory. In my submission, it is wrong in principle to try to introduce a serious complaint through the back door in the hope that they can persuade your Lordship, or try to persuade your Lordship to strike out the whole claim, or refuse the relief from sanctions application, when your Lordship has just been considering the one breach they have established.

We say this is wrong in principle and unsatisfactory, and it creates a very real sense that this last minute attempt, once again as we had on Thursday, to shoe-horn further complaints into their application that the defendants are doing everything they can to avoid the trial.

If the defendants are going to say, and it does not appear that they do any more in their skeleton, but if it is going to be said that a fair trial cannot be had, that is a question that has to be decided on the underlying breach which your Lordship found, and not other complaints they may have about the disclosure exercise. We say that the defendants' approach is not only highly opportunistic but is quite wrong in principle to ask your Lordship to consider it as a matter of your discretion. That is the starting point. I say it is very important because it covers the ambit of the application.

MR JUSTICE NICOL: Yes?

MR SHERBORNE: The second point is the test that your Lordship must apply. Your Lordship is obviously very familiar with the well-established three-stage test in the *Denton* case, and that test was set out by the Court of Appeal. The first stage is obviously to identify

whether the breach is a serious or significant one. The second is to consider why the default took place. The third is to evaluate all the circumstances of the case.

MR JUSTICE NICOL: Yes?

MR SHERBORNE: And to pay regard, as your Lordship knows, to the question of resources and a proportionate use of proceedings, and also the need to observe and comply with the rules. Although each case is fact sensitive, we have, as your Lordship will have seen from our skeleton, referred to two particulars once. I am only going to take your Lordship to one of them. The first one, the *Kazakhstan* case, is really there to show your Lordship that just because a court may find that there has been a deliberate default, and here we say it was not a deliberate default, and we will come on to that, but even where the court has found a deliberate default and no good reason, as it did in *Kazakhstan*, that does not mean that relief from sanctions will not be granted. The court still has to perform the same exercise.

The second case which I ask your Lordship to look at is the *Fox v Wiggins* case. I do not know whether your Lordship had a chance to look at that.

MR JUSTICE NICOL: I am afraid I did not. There was quite a lot for me to do and I did not have a chance. Let me just make sure that I have got the bundle of authorities which have been provided with.

MR SHERBORNE: It is the claimant's authorities.

MR JUSTICE NICOL: Just a moment. (*Pause*) Judgment of Mr Justice Julian Knowles.

MR SHERBORNE: My Lord, yes, and just so your Lordship knows the facts of this case, you will see on page 2, in the introduction, the judge explains that there the claimant was suing the defendants for libel and harassment and the claimant obtained judgment in default. You will see what the defendant was seeking in paragraphs 2(b). In particular (b) was an order setting aside the default judgment and seeking relief from sanctions. Against that backdrop, if you just turn on -- you do not need to look at anything to do with capacity.

MR JUSTICE NICOL: Which paragraph are you asking me to look at?

MR SHERBORNE: If you start at paragraph 91 probably, just to set the scene.

MR JUSTICE NICOL: Hold on.

MR SHERBORNE: If your Lordship is at paragraph 91 ----

MR JUSTICE NICOL: I have not got quite there. Just a moment. Sorry. (*Pause*) Application to set aside judgment entered in a default.

MR SHERBORNE: There the judge is explaining that he is having to apply the same test, the three-stage test in *Denton*. I apologise that it took your Lordship a long time to get to 91. Can I take you then to 111, which is where he starts to explain his reasoning. There he says that this is a defamation and harassment claim and he cites, not for the first time in the judgment, and I will show it to you again later, the *Berezovsky* case, where Eady J held that in a defamation claim involving serious allegations, it was in the interests of both sides that a proposed plea of justification should be properly addressed. "That is because the primary object of most libel actions is to achieve vindication of reputation, and if a claimant obtained relief purely on judgment obtained in default, it would be easy for those ill-disposed towards him to undermine the effectiveness of that vindication."

There he is explaining how important, and in my submission this applies with even greater force to this case, it is in a libel claim that vindication should be obtained, not just by the claimant but also for the defendant.

If you look at paragraph 112, he says, "Although, for the reasons that I have given, I cannot find on the material before me that the Sixth Defendant has a realistic prospect of defending the claim, I can ascertain that her defence will include a plea of truth ... Eady J's principle is therefore engaged. I consider that allegations of such seriousness as are involved in this case cannot be allowed to go by default." Again, that could not apply with greater force than this case here.

"Although I cannot find the Sixth Defendant lacks capacity, at the relevant time she did not have legal representation and she does certainly suffer from a number of serious medical issues. Taken together, I am satisfied that the nature of the claim and the allegations involved, and the nature of the suggested defence, are such as to satisfy the test in CPR r 13.3(b)" Then he goes on to look at the three-stage test, if you see, at 115. Then you will see he just goes through the first stage and he deals with whether or not it was serious and significant. He talks about there were a number of breaches in that case, and obviously we are dealing here with one breach. That was a number of breaches you will see in 117. Then 118, "Stage 2 requires me to consider why the defaults occurred." Paragraph 120, "Stage 3 requires me to evaluate all the circumstances of the case, so as

to enable me to deal justly with the application. Thus far, as the Claimant submits, the factors weighing in the exercise of my discretion point away from my granting relief from sanctions. However, I come back to my determination on the issue under CPR r 13.3(b). I have carefully taken into all of the points made by the Claimant about the dilatory way in which the Sixth Defendant and her mother have conducted aspects of this litigation. However, in my judgment, this special factor requires me to grant relief from sanctions by way of setting aside the judgment in default that has been entered against the Sixth Defendant. It is very important in a case such as this, where the Claimant's case is that he has been the victim of a coordinated campaign or, put another way, a conspiracy, at the hands of the Defendants, that the claim be tried on the merits against all of the alleged co-conspirators, including the Sixth Defendant. It would be a recipe for injustice to deny her the chance to defend her case on the merits, whilst allowing that chance for her alleged co-conspirators. As I pointed out earlier, such a scenario invites the risk of inconsistent verdicts. I also [and this is the important part] place great weight on the features identified by Eady J in *Berezovsky* ... about the potential need for vindication for a claimant in libel proceedings by way of a judgment on the merits and all the more so where the allegations in question are as serious as they are in this case."

So it is that part, as I pointed out earlier, "such a scenario invites the risk of inconsistent verdicts. I also place great weight on the features identified by Eady J ... about the potential need for vindication for a claimant in libel proceedings by way of a judgment on the merits and all the more so where the allegations in question are as serious as they are in this case. As I have said, the Claimant stands accused of seriously assaulting the Sixth Defendant and killing their unborn child."

Your Lordship knows, as we will come back to, how serious the allegations are here. There are 14 different incidents of alleged physical unprovoked violence against Miss Heard where she says she was in fear of her life. That is an important point, as I say, and as your Lordship will appreciate. That is really all because a lot of these cases are obviously fact sensitive.

MR JUSTICE NICOL: Indeed.

MR SHERBORNE: But the principle of the importance of vindication not just to the party who is said to be in default but to both parties is one which we say applies in this case as well and that is a matter of principle, and not fact sensitive.

With that in mind, can I turn to the three stages? Stage 1 -- it is really a question for your Lordship to decide if the regard the breach as serious and significant. Your Lordship is now ----

MR JUSTICE NICOL: Mr Sherborne, I made an unless order.

MR SHERBORNE: Yes.

MR JUSTICE NICOL: Are you really arguing that this was not a serious or significant breach?

MR SHERBORNE: My Lord, no, you will see that is why in our skeleton we say your Lordship is likely to find it is. That is what I was going on to say that you were well rehearsed.

MR JUSTICE NICOL: Stage 1 is agreed.

MR SHERBORNE: We understand your Lordship is likely to find that and that is why we have accepted that in our skeleton, and Ms Afia apologises to the court for it. Your Lordship will hopefully have had a proper chance to read Ms Afia's witness statement. I am not going to rehearse what she says there unless you wish me to do so, because there is a lot that we have to get through today, but what is clear in my submission is she gives an extensive, detailed and balanced explanation not just of the circumstances in which the order was made, and the nature of the disclosure exercise but also the approach which was taken by the claimant's solicitors in terms of reviewing the documents which gave rise to the breach. The fact that the claimant's solicitors took what your Lordship has found was an incorrect view of whether those texts fell to be disclosed would constitute in my submission a good reason to explain the default. This was not a deliberate failure to comply with a deadline. It was not the claimant deliberately withholding a document. The defendants had these documents because the claimant disclose them, as your Lordship knows, in the American proceedings, so there is no prejudice to them in the real sense, although it is accepted now they should have been disclosed in UK proceedings as well.

We say that in light of what Ms Afia says, and her explanation, your Lordship should accept it as a good explanation, and that would then bring the consideration under the Denton three-stage test to an end, effectively, because if your Lordship accepts there is a

good explanation then you do not need to get to the third stage. That, as your Lordship will have seen, was referred to in the *Fox v Wiggins* case and it is notes of the White Book. Even if your Lordship does not accept that as a good explanation or reason to explain the default, then it does place the default in context.

I say that because when your Lordship steps back and looks at the disclosure, despite all the dust that the defendants are seeking to throw up in these last-minute points in Mr Smele's witness statement the afternoon before the hearing, or Mr Charalambous' voluminous statement and exhibits late yesterday, when you step back your Lordship will see in my submission that the default of failing to provide a series of text exchanges between Mr Depp and Mr Holmes should be set against the claimant producing vast amounts of documents in terms of disclosure. In the trial bundle alone, of the nine files there are seven files-worth of documents. That is thousands of pages of disclosure, largely from the American proceedings, in circumstances where the defendants have produced only those documents handed to them by Miss Heard which she has decided help her. I will come back to that, but the claimant, and his solicitors in particular, have had to review thousands upon thousands of documents at great speed in circumstances where the defendant can and has gone through Miss Heard cross-checking everything. Can I put it this way, when your Lordship set an unless order in the circumstances your Lordship did, as you will recall, it was not intended to set a trap for the claimant, whereby if the defendant could find a text exchange or a document from this rather unique cross-checking exercise where the claimant has disclosed many, many thousands of documents in the American proceedings, and that the defendant through this cross-checking exercise finds, as I say, a text exchange or a document and produces it without any reciprocal obligation on the defendants, we say, that is not what your Lordship had in mind when you made the unless order that the claimant's claim should be struck out. We say that is the background to the third statement and it is very important background, too, when one considers that on the other side of the scale is the extremely draconian step of striking out the entire claim. Moving on to stage 3.

MR JUSTICE NICOL: I thought you were on stage 3.

MR SHERBORNE: What I was saying to your Lordship was effectively that is the backdrop to stage 3 because of the explanation that is given in detail by Ms Afia in her witness

statement. As I say, if your Lordship does not regard it as a good explanation on stage 2, it forms very much the backdrop on stage 3, and the context in which your Lordship needs to consider whether it is proportionate to the breach that has been established in all the circumstances of the case to strike out the whole claim. All of the circumstances include, as I say, the explanation that is given at stage 2, and the backdrop of the nature of the way in which disclosure has been provided in this case, in particular, how many documents the claimant has already disclosed and the fact that he has not withheld ----

MR JUSTICE NICOL: Mr Sherborne, I am sorry to interrupt you, but you have made the point already about Ms Afia's explanation. You have made the point about the volume of material that the claimant's solicitors had to consider. Let's move on to your next point.

MR SHERBORNE: Your Lordship asked me whether I was in stage 3 or not and I was trying to explain the overlap, if I can put it that way.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: As I say, your Lordship, has to consider whether the ultimate draconian step is required, and I have a number of points to make about that. Our case is, as we have said, that we accept that compliance with the rules is important. Ms Afia has apologised to the court for the default in no uncertain terms. Here we say that the court has to consider various factors when deciding whether or not the ultimate step would be a proportionate response. Those factors are as follows. Firstly, as I said, the vast number of documents already disclosed and the fact that the text exchange, which fell to be disclosed but which was not, was a very small fraction. It is very important in this context that your Lordship also notes that the defendants seem to no longer be saying in their skeleton there cannot be a fair trial as a result of the disclosure not having been provided, nor could they sensibly say so.

The next point is that although your Lordship found that the text exchange should have been disclosed, the texts are not documents which go to the heart of the allegations which the court has to decide, namely whether Mr Depp carried out this series of serious unprovoked physical assaults on Miss Heard, as I said 14 different ones, or whether, as he says, she was the one who assaulted him. The defendants cannot say that because my instructing solicitor took a certain view of the relevance of an exchange of texts about drug taking or obtaining drugs that this means there is any likelihood of documents going

to the heart of the case being disclosed. Prior to the draft judgment being circulated, your Lordship will remember our position, which is that not all texts about the use of drugs, or alcohol for that matter, could possibly be said to be relevant, not least because of admissions that I took your Lordship to on Thursday on both sides; the evidence of both Mr Depp and Miss Heard that they took drugs and consumed alcohol during their relationship. Prior to the draft judgment of your Lordship being circulated, the defendants' position was that if the action continued despite their application, they intended to apply for a specific disclosure of all documents referring to the claimant's use of narcotics between 2012 and 2016, an exercise which could never have been justified. Presumably, in the light of your Lordship's judgment, the defendants have now radically shifted their position. In their letter of 25 June, they have said that they would now apply for specific disclosure of documents referencing drugs in the period one week before just four of the 14 incidents. They have gone from a position where originally they were saying -- and this was to persuade your Lordship that, effectively, there could be no fair trial because even if you were going to grant relief, they would be seeking all the documents referring to narcotics for the entire period and that therefore that means that they could not have a fair trial unless that disclosure was given. They have now radically cut that down to just one week before four of the 14 incidents and the claimant has agreed to perform those searches. There is nothing for your Lordship.

What it does and the reason why I take your Lordship through that is that it illustrates that, in reality, the impact on these proceedings of the documents is very limited indeed. It cannot be said that somehow there can be no fair trial of the proceedings. That is very important because once one removes any real risk on the defendants' case that there can be no fair trial, then really it becomes in my submission whether the claimant should be punished, the defendants argue, to such an extent for this default, and I do stress this default, that his whole claim should be struck out. It is no good, and I will come back to it, asking your Lordship just because there are complaints made in witness statements by Mr Charalambous yesterday afternoon, that is not the same as your Lordship making a finding that those are breaches. If the defendant had wanted to rely on them, they should have sought to rely on them at the hearing last week, and they chose not to do so. If the problem was that the defendants chose not to serve their application until 4 o'clock on

the afternoon before your Lordship was due to hear it, and to serve a witness statement in support at the same time, then that is a fault that lies upon the defendants and they must bear the consequences of it. What it would not be right to do, in my submission, is to somehow introduce other complaints to try to persuade your Lordship that therefore there is an ongoing risk in relation to these proceedings. That is the backdrop.

We say that against that backdrop to punish the claimant by taking the draconian step of refusing relief from sanctions, thereby striking it out would be utterly disproportionate to what your Lordship has held. It is important then that I make a number of points in that context. Firstly, this was not a deliberate breach.

MR JUSTICE NICOL: You have said that already, Mr Sherborne, and I have understood that point.

MR SHERBORNE: Then I am grateful. What I have not covered and I need to cover is that the defendants, you will have seen, say, "Ah well, under the CPR, any default by a party's legal representatives should be attributed to the party himself or herself. That may or may not be right, but that is very different to the exercise your Lordship is performing in my submission, which is to decide whether in all the circumstances the claimant should be punished in terms of having his claim removed as a result, especially if it is going to be said as a result by the defendants that he is left with an action against his solicitors. An action for breach of contract or some other money claim might give the claimant a claim for a loss of opportunity against his solicitors, but this is no such claim. This is an entirely different type of claim and, in my submission, it would be woefully inadequate for the court to conclude, even if it took the view that it was the fault of the claimant's solicitors, in these circumstances, where one is considering all the circumstances of the case and what would be an appropriate sanction, that it should be attributed to Mr Depp, even though it is clear from Ms Afia's witness statement, and whatever points made by Mr Charalambous, which we say are utterly unrealistic and nit-picking, in circumstances where it is clear that the fault lay with the claimant's solicitors, we say it would be quite inadequate for your Lordship to conclude that somehow an action against them would provide an alternative. We say that is another point militating against imposing the ultimate sanction on the claimant, as your Lordship is being asked to do.

Another factor, and it is one your Lordship knows and I will not say much more about it, is the unfair position where disclosure is really only being given by one party. That is, as you know, something that the claimant feels very strongly about; that while he has already provided an enormous number of documents, part of which the defendants will say are helpful to them, there is no reciprocal obligation. That is important, I say, where a text exchange has not been disclosed because it was reviewed by the solicitors and not deemed to fall within 3.6. On the other hand, Miss Heard can provide a number of documents she thinks properly go to the heart of the case, as opposed to them being at best peripheral documents, and there are no sanctions on the defendants. In circumstances where your Lordship does have to consider fairness, we say that is a very material consideration indeed.

We say a further very compelling factor which weighs very heavily against strike out, and perhaps the most important factor, is how important it is to have a clear and reasoned judgment in this case. That is the only way, in my submission, vindication will be given, not just for the claimant but for the defendants as well. Your Lordship knows that it is important that vindication in libel claims is swift. Justice delayed is justice denied. Your Lordship knows that very well. It is always said to be essential in libel claims. That is why, as your lordship knows the limitation period was reduced to one year a number of years ago. An action for libel is quintessentially about vindication. The trial in this case is the determination of the most serious allegations of appalling types of violence. Your Lordship knows that.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: I apologise for repeating it, but that really is at the heart of this. It is not just physical violence, as your Lordship knows.

MR JUSTICE NICOL: Mr Sherborne, you have made the point about vindication and the importance of that to both parties, and I have understood this point. Could I ask you to move on to your next point?

MR SHERBORNE: My Lord, that is really the most important point but ----

MR JUSTICE NICOL: I understand its importance and I understand what you have said about Eady J and the *Berezovsky* case, which has made exactly that point. I have understood that point and I am inviting you now to move on to your next point.

MR SHERBORNE: That is, in effect, the last point. I need to expand on it to this extent. I understand your Lordship knows the allegations are very serious, but there are a number of points made by the defendants in response that I do really need to deal with.

MR JUSTICE NICOL: By all means deal with those points, yes.

MR SHERBORNE: I am grateful. The defendants' position, effectively, is that this is a dispute between Mr Depp and Miss Heard, but your Lordship is well aware that the defendants published these allegations to millions of readers of the *Sun*, both online and in hard copy form, and that, as a result, they reached an extremely wide audience within this jurisdiction. Not only that, the defendants persisted in these allegations through their defence under section 2 of the Defamation Act, and very publicly so, which has made these allegations even more widely reported in this country, both in the media and online. It is not right to say that they are somehow mere passive observers. Indeed, they prayed in aid on a number of occasions the fact that Miss Heard is just a witness. Not only that, they, as your Lordship will have seen, although they started with only defending two allegations they have now expanded those to justify 14 allegations.

They have deliberately conducted these proceedings -- and this is an important point your Lordship should bear in mind -- by airing the allegations in open court at interim hearings, in a way which we have said is gratuitous and deliberately intended to inflame the publicity surrounding them, to damage the claimant and to put him in the worst possible light. Whether that was by way of reading out texts, for example, at the pre-trial review or, more importantly, as your Lordship will recall, at the hearing on 20 March when the claimant, who realistically recognised the dangers posed by the Covid-19 pandemic and the risks that this would cause to the court staff and parties and therefore said the trial could not go ahead, you will recall that defendants' counsel, despite what was being said across the country about the need for lockdown, accused the claimant of being a coward very publicly. It was reported, as the defendants knew it would be, throughout all the papers and the media in this country. They called him a coward and said he wanted an adjournment because he knew he was going to lose. This very public and deliberate taunting to the effect the allegations are true, in my submission, is another factor why your Lordship needs to consider vindication as the paramount factor, and the defendants have made it so by the way in which they have deliberately conducted this. In

my submission, it is simply wrong for the defendants on the one hand to do that and now to try everything they can to avoid the trial taking place.

In my submission, therefore, vindication is of exceptional importance, but it is not just vindication per se because, and this is the other point the defendants make, they say, "Oh well, there is ample opportunity for vindication to happen in the US proceedings." In my submission, that does not provide proper vindication at all. Firstly, there is no guarantee that those proceedings will take place. For example, Miss Heard has applied at least once to strike out that claim on various grounds. Remember that her case there is she says that her opinion piece in the *Washington Post* did not name Mr Depp, so she has another substantive defence and she may well apply on other grounds. Secondly, that trial has, in any event, been adjourned to next year at some point, and there is nothing to say it will not be delayed again. Thirdly, the American proceedings have nothing do with the publication to millions of people in this country in the *Sun*. The defendants have endorsed allegations and they have chosen to repeat them time and time again in open court and persisted in them in the most public way possible.

Finally, the US proceedings will not produce a clear and reasoned judgment, which is exactly what Eady J said is so important. Trial in the proceedings in Virginia will be a jury trial with just a verdict. Here, your Lordship will deliver a clear and reasoned judgment taking into account a mass of evidence, hearing from the parties and giving your judgment in relation to 14 different incidents. As I say, Eady J made clear that it is a reasoned judgment that provides the vindication, not just for the claimant but also for the defendant.

There is also, in my submission, an important public interest given what has been said in open court by the defendants that a well-reasoned judgment is handed down. A jury in a court in Virginia maybe a year from now or more, if there is one, saying they simply find for Mr Depp or Miss Heard is nowhere near the same thing as your Lordship's reasoned judgment ,and we say it does not provide vindication at all.

For all those reasons where this is not a case where the claimant deliberately withheld documents, where the documents do not go to the heart of the allegation, where it cannot be said on the breach that there can be no fair trial, where the trial date is not imperilled and vindication in the form of a clear reasoned judgment is critical, we say it would be

wholly disproportionate in all those circumstances for your Lordship to strike out the claim for the default.

My Lord, those are my submissions based on that breach. What I have not addressed yet unless your Lordship wishes me it do so, are the different matters which the defendant has sought to introduce, we say, by the back door, as being breaches by the claimant, and we say it is quite wrong in principle to do. If your Lordship is going to consider them, then I will obviously need to deal with them.

MR JUSTICE NICOL: As I say, Mr Sherborne, the defendants have relied on certain other matters, and I will hear Mr Wolanski as to why they should be able to do so. However, it is convenient if you can give your response to those, on the assumption, which may right or may be wrong, that I do think they should be taken into account. It is convenient to have one party's submissions made comprehensively and then to hear the other party in reply.

MR SHERBORNE: My Lord, then I will do so. But can I say simply this: I will deal with the ones that I am aware have been made.

MR JUSTICE NICOL: That is all you can do.

MR SHERBORNE: With one reservation, your Lordship is right, but this is a rather unique case where all sorts of complaints have been made at the last minute. It may well be that I have not covered them all, and, if I have not done so, I am sure your Lordship will not hold them against me, because it is extremely unusual, to say the least, putting it at its lowest, and your Lordship knows how I would put it, that these are being introduced at such a late stage in a manner where, as I say, we have had little opportunity to actually deal with them, let alone for me to say what I need to say about them. I will hear what Mr Wolanski says. The first one said to be a breach relates to Mr Murphy. Just so your Lordship understands that, what is said, in effect, is that Mr Murphy gave a declaration to Miss Heard's lawyers for the purposes of her use in the criminal proceedings against her (just her) in Australia in relation to the illegal importation of dogs. That was in 2015.

MR JUSTICE NICOL: 2015 or 2016?

MR SHERBORNE: I thought it was 2015, but your Lordship may be right. If you just give me one moment, I will tell you.

MR JUSTICE NICOL: There may be a difference in our recollection about when the proceedings took place and when the alleged importation took place. Anyway, it does not matter whether it is 2015 or 2016.

MR SHERBORNE: My Lord, yes.

MR JUSTICE NICOL: So that is the context of the alleged breach regarding Mr Murphy's declaration?

MR SHERBORNE: My Lord, yes. It is on the back of the defendants being provided by Miss Heard -- although they do not disclose it to us even though we asked, this document must have come from Miss Heard, and it is on the back of that that the defendants have repeated their refrain that Mr Depp is in breach of his disclosure obligations. Can I take your Lordship to Mr Murphy's witness statement?

MR JUSTICE NICOL: Just a minute. This is in the bundle for the today's hearing, is it?

MR SHERBORNE: Yes.

MR JUSTICE NICOL: What tab?

MR SHERBORNE: If your Lordship gives me a moment, I have had to re-organise my bundle because it is obviously much bigger now than it was. It is tab 31.

MR JUSTICE NICOL: Just a moment, let me find that. Second witness statement of Kevin Murphy?

MR SHERBORNE: My Lord, yes.

MR JUSTICE NICOL: And which particular paragraph?

MR SHERBORNE: Start at paragraph 3, my Lord, on the first page.

MR JUSTICE NICOL: "I make this statement in support of the claimant's claim in these proceedings". That is the beginning of the first paragraph, paragraph 3.

MR SHERBORNE: My Lord, yes. It says, "I make this statement ... This is my second witness statement in this claim. I make it in response to the disclosure of the document by the defendants on 14 June referred to below." This is in response to the provision of that declaration I referred to. Then paragraph 4, "Paragraphs 7 to 9 of my first witness statement dated 12 December addressed Miss Heard's request to me to obtain false evidence for proceedings in Australia. I stand by that evidence and make this further statement to expand." Here Mr Murphy explains in detail over a number of paragraphs how he was involved in a process to ready the dogs for travel to Australia in April 2015.

As he says in paragraph 6, "I began to have concerns in March 2015 that timing constraints were not going to allow the dogs to be vaccinated," and he expressed those concerns to Miss Heard. He says he had investigated different options but they all involved allowing the dogs to fly in cargo and Miss Heard said she would not allow that. Then in paragraph 7, "I explained to Miss Heard on several occasions that bringing animals into Australia was like no other country. It was mandatory quarantining ..." And then paragraph 8, "Prior to Miss Heard and Mr Depp leaving for Australia, I notified a number of people that the dogs were not allowed to be taken to Australia. I further explained that the dogs should not be taken because it would be illegal and there could be severe penalties." Then this, "I made a point of discussing this matter because Miss Heard had brought the dogs into the Bahamas without paperwork and vaccinations in another incident in July 2014 and in knowledge of the risks of doing so." Then you will see because of that there was heightened awareness between the staff and Miss Heard about the need for proper paperwork. At 9, "At no time did I discuss the matter with Mr Depp because he never wanted the dogs to travel on any occasion because he felt they had better care in Los Angeles with staff". Here what he is plainly saying is it was nothing to do with Mr Depp, it was all to do with Miss Heard. Paragraph 10, this is Mr Murphy explaining that on getting to work following the departure, he learned that Miss Heard had "taken the dogs despite our discussions and my warnings of severe legal ramifications. I spoke with Mr Judge(?) shortly afterwards who explained that Miss Heard had insisted on bringing them to Australia." Despite knowing she was committing a criminal offence, she insisted on bringing them to Australia. "At exhibit KM/2 are the messages exchanged between me and Mr Brasner(?) and Mr Deuters(?) when they learned that Miss Heard had gone to Australia with the dogs."

Then in paragraph 11 he deals with the document that was provided by the defendants to Schillings on 14 June. It is important to bear that in mind because this document was provided on 14 June, which is said to be a breach by Mr Depp, but you will recall that it was relied on by the defendants not in their origin letter, but when the witness statement arrived on the afternoon before the actual hearing in the application notice, so they had plenty of time to consider whether they should apply for it to be a breach. They obviously chose not to and yet they still ask your Lordship to bear it in mind. I will show you why

it could not possibly be a breach as we go through this. What they are depriving the claimant of is proving that this is no breach at all, but asking your Lordship at the same time to consider that somehow he should be penalised in this context because of his previous conduct. We say this is a classic example of the defendant seeking to have its cake and eat it by not allowing the claimant to disprove this, but by trying to get your Lordship to rely on it. That is why I have to take this, unfortunately, in some detail, to demonstrate it. I am not going to take every point in this detail but show your Lordship the nature of the exercise the defendants are asking you do so.

If you look at paragraph 11, it states, "As stated in paragraph 9 of my first witness statement, Miss Heard requested I make a false statement regarding the dogs' illegal entrance into Australia. When I expressed I was extremely uncomfortable with this, Miss Heard said to me, 'well, I want your help on this. I wouldn't want you to have a problem with your job.' It became very apparent to me that Miss Heard was threatening my job stability unless I co-operated with providing a declaration that supported her false account for the Australian proceedings." It was this witness statement which obviously she used to avoid the charges that would have involved imprisonment in Australia. "Because of her statements I felt extreme ..."

MR JUSTICE NICOL: Sorry, where is that?

MR SHERBORNE: That is not the witness statement. That is what the effect of the declaration was because there are different charges. "Because of her statements I felt extreme pressure to co-operate despite knowing this would involve being untruthful." Then he explains the declaration which is the document that the defendants disclosed on 14 June. "On 13 October I signed the declaration for the Australian proceedings that discussed the circumstances in which Miss Heard brought her and Mr Depp's dogs into Australia." If you want to see the document, it is the exhibit at page 574 in my hard copy bundle. I appreciate that is not the same for your Lordship.

MR JUSTICE NICOL: Can you look on your electronic copy and tell me what the pdf page number is, please?

MR SHERBORNE: I will have to wait for somebody else to do that, I am sorry.

MR JUSTICE NICOL: Let's not be distracted by that. Let's move on to the point that you want to make.

MR SHERBORNE: If your Lordship goes back to paragraph 12, this declaration was prepared, as he says, by Miss Heard's US lawyer in this matter. You have seen reference in Mr Murphy and Ms Kate James's witness statement in relation to the Australian proceedings how pressure was put on Ms James by Miss Heard. Miss Heard asked her US lawyer whether it was appropriate to do so, and you will see he said just be careful. No, I will not paraphrase it, I will take you to because he quite clearly does not advise her to lie, which we will come back to. "That declaration contains statements that were not entirely truthful. It was not true that Ms Kate James, Miss Heard's assistant, was responsible for the paperwork and had not completed it and that this was the reason Miss Heard travelled with the dogs to Australia without the necessary paperwork. The true position is that I was responsible for the paperwork which I could not obtain in time. Miss Heard was fully aware of this in advance of travelling to Australia with the dogs." Before I move on, I have got the page, it is page 600.

MR JUSTICE NICOL: Just a minute. (*Pause*)

MR SHERBORNE: Does your Lordship have it?

MR JUSTICE NICOL: I am still trying to get to page 600.

MR SHERBORNE: I am sorry.

MR JUSTICE NICOL: Electronic bundles are extremely convenient, but they are not easy to navigate.

MR SHERBORNE: My Lord, I can understand.

MR JUSTICE NICOL: Just give a moment and I will get to page 600. It is headed "Privileged and confidential - Statement of Kevin Murphy"?

MR SHERBORNE: My Lord, yes. I am not going to take you through it, but this is a document that you can see explains the circumstances in which this was provided. I just want to show your Lordship the document so you can see what he was referring to. You will see he signs it on the second page. No point is really taken on the content of it other than to say it contradicts what he says. The important point for your Lordship now is that the defendants have said that this is a document Mr Depp must have and therefore by not disclosing it, he is in breach. If we go back to Mr Murphy's witness statement ----

MR JUSTICE NICOL: Which paragraph?

MR SHERBORNE: Paragraph 13, he says in categorical terms that the lawyers with the conduct of the matter were "Miss Heard's lawyer in the US with whom I dealt primarily. Miss Heard also had an Australian counsel at Ashurst's. I was told by both [and this is paragraph 14] US and Australian counsel that my statement in the terms that they had drafted on Miss Heard's behalf [so they drafted it for him] would be integral to the outcome of the proceedings. I was told that I was going to have to travel to Australia to testify in person on Miss Heard's behalf. Miss Heard knew that she was asking me to lie under duress and from what she said to me it was clear to me that I was essentially being told by her that my job would be at risk if I did not agree to her demands." That goes back to the conversation at paragraph 11. "I was relieved", he says in 15 "that the matter then settled and I was not going to be asked to lie in person in Australia." He did not have to travel out to give evidence on her behalf.

Then you can see how he explains in paragraph 16 and following how he was never comfortable with the fact he had given a statement that was not entirely truthful "but as long as Miss Heard was Mr Depp I did not feel able to take steps to remedy this without there being a risk to my job."

At paragraph 17, after Miss Heard files for divorce, he retained the services of an Australian law firm to seek advice on retracting his declaration in Australia. He says that once Miss Heard was no longer having control or influence over his job he felt he could take this step to attempt to right the wrong. "This effort was completely independent," he says, of Mr Depp, "and I personally incurred all the legal costs". He exhibits a letter from the Australian lawyers confirming his instructions of that firm. Then at 19 he explained through them he retained an Australian barrister for specialist advice because he was obviously worried about potential criminal liability. This is Mr Murphy taking it very seriously indeed that he was asked to and, in the end, agreed to lie on her behalf. "I sought advice in Australia arising from the false statement provided by me in a statutory declaration tendered in criminal proceedings in Queensland the prospect of avoiding prosecution by making a voluntary disclosure as to the falsity of such statement and the steps I would need to take. I very much wanted to understand the process and to explain the pressure I had been under to sign the statement." He is taking, as I say, very serious steps to deal with the situation. Then in August 2016 he resigned from his position with

Mr Depp. That was seven years ago. "Because I was no longer working and my legal bills were costly, it was no longer financially feasible for me to continue pursuing this matter. Following the proceedings, Miss Heard continued to travel with her dog and even made a joke of the Australians to do with her cat on social media." Then he goes on to talk about the lie which Miss Heard told, which you will remember from the hearing a few weeks ago to Homeland Security in relation to Savannah McMillan. That is Mr Murphy. What he is dealing there, as I say, is the circumstances which gave rise to that declaration, and all of them clearly evidence the fact that this was not Mr Depp but Miss Heard who had arranged this. In the light of this, Mr Smele in his witness statement, where this was referred to, in the afternoon before the hearing on Thursday when we received that witness statement -- Can I just take you to one part of that? It is paragraph 25 of his first witness statement.

MR JUSTICE NICOL: First witness statement?

MR SHERBORNE: Yes.

MR JUSTICE NICOL: I have got that, tab 33.

MR SHERBORNE: It is, my Lord, yes, and it is just paragraph 25. As I say, I am not going to take each of them at this level of detail, or we will be here for a long time. This is just to demonstrate the approach taken by the defendants. Here he talks about other serious concerns - you will see above paragraph 23, this is the rubric - regarding the claimant's disclosure. As well as the breach, these are the things which Mr Wolanski said he was not relying on by way of breach. He refers in 23 to the declaration of Mr Murphy and he says it contradicts the statement Mr Murphy has given. In my submission, it does not, but he says that it obviously falls within the scope of 31(b) and then says this, "The claimant has never disclosed the statement in these proceedings. Given that the claimant employs Mr Murphy [he does not but anyway] we assume [at the time but that is not point] that the claimant may well have arranged for this statement to be taken." That is the most they can say. "The claimant may well have arranged for this statement to be taken, or at least that his lawyers in US or Australia or here in the US would have retained a copy of it." There is no evidential basis for saying that Mr Depp has it. It is quite clear from the evidence that it was all arranged by Miss Heard's lawyers and she disclosed it.

In any event, this is said to be a serious breach by the claimant, we say on the flimsiest of pretexts.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: We say again this just demonstrates the way the defendants are approaching this by throwing into the mix anything they can think of to say it might be a breach by the claimant and therefore your Lordship should strike the whole action out.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: I think the next one, and I will try to take this much quicker, is the complaint that is raised in paragraphs 29 and following. This one is only called "further concerns", so it is not said to be a breach, or a serious breach, not surprisingly, but could I just say a lot of material has been provided in relation to this. Mr Charalambous yesterday afternoon, as far as I got through it in the time, in a 250-page exhibit and 26 pages of a witness statement refers back to this point. In a nutshell, what is said is that when Ms Afia said to the court in a witness statement back at the pre-trial review that this document did not come from the claimant, it appears that she may have been wrong in that. One does have to go back into the electronic data to try to establish this, but even if that is correct, in my submission, that does not take the defendant any further. It is not said to be a breach by the claimant. In any event, it lacks, as we say, any real reality because the document was disclosed by the claimant on 20 February, so before even the pre-trial review.

It is a transcript your Lordship will recall which contains a number of highly damaging allegations against the defendants' case with Miss Heard admitting to physically having assaulted Mr Depp. When he says to her that she punched him, she says, "I just hit you across the face. I wasn't punching you, babe, you're not punched." She calls him, I think, a "pussy" because he is complaining about having been hit. She goes on to admit that she did start a fight and she was the physical one. It does not make any sense the suggestion that somehow the claimant is trying to withhold documents in that case, firstly, because he disclosed them, and, secondly, they are helpful to his case anyway, so it cannot be said that does not give rise to a fair trial. This is the second concern said to be about the claimant's disclosure.

There is another point made in Mr Charalambous's witness statement, which I think is dealt with in Ms Afia's eighth witness statement. I do not know if your Lordship got to that. That was provided at speed last night in the event that your Lordship really was going to take these into account.

MR JUSTICE NICOL: I am afraid I did not get to Mrs Afia's eighth witness statement. Where is that?

MR SHERBORNE: It is right at the back of the bundle, at tab 45.

MR JUSTICE NICOL: Let me just have a look at the eighth witness statement and see what it says. (*Pause for reading*)

MR SHERBORNE: I was going to take you to paragraph 12 to deal with the text message, the other matter.

MR JUSTICE NICOL: Paragraph 12? Just a moment. (*Pause for reading*)

MR SHERBORNE: You will see Mr Charalambous at 13 has raised two further text messages. If you want to read to 15. (*Pause for reading*)

MR JUSTICE NICOL: Yes, I have read paragraphs 13 to 15.

MR SHERBORNE: We say in the context of the disclosure exercise performed, text messages, thousands upon thousands of documents, we say this kind of exercise, where the defendants have the unique ability to cross-check disclosure, is not one which should be allowed to inform your Lordship's judgment on whether or not it would be proportionate to strike the entire claim out. It was raised at the last minute by the defendants in a way whereby we cannot deal with them in the proper fashion. Ms Afia can try to give a proper explanation on a Sunday night at speed on what she has seen, but this is not satisfactory at all.

MR JUSTICE NICOL: Yes.

MR SHERBORNE: That is the nature of exercise your Lordship is being asked to conduct, and I do object to it in the strongest possible terms, as your Lordship will appreciate. We say it would be wrong in principle to take these into account. At 16 you will see there is reference to an email -- this is a point that I made earlier right at the outset that there is a spat between the claimant's American lawyer and the defendant's American lawyer about whether some of the documents that were provided by Miss Heard to the defendants, if I can get this right, may have been the subject of a protective order. Your Lordship will

remember the whole problem with protective orders where Miss Heard has the benefit of a protective order in the Virginia proceedings and we had to get her consent before we could even disclose those documents. An entirely artificial process was created that we had to go around in order to be able to provide documents. It is said that some of those documents provided were part of the protective order. I think the American lawyer says that should not have been done and they should not do that. May I make it absolutely plain, as I need to, as Ms Afia does here, we are not seeking to stop Miss Heard providing documents for use by the defendants in this country. We do complain ----

MR JUSTICE NICOL: Just pause and repeat what you just said, please, Mr Sherborne. You are not seeking to stop Miss Heard doing what?

MR SHERBORNE: Relying on and providing to the defendants documents from the US proceedings. I understand Mr Wolanski is going to show you the letter and say that is what we were trying to do. If that is what is said, well, then I can categorically state on behalf of the claimant that he does not object to it. I do not know about the spat between the American lawyers, but I can tell you on instructions that we do not seek to do so.

MR JUSTICE NICOL: I have seen some reference to this I think perhaps in Mr Wolanski' skeleton for this hearing. On the claimant's behalf, are you prepared to offer an undertaking to that effect?

MR SHERBORNE: Yes, if your Lordship requires that, then we can give an undertaking. I want to try to dispose of this point without having to have a long debate about it, but what it cannot do, in my submission, is assist the defendants in their relief from sanctions application. I know the defendants are seeking to rely on ----

MR JUSTICE NICOL: It is not the defendants that are seeking relief from sanctions, it is the claimant, is it not?

MR SHERBORNE: Exactly, but the defendants have thrown this in as part of their attempt to say to your Lordship that it would not be disproportionate to strike this out, so it is said to be another attack on Mr Deep. What I am keen to avoid is this multiplication of issues thrown up by the defendants at the last minute as a way of slinging mud at Mr Depp to say that you should refuse relief from sanctions. In my submission, that would not be a principled approach for the court to take. If the defendants want to raise a separate point about this, then, as I say, it can be dealt with by the assurance or undertaking, or whatever

form your Lordship thinks is appropriate, but what it does not do, in my submission, is relate to the three-stage test which your Lordship is performing.

MR JUSTICE NICOL: All right. I have understood that point. Now, is there anything else you want to say in support of the claimant's application for relief from sanctions?

MR SHERBORNE: I think that deals with this. You will appreciate I have taken it at some speed.

MR JUSTICE NICOL: I understand that, but needs must and we have quite a lot to deal with, if you are successful on this application.

MR SHERBORNE: I do understand, my Lord, yes.

MR JUSTICE NICOL: Thank you very much then for your submissions.

MR SHERBORNE: Thank you, my Lord.

MR JUSTICE NICOL: Have we got Mr Wolanski on the line?

MR WOLANSKI: We do, hopefully with a clearer line than we had last Thursday.

MR JUSTICE NICOL: That is perfectly clear, thank you, Mr Wolanski.

MR WOLANSKI: Going then straight to the three stages of the *Denton* test for relief from sanctions, first of all, the seriousness of the breach is obvious and, albeit reluctantly, now accepted by the claimant. The second stage on good reason, we say that the incompetence of the defendants' legal team is not a good reason for the default; it is a bad reason. The authorities make clear that, in general, whether it is the fault of the party or his lawyer, makes no difference. We will come to the relevant case on that in due course. Further, we do not accept ----

MR JUSTICE NICOL: Just a minute. I think you referred me to a note in the White Book, yes at 3.9.5.

MR WOLANSKI: I did.

MR JUSTICE NICOL: You referred me to that for the proposition that good reasons are likely to arise from circumstances outside the control of the party in default.

MR WOLANSKI: Yes.

MR JUSTICE NICOL: But I looked on to the next paragraph still within 3.9.5, and that says, "If some good reason is shown for the failure to comply with the rule, practice direction or order the court will usually grant relief from any sanction imposed." The effect of it not being a good reason is that almost automatic relief from sanctions is not triggered.

MR WOLANSKI: Yes.

MR JUSTICE NICOL: We do have to get to the third stage and that is your point.

MR WOLANSKI: That is my point because this is not a good reason. Still on stage 2, however, before we get on to stage 3, the claimant says in evidence, or rather his solicitor says in evidence that the fault lies with Schillings for the breach, but we do not accept that. And we do not accept that the claimant is not personally culpable in relation to the breach. It is very striking that there is no evidence on this application from the claimant personally and he does not personally address the allegation that we have made that he has been seeking to withhold damaging documents from the defendants. It is in this regard that we will be addressing your Lordship on two additional matters. Mr Sherborne says it is inappropriate for us to do so, but, in my submission, it is crucial for us to do so because they are both relevant to the question of whether or not the court can accept the assurance given by the claimant's solicitors that he was in no way culpable in relation to this breach.

MR JUSTICE NICOL: Just a minute. Yes?

MR WOLANSKI: The first of those two matters is that, as we will see, the claimant has already misled your Lordship at the PTR on an important matter relating to disclosure. It is not in dispute that the evidence given on his behalf by Ms Afia at the PTR in relation to an important recording that was at the centre of an application for disclosure had never been in his possession. It is now accepted by Schillings that that assurance given to your Lordship through his solicitor, and repeated by his counsel to your Lordship in court, with the claimant sitting in court present, was false. Despite Schillings now making clear that that assurance was false, there is still no statement from Mr Depp personally explaining how he came to mislead your Lordship, let alone an apology.

The second matter which is relevant to the question as to whether or not your Lordship can accept Ms Afia's assurance today that the claimant is not culpable relates to the conduct of the claimant's American lawyers with regard to Miss Heard, because, as we will be demonstrating, as recently as last Friday immediately after the hearing of last Thursday was reported in the media, the claimant's American lawyer Mr Choo wrote ----

MR JUSTICE NICOL: Just slow down a minute ---- yes?

MR WOLANSKI: ---- wrote a message to Miss Heard's representatives in America threatening to seek sanctions in court in America against Miss Heard for providing the defendants with the Australia drugs texts and seeking an assurance that she would provide ----

MR JUSTICE NICOL: Just slow down, please. --- threatening to seek sanctions in the US for providing the defendants with the Australian drug texts?

MR WOLANSKI: Correct. And seeking an assurance from Miss Heard that she would provide no further such documents to the defendants. Set against that background, we say the court can reject Ms Afia's bald statement that the claimant was not in any way responsible for or culpable in relation to the breach which your Lordship has found he is guilty of.

Turning to the third stage, we will rely on the following seven factors, any one of which would in itself be a sufficient reason to deny the claimant his application for relief. Taken together, the case for denying that application is in my submission overwhelming. First, there is no reason for this court today to revisit the reasons why the unless order of 10 March was made, and, as the authorities show, it is only in a rare case that this is appropriate. The court has already ruled what the sanction for breach should be and nothing has happened that can change that, or should change that. As it happens, there was in fact every reason for your Lordship to make an unless order on 10 March, since that was less than two weeks before the trial was due to start and the claimant was guilty of multiple breaches of his duties of disclosure just days before the trial was due to commence. That leads me to the second point we rely on in relation to the gravity of the breach which your Lordship has found. Had the trial proceeded on 23 March, the defendants would have had that trial without the Australia drugs texts. The claimant ----

MR JUSTICE NICOL: Just slow down please. When were those drugs texts supplied by the claimant in the US proceedings? I think that was in February, was it not? I think my recollection is that the evidence was that no later than 18 February.

MR WOLANSKI: That is right, my Lord. Obviously we did not know about them; they were not disclosed to us. That is the whole point. We only found out about them because Miss Heard give them to us very recently.

MR JUSTICE NICOL: Just a minute.

MR WOLANSKI: The claimant had them before the 23 March trial, but did not disclose them to us. Had the trial gone ahead on 23 March, it would have gone ahead without the defendants having those texts. We would have been unable to challenge the claimant on his account of having not on his account had drugs in Australia, not having taken drugs in Australia and not having discussed drugs with Miss Heard in Australia. We would also not have had those documents in order to challenge the claimant's credibility more generally, because they directly demonstrate that he is not telling the truth on an important matter at the heart of the dispute over what happened in Australia.

MR JUSTICE NICOL: I have already ruled that those texts were disclosable.

MR WOLANSKI: You have. The third is a matter to which I have already alluded in relation to the second stage, namely that it is now clear that the claimant through his legal team misled the court at the PTR, and I shall be returning to that in more detail.

MR JUSTICE NICOL: Yes.

MR WOLANSKI: Fourth is the matter to which I have already referred in relation to the second stage which is his threats to Miss Heard in relation to her supply to the defendants of the Australia drugs texts and its threat to her of sanctions for doing so.

MR JUSTICE NICOL: Just a minute.

MR WOLANSKI: Again, I will be returning to that in more detail because we say that what Mr Depp has been engaged in is an attempt not just to prevent the defendants from receiving relevant evidence in these proceedings which he has chosen not to disclose to us; it also demonstrates an attempt to threaten and intimidate Miss Heard, who is of course our key witness, just days before the trial is due to start.

MR JUSTICE NICOL: At some stage, you do not have to do it now, do you want to respond to the proffered undertaking by Mr Sherborne on the claimant's behalf?

MR WOLANSKI: I will if we get to it, but, in my submission, this trial should not proceed at all. If your Lordship is against me on that, of course, yes, we will accept the undertaking.

MR JUSTICE NICOL: I understand your point that the trial should not proceed at all, but you are making the point about Mr Depp's threats against Miss Heard and, in that context, I was inviting you to respond to Mr Sherborne's offer of an undertaking.

MR WOLANSKI: I will address that when I make submissions on this topic, if I may, my Lord.

MR JUSTICE NICOL: Of course.

MR WOLANSKI: The fifth point we make is that the defendants cannot now have a fair trial. I am saying that because it is now apparent from Ms Afia's seventh and eighth witness statements that the disclosure exercise which has been carried out by the claimant's representatives was conducted at the very least totally incompetently and quite possibly with a view to the deliberate withholding of damaging documents. In relation to incompetence, we know this not just because, as my learned friend explained last week his team do not understand how CPR 31.6 operates -- that in itself is of course a serious problem since it shows that the wrong test has been applied to documents in this case and therefore may well have been applied across the board -- but there is more because Ms Afia's latest evidence tells a very sorry tale of wholesale incompetence. A disclosure exercise was conducted in a desperate rush. Important documents have been overlooked. Important recordings have never been listened to by members of Schillings' team and insufficient search key words have been applied.

The result, as is clear from Ms Afia's statements, is chaos, and I will be referring your Lordship in this context to further examples of documents which the claimant has not disclosed, which we obtained very recently from Miss Heard, and which the claimant now accepts he should have disclosed. In my submission, unless the whole disclosure exercise is carried out afresh with a different legal team, the defendants cannot have a fair trial.

You might expect that in the face if your Lordship's draft judgment, the claimant would have offered to have the task done again against this sad background of ineptitude. But no such offer has been made, and now it is too late. The trial starts in a week and neither we nor the court can have any idea about which other documents exist in the claimant's control, which he has elected not to give us or which have been overlooked through the incompetence of his legal team.

The sixth point is that the claimant can have his vindication, if he is entitled to it, through his US claim for libel against Miss Heard. This claim is in respect of purported damage caused to the claimant by the defendants to his reputation not just in this jurisdiction but globally. The claimant is not confined to damage in this jurisdiction. It extends also to damage in the US, where he and Miss Heard reside and where they are both citizens. That trial is currently due to start in January. The problems with disclosure

that the claimant has complained of in these proceedings arising from the fact that Miss Heard is not a party, and I note Mr Sherborne referred to those just now as giving rise to an unfair position as far as his client is concerned, those problems do not arise. The asymmetry of which Mr Depp makes complaint in these proceedings does not exist, since Miss Heard is a party. The allegations in respect of which Mr Depp brings the claim are the same as the allegations complained of in these proceedings. In response to the point made by Mr Sherborne that Miss Heard is contesting what we in this jurisdiction would call reference or meaning, I am informed that a judge in the US proceedings has already ruled that the *Washington Post* article, which is the subject of the claim, did refer to the claimant in respect of three of the four statements complained, so that issue is resolved.

Moreover, we do not accept that vindication achieved through a jury verdict is any less effective for Mr Depp than vindication achieved through a reasoned judgment in these proceedings. If Mr Depp really considered vindication through a jury verdict to be insufficient then why did he bring the claim in the US at all? As your Lordship is aware, vindication in libel cases has until very recently been achieved almost entirely in this jurisdiction between the verdicts of jurors, and it was never suggested that that was not proper vindication.

MR JUSTICE NICOL: Just a minute.

MR SHERBORNE: Moreover, in the US proceedings, the problems with, for example, remote video links and time zones are much less challenging because almost all the witnesses are there and should be able to give evidence in person. By January we all hope the pandemic will have eased, further facilitating the giving of evidence by live witnesses in person.

The seventh and final point we make in relation to the third stage of the test is that if this case does go ahead next week it will absorb vast resources. Five court rooms have been made available. Large numbers of court staff will be required, all of this largely at public expense and to the detriment of other litigants who would otherwise have access to those resources. In my submission, Mr Depp has forfeited the right to this indulgence. He has demonstrated contempt for our courts and for your Lordship. The absence of any contrition from him personally or an apology in respect of these serious default demonstrates a breath-taking arrogance.

My Lord, I am going to address four of those seven topics in more detail, but before I do, I would like to say a little bit about the law. Can I first of all ask your Lordship to turn in the bundle of authorities, to the *Global Torch* case? Hopefully, your Lordship has it.

MR JUSTICE NICOL: Just a moment. I am going to ask my clerk again please to help me on when she received or sent to me the defendants' bundle of authorities.

CLERK OF THE COURT: I sent that to you on the 28th at 20.14.

JUDGE NICOL: Was that Sunday at 20.14? Yes, I have got it.

CLERK OF THE COURT: Great.

MR JUSTICE NICOL: Just a moment. *Global Torch* is tab 2, I think.

MR WOLANSKI: It is tab 2.

MR JUSTICE NICOL: Just a minute.

MR WOLANSKI: It is a decision of the Supreme Court 2018 relating to the breach of an unless order in respect of a statement which the party was personally ordered to make. I would like you please to look at paragraph 23. It is the judgment of Lord Neuberger at page 68 of the pdf.

MR JUSTICE NICOL: "This contention effectively involves saying that..."

MR WOLANSKI: Yes, please. I would like to start at G, about six lines down: " The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction. (24) In the present case, essentially for the reasons given by the three judges in their respective judgments, there do not appear to be any special factors (subject to what I say in the next two sections of this judgment). Further, it is difficult to have much sympathy with a litigant who has failed to comply

with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place."

Next please is the *Michael Wilson v Sinclair* case which is in tab 3. That was an application for relief from sanctions its Court of Appeal summarised the relevant post *Denton* principles at paragraph 26 at 91 of the pdf.

MR JUSTICE NICOL: I have got 91. Thank you. I have got paragraph 26, yes.

MR WOLANSKI: In relation to the third stage of the test ----

MR JUSTICE NICOL: Mr Wolanski, your voice was muted or very quiet then.

MR WOLANSKI: In relation to the third stage ----

MR JUSTICE NICOL: No, you still need to do something about the volume on your microphone.

MR WOLANSKI: I fear the gremlins from last Thursday may have returned. If I speak close to the microphone, does that help? Apparently, my solicitors say they can hear me fine, so it may be a problem at your Lordship's end.

MR JUSTICE NICOL: Amy, can you hear Mr Wolanski?

THE CLERK OF THE COURT: Yes, I can, and quite clearly as well.

MR JUSTICE NICOL: I am afraid your voice has now gone quiet as well so it sounds as if it is a problem at my end.

CLERK OF THE COURT: Do you want to leave and dial back in?

MR JUSTICE NICOL: Mr Wolanski, at the moment I can only hear you very faintly, so I am going to ask please for everybody to dial back in and for us to a take a few minutes while that occurs.

MR WOLANSKI: Very well.

MR JUSTICE NICOL: Thank you.

**(Short break )**

MR JUSTICE NICOL: Mr Wolankski, I can hear you perfectly clearly, thank you, Amy. That has resolved the problem. Is Mr Sherborne present on the call?

CLERK OF THE COURT: I do not think he is.

MR JUSTICE NICOL: I think Ms Wilson is. Ms Wilson, do you want to see if we can get Mr Sherborne back?

MS WILSON: Yes, my Lord, I am just trying to now.

MR PRICE: My Lord, it is Mr Price here. I am wondering where we are going on timing. I have no idea how long the other applications are going to be after that as well.

MR JUSTICE NICOL: Mr Price, thank you for your patience. I think the reality is that by the time Mr Sherborne has responded, I am not going to be able to hear you before at least lunch time. If you would like to be released until sometime from 2 o'clock onwards, that is the best I can do at the moment.

MR PRICE: I am grateful for that indication, my Lord. There were some other applications mentioned in today's proceedings. Is the disclosure application likely to follow this application assuming it succeeds?

MR JUSTICE NICOL: I cannot tell you that at the moment because I may need to hear from the other parties about the precise order in which I take the further matters before me, but I can say it will not be before 2 o'clock.

MR PRICE: I will probably stay in the meeting and work on some other things so I know what is going on, but I am grateful, my Lord.

MR JUSTICE NICOL: Very good. Have we got Mr Sherborne back?

MR SHERBORNE: My Lord, you do, yes.

MR JUSTICE NICOL: Mr Sherborne, thank you. I can now hear Mr Wolanski very clearly so I am going to ask him please to continue with his submissions. You were taking me to *Wilson v Sinclair*.

MR WOLANSKI: I was paragraph 26.

MR JUSTICE NICOL: Paragraph 26. Just a moment. Yes?

MR WOLANSKI: And it is (iii) which I invite your Lordship to look at because there is a summary of the law post *Denton* with particular reference to how the court should approach factors (a) and (b) in 3.9.

MR JUSTICE NICOL: Let me just read 26.3. (*Pause for reading*) I have read 26.3.

MR WOLANSKI: Those two factors should be given particular weight. Next please paragraph 35 where Richard LJ addresses the distinction between on the one hand orders imposing a stay if there is non-compliance and on the other unless orders imposing a strike out. I

would invite your Lordship to read paragraph 35 and paragraph 36, please. (*Pause for reading*)

MR JUSTICE NICOL: Yes, right, I have read paragraphs 35 and 36 of *Wilson v Sinclair*.

MR WOLANSKI: Thank you. Finally from the same authority on this point, where an unless order has been properly made and therefore the sanction is appropriate, unless there is some exceptional circumstances or some change of circumstances. Paragraph 38 please. (*Pause for reading*) So the court on an occasion such as the current one has to proceed on the basis that the sanction was properly imposed. Before leaving this case, please go to paragraph 56 page 103 of the electronic bundle. Does your Lordship have that?

MR JUSTICE NICOL: I do. I am just reading it now. (*Pause for reading*). Yes?

MR WOLANSKI: Here we have Lord Justice Christopher Clarke again addressing the distinction between an unless order and orders which impose a lesser sanction leading to a breach, and important for current purposes is what he says five lines from the bottom of that page with reference to unless orders as follows. The applicant -- and that is an applicant in a case where there is not an unless order -- has not been given what is expressed to be a last chance. Where an unless order has been made as in the current case, the applicant has been given a last chance and that is not a matter that the court should ordinarily revisit.

Finally on this trio of cases, please go to the next case in the bundle *Sinclair v Dorsey & Whitney*, another Sinclair but different from the one in the case we have just been looking at. It is at tab 4. This was a case involving an unless order. It is a decision of Popplewell J (as he then was) in 2016 where the claimant was ordered to make a payment for security for costs of £100,000 and an unless provision was attached to that order. Just one paragraph I would invite your Lordship to look at from this and that is paragraph 43 at page 119 (*Pause for reading*).

MR JUSTICE NICOL: I have read it, thank you.

MR WOLANSKI: You will have noted then what Popplewell J identifies there is the need to see whether or not there is anything in the case that puts it in that rare category of cases where the value judgment that was made prior to making the unless order should be revisited. In my submission, the current case is not such a case.

The final authority I would like to take your Lordship to is in tab 5 please and it is a case called *Gladwin v Bogescu*.

MR JUSTICE NICOL: Which paragraph?

MR WOLANSKI: Paragraph 30, please, page 130 of the bundle. It is another relief from sanctions case, and in this paragraph Turner J addresses the question of whether this is in some way a mitigating factor on an application for relief from sanctions that the default was the fault of the defaulting party's legal adviser, and he says it is not. (*Pause for reading*)

MR JUSTICE NICOL: Yes?

MR WOLANSKI: With that in mind, can I please turn now to the first of the four topics which I said I would address your Lordship in more detail as a third stage. That topic is the role of the claimant personally in the breach of the unless order which your Lordship has already ruled on. On this can I ask you please it look at Ms Afia's seventh witness statement, which is in tab 42 at page 763?

MR JUSTICE NICOL: Just a minute.

MR WOLANSKI: It is page 789 of the electronic pdf.

MR JUSTICE NICOL: Which paragraph?

MR WOLANSKI: Paragraphs 23 to 25, please, which is page 768 of my bundle. I am told that is page 794 of the electronic bundle. Does your Lordship have that?

MR JUSTICE NICOL: Yes, and it was paragraph?

MR WOLANSKI: 23, 24 and 25.

MR JUSTICE NICOL: Let me just read those. (*Pause for reading*) Yes?

MR WOLANSKI: The explanation, in short, in relation to the failure to disclose these messages was that they were reviewed but a decision was made that they did not meet the test under 31.6, In relation to the claimant's role all that is said is this at paragraph 25: "I wish to assure the court that there was no attempt to hide or withhold them by the claimant, contrary to what the defendants asserted in their application. Indeed, as already explained, it was the claimant who had already disclosed this exchange in the US libel proceedings only a few weeks earlier." As to that latter point, we will come back to that because, as will be apparent, the claimant has been taking rigorous steps to stop documents that were disclosed by him in the US libel proceedings from finding their way

to the defendants in this case. That is not a point which avails the claimant at all on this application.

However, it is the first point which I wish to make some observations about. All we have here from Ms Afia is a bald assurance. She does not explain the basis on which she provides that assurance. She does not say whether or not she spoke to the claimant about this issue of the Australia drugs texts. She does not say whether or not the claimant knew about the Australia drugs texts. She does not say whether the claimant had any input into the decision to withhold them or whether he was advised as to whether or not they should be disclosed. So, we know nothing about the state of knowledge of the claimant personally at the time the decision was made not to disclose them and we know nothing about his role personally in the decision not to disclose them. As I say, there is no evidence on this application from the claimant himself.

I am about to move to the second of the four topics I am going to explore in more detail. It may be your that Lordship considers this a good time to adjourn. It is a somewhat more substantial topic.

MR JUSTICE NICOL: I think it would be. How much longer do you think you will be, Mr Wolanski?

MR WOLANSKI: I think I may be an hour.

MR JUSTICE NICOL: Mr Sherborne, are you still on the line?

MR SHERBORNE: My Lord, I am.

MR JUSTICE NICOL: Mr Wolanski has not finished yet, but if he is going to be another hour do you have any idea as to how long you are likely to need in reply?

MR SHERBORNE: It is difficult.

MR JUSTICE NICOL: On the basis of what you have not heard yet but from what you have heard so far, how long do you estimate you will need in reply?

MR SHERBORNE: It depends. A number of the points Mr Wolanski is making again, so I do not know the extent to which that is going to expand. Your Lordship has my submissions on the fact that so much of this material has been brought in by a side wind, and if your Lordship takes the view you need me to deal with it, you told me to say something *de bene esse* about it about it, but if you are going to regard these as factors to be brought if despite no finding of breach, I may well take some time to deal with it. I am very

concerned at how long this is all taking, as I am sure your Lordship is, but I could be at least half an hour or so, may be much longer, depending how far Mr Wolanski is allowed to go into this material.

MR JUSTICE NICOL: All right. I do not know if anybody is on the line who can pass a message to Mr Price.

MR PRICE: I am here.

MR JUSTICE NICOL: Hello, Mr Price. Thank you. It looks as though I will be involved with the present application at least until 3 o'clock, so if you want to take an extended lunch break I will not need to hear you before at least 3 o'clock.

MR PRICE: An extended lunch break is always a good idea.

MR JUSTICE NICOL: Thank you, Mr Price. I will terminate the call now. We will resume at 2.05.

**(Luncheon adjournment)**

**Marten Walsh Cherer hereby certifies that the above is an accurate and complete record of the proceedings or part thereof.**