Appeal Ref: A2/2020/2034

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

BETWEEN:

JOHN CHRISTOPHER DEPP II	**Appellant**
-and-	
NEWS GROUP NEWSPAPERS LTD (1)	**Respondents**
DAN WOOTTON (2)	

APPELLANT'S SKELETON ARGUMENT: 21 DECEMBER 2020
APPLICATION FOR PERMISSION TO APPEAL

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*References in this skeleton argument to **[J/x]** are to paragraphs of the Judgment of Mr Justice Nicol, which is found at Tab 5 of the Core Bundle. References to **[S/x]** are to page numbers of selected documents which comprise the Supplementary Bundle.*

Introduction

1. The Appellant seeks permission to appeal the decision of Mr Justice Nicol on the grounds that his judgment reveals a fact-finding exercise which was seriously flawed.

2. Whilst the Court of Appeal is understandably slow to set aside a judgment on facts because of the ability of the trial judge to assess the witnesses, that caution cannot apply where, as here, the Judge failed to perform the task appropriately. The Judge conducted no analysis of the evidence of the alleged assaults or injuries which the Appellant is said to have inflicted, or the credibility of the witnesses. Further, the Judge failed to explain his reasons for his findings which are simply asserted, as opposed to reasoned by reference to the conflicting evidence, the documents, the witness statements and oral testimony.

3. This was a libel trial in which the Respondents needed to prove that the Appellant was guilty of beating his former wife (Ms Amber Heard) on a number of occasions, causing her significant injuries and leading her to fear for her life. Upon initially accusing the Appellant of violence in 2016, Ms Heard relied on three incidents to obtain a temporary restraining order (December 2015, April 2016 and May 2016). By the time the Appellant brought his claim against the Respondents, Ms Heard was advancing 14 separate incidents over a three-year period. By the end of the trial, an undefined number of further ones were alleged. Despite this, and the wealth of conflicting evidence presented, the Judge failed to examine the competing accounts of each incident, or to explain whether he found them proved and, if so, on what basis. The same failing applies to the inconsistent accounts given by Ms Heard (who was the sole witness for the Respondents in relation to all bar one of these incidents) of the injuries she allegedly suffered from these attacks.

4. A table of the 15 incidents, the alleged injuries and the relevant passages in the Judgment is attached as a Schedule at ***S/B4-B19***. The Schedule shows the lack of analysis and reasoning which it was incumbent upon the Judge to perform. In particular, the Judge should have analysed the extent to which Ms Heard's evidence undermined her credibility in relation to her allegations of physical assault / injury.

5. Despite the central importance of this issue, as both parties emphasised throughout the trial, the Judge carried out no assessment of Ms Heard's credibility (or other witnesses on behalf of the Respondents). The Judge accepted at the outset that Ms Heard must have been correct in her allegations, and then discounted any evidence to the contrary, even attributing to Ms Heard evidence which she did not give and thereby bolstering her evidence (see paragraph 67 below). This 'improvement' of her evidence on occasion is a compelling reason why his findings are unsafe. The Judge took little or no account of the striking examples of Ms Heard's willingness to lie or commit wrongdoing (which should have reflected upon her reliability as a witness), even in the face of documentary evidence (such as her email to her personal assistant asking if there was a vet who could be 'greased' in order to 'procure a slightly altered health doc').

6. The Judge failed to examine the starkly opposing accounts given for each incident by the Appellant and other witnesses. The evidence from nineteen witnesses, many of whom were independent, was either dismissed or ignored, although none were found to have lied. The

Judge accepted Ms Heard's evidence uncritically, but made no findings that the Appellant and these witnesses had lied. It is inexplicable that the Judge made no adverse findings on the Appellant's credibility, given the fact that he accepted Ms Heard's version of events which conflicted sharply with both his evidence and the contemporaneous documents. It was accepted by the Appellant that he drank heavily at times and took drugs (as did Ms Heard) but he was unequivocal that he had never attacked Ms Heard or any other woman in his life. There is no proper explanation or reasoning in the Judgment as to how the Appellant's admitted use of drink and drugs was connected to the alleged violence to Ms Heard.

7. The Judge's conspicuous failure to analyse the evidence and the arguments for each incident with the care that the parties were entitled to expect and which a proper resolution of the issues demanded justifies this Court intervening in the decision, notwithstanding its general reluctance to disturb the findings of a trial judge, ***Harb v Aziz*** **[2016] EWCA Civ 556 at [48]**.

8. This application is not premised solely on the fact that the Judge reached conclusions on the evidence that were outside the bounds of a reasonable finding. The Appellant's case is that the Judge failed properly to analyse the evidence or to explain his reasoning. The Court of Appeal is not asked to substitute its own decision, but rather to set aside the Judgment and order a new trial.

9. In view of the unreasoned findings of fact, the Appellant did not receive a fair trial in accordance with Articles 6 and 8 of the Convention.

The approach the Judge should have taken

10. In cases where (as here) a judge faces irreconcilable accounts of events, the credibility of the witnesses is key. Where the outcome of a case depends heavily on the oral evidence of a witness, a judge must carefully consider and analyse the quality of the evidence: the witness's ability to recollect events, consistency, and truthfulness are a fundamental part of the analysis which must be explained in the judgment.

11. Contemporaneous documents are an important indicator of the truth, and a trial judge should make findings of fact based upon on inferences drawn from documents and known or probable facts, ***R (Dutta) v GMC*** **[2020] EWHC 1974 (Admin) at [39]**, citing ***Kimathi v Foreign and Commonwealth Office*** **[2018] EWHC 2066 (QB)**.

12. The evaluation of oral evidence requires a judge to consider how the testimony can be reconciled with documentary evidence. The value of oral evidence "*lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny"*: ***Kimathi*** at **[96]**, citing ***Gestmin SGPS SA v Credit Suisse (UK) Ltd*** **[2013] EWHC 3560 (Comm)**. If a trial judge disregards important documentary evidence, s/he should give clear reasons for doing so and for preferring conflicting oral testimony given by a witness at trial, ***Goodman v Faber Prest Steel*** **[2013] EWCA Civ 153 at [17]-[18]**.

13. When a decision depends on accepting the oral evidence of one witness, whose reliability and credibility has been challenged (as it was in this case), the trial judge must address the challenges in *sufficient detail, **Harb v Aziz*** **at [33], [39]**. This involves testing the strength and weaknesses of that testimony **[34]-[35]**. The Judge did none of this.

14. The benefit of oral testimony is that the judge is able to "*assess their character, the honesty and candour of their evidence, and the quality of their recollection*", ***Central Bank of Ecuador v Conticorp SA (The Bahamas)*** **[2015] UKPC 11 at [7]** citing ***Mutual Holdings (Bermuda) Ltd v Hendricks*** **[2013] UKPC 13**. It follows that where, as here, a trial judge does not make any assessment of a witness's credibility, the judicial task has not been performed. ***Kimathi*** **at [98]** helpfully summarises the "*three main tests which in general give a useful pointer as to where the truth lies*":

> *"(1)The consistency of a witness's evidence with what is agreed or clearly shown by other evidence to have occurred;*
>
> *(2)The internal consistency of the witness's evidence;*
>
> *(3)The consistency with what the witness had said or deposed on other occasions.*"

15. A judgment need not address every item of evidence or submission, but it *must* explain the conclusions. The judgment must demonstrate that a proper analysis was undertaken and the inherent probabilities were considered: ***Harb v Aziz*** **at [37]-[38]**. If the judgment does not

explain how critical matters have been resolved the fairness of the trial process is undermined: ***Harb v Aziz*** **at [39]**.

16. The failure to give adequate reasons, e.g. why the account of one witness was preferred to another, or why evidence was rejected, may give rise to a free-standing ground of appeal, ***Simetra Global Assets Limited v Ikon Finance Limited & oths*** **[2019] EWCA Civ 1413 [2019] 4 WLR 112 at [39]-[40], [43].** *"…[I]n particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it*." Males LJ at **[46]**.

17. If the particular episode is serious or quasi-criminal in nature, then the analysis of the evidence and its inherent probabilities must necessarily include adequate reasoning so as to make clear why the judge was satisfied that the evidence supporting it was sufficiently cogent. The Judgment in this case fails that test.

The approach of the Court of Appeal

18. The availability of an appeal process to review controversial and damaging findings of fact is an integral part of the protection which Article 6 is meant to guarantee civil litigants. This includes an effective appeal process where serious findings of fact have been reached without any proper explanation. Para 369 of the European Court of Human Right's Guide to Article 6 states: "*The guarantees enshrined in Article 6 § 1 include the obligation for courts to give sufficient reasons for their decisions (**H. v. Belgium, § 53**)"* and at para 374: *"… where a party's submission is decisive for the outcome of the proceedings, it requires a specific and express reply (**Ruiz Torija v. Spain, § 30; Hiro Balani v. Spain, § 28**)*". Para 371 further states: "*The reasons given must be such as to enable the parties to make effective use of any existing right of appeal (**Hirvisaari v. Finland, § 30 in fine**)*".

19. The restraint to be exercised by the appeal court when findings of fact are challenged was summarised in ***Group Seven*** **[2019] EWCA Civ 614; [2020] Ch 129 at [21]-[23]**. But while they provide the "*framework in which [the Court of Appeal] must operate"*, some of the considerations are inapplicable (or carry significantly less weight) where the Court is invited to order a retrial because of a failure to take account of relevant evidence or a failure

of reasons: ***Simetra Global* at [38]**, citing ***Henderson v Foxworth Investments*** and ***Volcafe Ltd v Cia Sude Ameriana de Capores SA* [2018] UKSC 61; [2019] AC 358 at [41]**.

20. Here, the Appellant seeks to set aside the Judgment since, as in ***Harb*** at **[41],** the Judge has failed overall to "*engage with the arguments advanced on [the party's] behalf and, insofar as the case turns on the facts, deal fully with the evidence and explain how he has come to his conclusions*". The usual advantage of at trial judge who was 'immersed in the evidence' does not apply where the judge failed to take account of evidence, arrived at a conclusion unsupported by the evidence, or failed to give adequate reasons. Here, the Judge's findings are really assertions, and not reasoned conclusions.

The serious failings in the Judgment

21. Despite its length, the Judgment is deficient in many respects. By way of example, specific failings are identified below. These examples demonstrate the gravity, range, and importance of the deficiencies.

Lack of reasoned decision-making, the failure to test the evidence, and the failure to test the credibility of witnesses

22. The Judgment lacks analysis. Most of the findings that the Appellant committed violent attacks are not explained in any way. Despite the multitude of alleged assaults and injuries claimed, there are few passages where the Judge explains his findings as to what happened during these assaults or why he made them; he merely asserts that he 'accepts' Ms Heard's account.

23. Consideration of Incident 1 shows the Judge's resort to bare assertion started at the outset; he found that the alleged domestic violence was proven because he accepted Ms Heard's evidence that the Appellant had a 'monster' side to his personality, which was violent and might not remember his violent actions **[*J/209*]**. The Judge failed to set out or explain his reasons for that conclusion.

24. His consideration of references to 'the monster' in documents **[*J/177-J/186*]** provides no assessment of why 'monster' refers to violence (rather than drug binges or drinking) or the

basis on which the Judge concluded that drugs and drink made the Appellant violent, or how he intended to take account of his finding that the Appellant at times did not remember committing violent assaults. It also ignored references to 'the monster' in other contemporaneous documents showing a completely different interpretation, e.g. the texts in September 2015 when Ms Heard described 'the monster' as the side of the Appellant that ran away from an argument, as opposed to 'the man' who would stay and deal with it [***S/B247***]. Despite this being relied on by the Appellant as demonstrating the implausibility of her 'monster' account, it is not referred to in the Judgment, let alone analysed and rejected. This is an example of how documentary evidence on a key issue which undermined Ms Heard's testimony was ignored without explanation. It is also a valuable test of Ms Heard's credibility.

25. It was incumbent on the Judge to explain how he was satisfied, on the basis of 'cogent' evidence, that the Appellant had committed appalling acts of domestic violence, and not take a short-cut and adopt Ms Heard's 'split personality' theory (cf. ***Harb v Aziz*** at [38] & [40]). The lack of any reasoning for such a finding, and one on which the Judge builds for other findings, is a persistent flaw in the Judgment.

26. In relation to Incident 2, the Judge's conclusion that it happened 'as Ms Heard alleged' **[*J/225(x)]*** demonstrates a lack of adequate reasoning; what Ms Heard had alleged had shifted in many ways. The Appellant's written closing included a schedule summarising her changing accounts **[*S/B20-B23*].**

27. The Judge failed to undertake any, or an adequate analysis, of Ms Heard's shifting account, despite the importance of 'consistency' as a consideration of a witness's testimony (cf. ***Kimathi*** at 14 above). Instead, he excused her 'confusion' because "*Ms Heard said that Mr Depp inflicted a number of assaults on her in March 2013*" ***[J/225(viii)]***. Not only was that a failure to analyse consistency, it was also not a reasoned finding and/or the Judge failed to take account of relevant evidence and/or his acceptance of Ms Heard's evidence was unfair to the Appellant.

    27.1. Having failed to address Ms Heard's lack of consistency in her account, the Judge then failed to address the inconsistency between her excuse for it and her earlier evidence. In her 1st statement, Ms Heard had made no allusion to there having been

numerous assaults that month, quite the opposite. She gave evidence that Incident 2 stood out: "*This incident was unlike anything I had experienced with [the Appellant] up until that point*." AH1 at 64 **[*S/B38*]**.

27.2. The Judge failed to consider the contemporaneous documentary evidence which contradicted this account. On 22 March 2013 (the date Ms Heard finally settled on as the date of Incident 2), Ms Heard had texted her mother that the Appellant "*was not being violent with me*", but that she was struggling with the Appellant's mood swings ***[J/225(vi)]***. That was inconsistent with her account of Incident 2 and with her excuse for her 'confusion'.

27.3. The Judge dismissed a photograph of Ms Heard taken on 23 March **[*S/B254*]**[1]**,** in which her face was plainly visible and unblemished, as being "*not sufficiently clear*" to identify whether she was injured as alleged ***[J/225(vii)]***. Having regard to the injuries Ms Heard was alleged to have suffered from the assault the previous day, namely a split lip and swollen face (W Henriquez Day 13, pp.2130 & 2156 **[*S/B237 and S/B238*]**), no reasonable tribunal could have made that assessment of the document.

27.4. The Judge's reliance on Ms Heard's 'confusion' was also unfair to the Appellant. First, it had never been put to him that he had assaulted Ms Heard on numerous occasions in March; quite the opposite. In cross-examination, the Appellant had been asked whether he remembered "*<u>an</u> incident*" in March 2013 where he and Ms Heard had argued about a painting by her former partner, Ms van Ree: Day 2, p.192 **[*S/B205*]**[2].

[1] The Judge had no basis for doubting the date of the photograph, although it did require close examination of documents.

[2] The contrast in treatment of what was not put to Ms Heard and what was not put to Mr Depp was extraordinary, particularly bearing in mind the Respondents bore the burden of proof. The Judge was apparently untroubled by the fact that the inconsistency of this incident was 'explained away' by allegations of serious, unparticularised, and unpleaded violence not put to the Appellant. In sharp contrast, a disclosed document where he calls his security for help to

27.5. Secondly, it highlighted the unjust difference in approach to non-pleaded incidents of violence which was not only unfair but incompatible with the burden of the proof the Judge was required to apply. The Judge took account of Ms Heard's unpleaded allegation of numerous incidents of violence in March 2013 to explain away the fact that Ms Heard had changed her account following document disclosure, but then excluded evidence from her of another alleged assault which had been fully explored at trial, and which the Appellant forcefully sought to rely upon, as obviously undermining her credibility, because it had not been pleaded (see paras 53-54 below on Bahamas, December 2015).

28. The Judge's fact-finding regarding Incident 8 (Australia, March 2015) is flawed. The Judge accepted Ms Heard's account of events in Australia, almost in its entirety **[*J/370(xxii) – (xxiii)]*** but, as is clear from the Schedule, he failed to make findings of fact or analyse the multitude of assaults and injuries she claimed she suffered. The original allegations are in AH1 at paras 99-116 **[*S/B46-B50*]**.

29. The only part of Ms Heard's evidence the Judge did not accept was that it was a "*three-day hostage situation*". Despite accepting that Ms Heard could have left the house or phoned for help ***[J/370(xxi)]***, the Judge found that her repeated insistence on this evidence was not a lie, but rather 'hyperbole', without explaining how he reached this conclusion ***[J/370(xxi)]***.

30. The Judge also failed to assess the impact of his finding that there was nothing akin to a "*three-day hostage situation*" on Ms Heard's credibility. That point was a central premise of her evidence of her Australian ordeal. The context was that she "*was trapped in this remote place without any means to leave*", she was "*at least 20 minutes from help*" and was "*trapped and isolated*" (AH1 at para 102 **[*S/B46-B47*]**). Hyperbole cannot explain away that evidence; in light of the Judge's findings that Ms Heard could have got help or left the house. If he had addressed this evidence, he would have found she had lied in her statement. It was incumbent on the Judge to address her evidence, to analyse it, and to explain how

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remove Ms Heard because she had "*struck me about 10 times*" was considered too unfair to be taken into account at all **[*J/201-202*].**

this untruthful evidence affected his decision. His failure to do so is illustrative of something characterizing the Judgment; the Judge never criticized Ms Heard in any respect.

31. Having found (as he did) that Ms Heard could have left the house and that there were "*people around*" ***[J/370(xxi)]***, the Judge failed to address the inherent improbability of her account that she remained in the house for 3 days and suffered a large number of assaults and sustained multiple injuries. Instead, the Judge found that these assaults "*must have been terrifying*" ***[J/370(xxii)]*** and accepted her evidence that she feared for her life AH1 at 112 ***[S/B49]*** & **[*J/370(xxii)]*** – but (for reasons which he did not address) he did not explain why Ms Heard remained in the house.

32. The Judge also failed to test Ms Heard's account against the contemporaneous documents and the absence of documents that would have existed if her account were true.

    32.1. An accidental five hour recording on a phone captured snippets of conversations of people at the house in the aftermath of Incident 8 (where there was extensive damage to property following the couple's argument). They were unaware they were being recorded. It captured Mr Judge, head of security, referring to Ms Heard. He had seen and spoken to her; he relates that Ms Heard had admitted throwing the first bottle and admitted hitting the Appellant first ***[J/324]***. This documentary evidence contradicted Ms Heard's oral evidence (Day 11, pp.1846-1847) **[*S/B231*]**. The Judge included it in the Judgment – but then ignored its implications for the accuracy of Ms Heard's account and her credibility.

    32.2. Ms Heard's psychotherapist's note of his conversation with her the same day contains no record of Ms Heard relating to him the events she recounted in oral evidence **[*S/B246*]**, **[*J/353*]**. The note was consistent with the recording. The Judge mentioned the note, but once again failed to consider its implications for Ms Heard's oral evidence.

33. The Judge also failed to consider the lack of documentary evidence which would have been expected to exist if Ms Heard's account were true:

33.1. Ms Heard's evidence was that she sustained "*an injured lip and nose and cuts on [her] arms*" AH1 at para 102 **[*S/B46-B47*]**, Day 11, p.1832-3 **[*S/B228-B229*]** and cuts on "*my arms, my feet*" and her "*hands*" or "*wrists*", Day 11, pp. 1838-9 **[*S/B230*]**.

33.2. There were no medical records recording the injuries which Ms Heard allegedly sustained: C.f. the Confidential Annex. The absence of contemporaneous documents was a material, relevant consideration which the Judge ignored.

33.3. Ms Heard's evidence was that, throughout her relationship with the Appellant, she took photographs in order to show him afterwards what he had done: AH1 at paras 39, 43 **[*S/B33-B34*],** Day 11, pp.1846-1847 **[*S/B231*]** (although she had to accept in evidence that she never in fact did so, which supported his case that the photographs were not authentic and did not show genuine injuries). Ms Heard did take photographs at the time showing damage to the house in Australia; but none at all evidencing any injuries to her. She photographed graffiti on a mirror to record the damage done to the house, but did not photograph injuries to her face which (if they existed) would have been visible in the mirror. The Appellant pressed this submission (Day 16, pp. 2646-2647 **[*S/B243*]**), but the Judge ignored it. It is not only the absence of evidence which should have existed if Ms Heard's account of documenting the Appellant's conduct was true, the Judge failed to consider the inherent improbability that if her account were correct, after the assault, she photographed a lampshade, but not her facial injuries.

34. The Judge failed to assess that on the accidental recording, Mr Judge says he saw "*scratches on her left arm*" but did not mention facial or other injuries. The Judge failed to test Ms Heard's oral evidence against this contemporaneous document.

35. The Judge's failure to consider all the evidence extended to the conflicting evidence given by other witnesses: for example, the evidence of Ben King was that he saw scratches on Ms Heard's arm but no other injuries. He was at the house on 8 March **[*J/324*]** and accompanied Ms Heard back to Los Angeles. He was not challenged in cross-examination on his evidence that Ms Heard had no facial injuries, Day 7, p.1097-1101 **[*S/B210-B211*]**. The Judge ignored this critical evidence against which to assess Ms Heard's account. Furthermore, this is not in his Judgment, and there is no finding about Mr King as a witness.

36. The Judge therefore concluded that the Appellant was guilty of serious physical assaults without taking account of or even acknowledging that Ms Heard had been untruthful in her evidence, without testing her account against the documentary evidence and the evidence of other witnesses, and without making any findings that he disbelieved those witnesses.

37. Incident 12, which the Judge also found proved, provides another example of him failing to test Ms Heard's account against contemporaneous documentary evidence. Ms Heard's evidence was that the alleged assault on 15.12.15 left her with "*two black eyes, a broken nose, and a broken lip, bruised ribs, bruises all over my body…bruises on my forearms…I had bruises primarily. The really bad ones were in my hairline, in my scalp, my chin… like purple/red on my temples and in my chin*" (Day 12, p.1912 **[*S/B233*]**).

38. A medical note from 17.12.15, made by Ms Heard's private nurse and friend, who had relevant expertise and who cared for Ms Heard, recorded that she had examined her and found nothing more than a small abrasion on her lip ***[J/444]*** (which was consistent with the evidence she often had chapped lips that would bleed). The Judge disregarded the documentary evidence on the basis the nurse's visit was "*a cursory inspection*" ***[J/455(x)]***. If Ms Heard had had the injuries she described, it would have alarmed even a stranger – it is implausible that her private nurse and friend would have missed them. This contradicted the evidence from Ms Heard that the bruises would have been most pronounced on the second day after an assault (Day 10, pp.1687-1688) *[**S/B223-B224***].

39. Her evidence of the injuries was also inconsistent with the other contemporaneous documentary evidence (such as footage of her appearance on a popular television programme the following day which showed her uninjured face, in particular the broken nose which could not possibly have been covered up by make-up), as well as witness evidence. Ms Heard also posed with a wide-open mouth which was inconsistent with having sustained a split lip. Her evidence under cross-examination expanded to include bruised ribs and a bruised chin; injuries which had not previously featured in her evidence or in the pleadings. Although the Judge accepts that the Appellant assaulted Ms Heard "*as she and the Defendants have alleged in Incident 12*" ***[J/455(xv)]***, as with the other findings, it is not clear which parts of the assaults or injuries he finds are proved, or his reasons (see Schedule at ***S/B4-B19***) given the inconsistent nature of her evidence and conflicting

documentary evidence. The Judge's assessment of the documentary evidence was not one reasonably open to him.

40. Incident 14 was the final alleged assault. It was important because a number of witnesses had seen Ms Heard in the immediate aftermath. Many of them were independent of the Appellant and Ms Heard, including the evidence from two Los Angeles Police Department ("LAPD") officers who attended the scene.

41. The Judge rejected the evidence of the two officers, despite being independent of the Appellant and Ms Heard. The Judge did so primarily because they took no contemporaneous notes **[*J/573(iv)]***. He failed to consider that the LAPD police procedure only required police logs where (as here) there was no sign of domestic violence. He also ignored the fact that the Respondents deliberately chose not to cross-examine the account given by the second officer who stated that Ms Heard had no facial injuries when he saw her.

42. The Judge also rejected the evidence of other witnesses who worked in the building where Ms Heard lived, who saw her after Incident 14 and testified she was not wearing make-up and had no injuries to her face. The Judge gave no explanation as to why he disbelieved those witnesses or several other witnesses who gave evidence to the same effect. His finding was that he accepted Ms Heard's evidence that she wore make-up when she went out because of paparazzi interest. He failed to address how that finding fitted with these witnesses having seen her within the building or how they could be so wrong in their evidence that she was not wearing make-up, as well as ignoring the evidence given by her acting coach and friend who testified that Ms Heard often wore no make-up unless she was going to an event: Day 14, pp.2250-1 ***[S/B239-B240]***.

43. In a trial where witness credibility was such a central consideration, there is a notable absence of any section in the Judgment where the Judge examined the credibility of the witnesses. With two exceptions (Joshua Drew and Kate James)[3] the Judge fails to give any such assessment of the witnesses.

[3] The Judge found Mr Drew an impressive witness ***[J/573(iii)]***. The Judge found Ms James unsatisfactory because she had been dismissed ***[J/112]***. He did not explain how that assessment

44. It is implicit in his decision and the findings which he made in accepting Ms Heard's account that he rejected the sworn evidence of nineteen witnesses, including, police officers and various individuals who worked at the building where Ms Heard lived. The Judge failed in his obligation to explain why sworn evidence was disbelieved (cf ***Kogan v Martin*** **[2019] EWCA Civ 1645; [2020] EMLR 4 at [88]***)*. His failure to provide this assessment of the witnesses further demonstrates the lack of analysis endemic in the Judgment.

45. Ms Heard gave evidence that, in respect of this alleged assault (Incident 14), the Appellant had wound his arm back "*like a baseball pitcher*" (Day 10, p.1646 **[*S/B222*]**) and thrown an iPhone at her face with force. Ms Heard claimed that the phone struck her cheek and eye. Under cross-examination Ms Heard said she thought it "*popped her eye out*" (Day 10, p.1646) [***S/B222***]. Even though the Respondents relied upon photographs, none of them showed any sort of injury to Ms Heard's eye or face consistent with being struck in the face with an iPhone with force. There is no swelling or any lacerations. This is yet another example of how the Judge failed to analyse carefully the material or to provide an explanation as to how he made a finding in the Respondents' favour despite such conflicting evidence.

46. Where the Judge discounted evidence from the Appellant's own employees, he failed to give adequate reasons, address relevant factors, or otherwise explain his reasoning.

    46.1. If, as the Judge found, the Appellant's staff were motivated to avoid bad publicity for the Appellant, the Judge failed to consider the inherent probabilities which flowed from that finding. The implication is that, on occasions where the Appellant's employees were present when he allegedly assaulted Ms Heard (such as Incident 4), they did nothing to protect her. The Judge needed to address whether the witness in Court was so lacking in humanity that he was willing to stand by while a woman was assaulted. These witnesses gave sworn testimony that they would never have done so.

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fitted with the documentary evidence from the time around her departure where she continued to give assistance to Ms Heard's sister who was taking over **[*S/B245*]**. He just ignored it.

46.2. By not addressing inherent probabilities, the Judge failed to analyse the circumstances. Even if the Appellant's employees were only interested in protecting the Appellant, the only conduct consistent with that priority would have been to have intervened to stop an assault. Otherwise, there was a risk of Ms Heard disembarking from a flight with assorted injuries and a consequential PR disaster, the very thing the Judge concluded they wanted to avoid.

46.3. Similarly, if Ms Heard had the facial injuries she described after Incident 8 in Australia, it is improbable that the employees would have arranged her return to Los Angeles on a commercial flight (as they did), landing in an airport frequented by paparazzi.

47. Faced with allegations of having physically assaulted Ms Heard on at least 14 occasions which the Appellant testified had not happened (combined with Ms Heard's reliance on his 'monster' personality not remembering what he had done), the Appellant's response was necessarily focused on Ms Heard's credibility. As to that, the Judge:
    (a) failed to address the principal challenges posed to her credibility;
    (b) failed to take advantage of seeing Ms Heard cross-examined on contemporaneous documents to assess her "*candour*" (cf. ***Central Bank of Ecuador*** **above at 14**) and '*to gauge her personality, motivations*' (cf. ***Kimathi*** **at [96]**), and
    (c) made findings that were unsustainable on the evidence and reasons that were untenable.

48. A key element of the Appellant's challenge to the veracity of Ms Heard's (sole) account of being the victim of three years of persistent domestic violence was the evidence of her violence towards him. Much of this evidence came from her, including recordings made by her of their conversations, as well as contemporaneous documents and witness testimony. The Appellant relied upon this (a) to rebut Ms Heard's account of the alleged assaults – because it was inconsistent with them, and (b) to challenge her credibility, because her evidence on oath was that she had <u>never</u> been violent towards him other than in self-defence. See AH3 at para 12 **[S/B123]**; Day 11, pp.1774 **[*S/B226*]** "*I was not violent with him*" & pp.1777-8 "*I had been for years, for years, Johnny's punching bag and for years I had never ever hit him. I had never so much as landed a blow … it was the first time after all these years that I actually struck him back.*" **[*S/B227*]**.

49. A finding that Ms Heard had lied in respect of that evidence (as was inevitable given the wealth of evidence demonstrating that she was violent) would have required the Judge to consider the veracity of her evidence that she had been the victim of numerous assaults, because it was central to understanding both what happened in the relationship and her credibility. Instead, the Judge (i) ignored contemporaneous documents, (ii) made unsustainable findings on the documents, and (iii) failed to take account of compelling evidence of Ms Heard's violence. His uncritical acceptance of her account of events is manifestly unsafe.

50. For example, in one of the audio recordings made while the Appellant and Ms Heard were still in a relationship (referred to as 'Argument 2'), Ms Heard openly admitted, knowing that she was being recorded, that she had hit the Appellant, slapped him across the face, and thrown pots and pans at him [**Argument 2 Media File and transcript at *S/B271***]. She even calls him a "*f****** baby*" for complaining about being hit and for walking away instead of staying once she had started to get physical. In another recording shortly after the end of their relationship [**Audio recording from San Francisco and transcript at *S/B308***], she did not deny the Appellant's statement that she had violently punched him on the occasion of 'Incident 13'. This recording was made in San Francisco when Ms Heard chose to visit him in his hotel bedroom alone, soon after seeking the continuation of an ex parte domestic violence restraining order obtained against him because she claimed to be in fear for her life, even asking him to join her in bed. The Judge gave no weight to this point.

51. The only fair conclusion from this documentary evidence was that Ms Heard had not only been the violent one (which was inconsistent with her account of being 'the abused', as opposed to the 'abuser') but that she had also been untruthful in her oral evidence about the Appellant's violence.

52. Bizarrely, the Judge placed no reliance on her admission of violence because her statement in the recording 'was not given on oath' and because he found that the document did not evidence what it manifestly did, namely, an admission by Ms Heard of having attacked the Appellant **[*J/169-176]***. The Judge's departure from the established approach to fact-finding was not warranted, particularly without giving reasons. His preference for oral evidence which contradicted a contemporaneous document was a failure of approach, being

inconsistent with ***Armagas Limited v Mundogas SA ("The Ocean Frost")*** **[1985] 1 Lloyd's Rep 1**.

53. The Judge excluded evidence which undermined Ms Heard's credibility regarding her account of the violence in the relationship. For example, it was wrong for the Judge to exclude the eyewitness evidence of Tara Roberts of Ms Heard's assault on the Appellant in December 2015 (T Roberts Witness Statement at paras 10-21 **[*S/B132-134*]**) as 'neither necessary nor proportionate' because the Respondents had not pleaded it **[*J/458*]**. Ms Roberts' evidence was that she witnessed Ms Heard aggressively lunging and clawing at the Appellant, but that he never physically responded at all to the attacks. Ms Roberts also saw the swelling gash on the Appellant's nose after Ms Heard had thrown a can of paint thinner at his face T Roberts WS at para 15-16 **[*S/B133*]**. The Respondents introduced the supposed incident, led evidence on it and made submissions on it in closing. It was necessary for the Judge to make findings as to what occurred; the Appellant relied upon the evidence to demonstrate Ms Heard was untruthful in her account of being the victim of violence. The Judge failed in his task. By not making findings of fact on Ms Roberts' evidence, he failed to take account of relevant evidence. If the Judge had found Ms Roberts to be a truthful witness (which, given the cross-examination he would have been compelled to do: Day 6, pp. 961-971 **[*S/B206-209*]),** he would again have had to revisit the views he had formed as to Ms Heard's truthfulness.

54. The Judge's conclusion that Ms Roberts' evidence would have made no difference to his decision **[*J/581*]** was not a reasonable one. Accepting Ms Roberts' evidence would inevitably have required the Judge to consider Ms Heard's account, and in particular whether she was willing to lie about the violence in the relationship. The fact that the Respondents said that they no longer wished to rely upon Ms Heard's account, AH5 at paras 23-29 and Confidential Schedule **[*S/B151-B153*]**, (in response to a request by the Judge to the parties some months after the trial asking what bearing it had on the issues) was not a reason for the Judge to ignore the evidence. This is another example of the Judge failing to address evidence which was damaging to Ms Heard's credibility.

55. This was consistent with the Judge's disregard of any evidence that showed Ms Heard was capable of violence.

55.1. The Judge refused to make any findings that Ms Heard had assaulted her former partner, Tasya van Ree, leading to her arrest. Subsequent events which he rehearsed **[*J/194-J/197*]** are not findings of fact. The fact Ms van Ree did not wish to pursue a complaint says little. The Judge refused to address whether the assault happened.

55.2. The Judge similarly refused to address video evidence of Ms Heard's sister, Whitney Henriquez, in a reality TV type programme. In this video, those around Ms Henriquez refer to her being bruised and that her sister had 'beat her ass' **[Video at Media File P182a and transcript at *S/B252-253*]** Day 14, pp. 2264-8 **[*S/B241-242*]**; this contradicted evidence given by her that her sister had never been violent to her. The Judge glossed over this **[*J/200*]**. The footage was consistent only with a finding that she was sporting bruises and Ms Henriquez's evidence that she had wanted "*to shut down that topic of conversation*" was also consistent with the fact that this had happened. Whatever the evidence showed, the Judge did not address it or make any findings of fact. These matters deserved proper scrutiny.

55.3. The deliberate tailoring of Ms Henriquez's evidence to suit that of her sister (even whilst giving evidence under her watchful eye) was another challenge to Ms Heard's credibility that the Judge ignored and failed to address in his Judgment.

56. At the time, the Appellant and Ms Heard had many recorded conversations about the nature and state of their relationship. The transcripts and audio files were in evidence. Ms Heard never referred to violence akin to that which she recounted in her oral evidence, save for a reference to one occasion when the Appellant accidentally knocked Ms Heard's head and she accused him of head butting her (Incident 12). The Judge gave no adequate consideration to her failure to mention in those recordings anything akin to her evidence at trial. The Judge should have considered whether her willingness to mention this (which the Appellant explained was an accidental knock of heads after she punched him) undermined her evidence that she did not refer to the assaults because these conversations had "*a purpose or purposes different from conveying truthful information*" **[*J/175*]**.

57. The Judge failed to consider, if he accepted the evidence from Ms Heard as to the purpose of the conversations, why, despite that, he felt able to rely on the same documentary record to be satisfied the Appellant had assaulted Ms Heard by headbutting her **[*J/455(iii)]***. It was

one rule for Ms Heard and another for the Appellant when it came to relying on or disregarding the contents of the same document[4].

58. Further, in relation to the 'headbutt', although the Judge found this incident proved (albeit without dealing with the other serious assaults alleged during this incident, as shown in the Schedule) and, by implication, rejected the Appellant's account that this was just an accident. There is no reasoning as to (a) why he found the headbutt was not accidental but intentional; (b) whether Ms Heard's nose was broken or not; (c) why, if she did have black eyes, these were not seen by the registered nurse who examined her face and head.

59. The Judge should have taken account of the answers given in relation to documents put in cross-examination in order to assess the candour and personality of the witness. The Judge failed to do this, or reached unreasonable conclusions about Ms Heard's responses.

60. Each adverse document put to Ms Heard was met with a response that it was not accurate or someone else was to blame for what was written (even those where the potential adverse impact on her character or account was limited), including medical notes which recorded her own statements to doctors or registered nurses, there is no indication in the Judgment that the Judge considered the point. He just accepted everything Ms Heard said, however implausible, and however inconsistent with the documents. For example, when Ms Heard's medical records contradicted her evidence, she blamed the healthcare professionals:

    60.1. Ms Heard's nurse (and friend), Erin Boerum, recorded Ms Heard telling her about her "*jealousy*", her "*rage*" (Note of 27.08.14 **[*S/B244*]**); Ms Heard's response was that the nurse had either wrongly recorded matters or the notes had to be interpreted completely differently from their natural meaning (Ms Heard's answers were less than

[4] The document called Argument 2 demonstrates how the Judge accepted the contents of a document were accurate and corroborative when they supported Ms Heard, but the contents of the same document could be disregarded as inaccurate when not corroborative of Ms Heard. The Court's attention is drawn to ***J/174-175, J/354-356, J/370(xxiv) & J/389 & J/396(iii)***. All of those paragraphs refer to statements said by either Ms Heard or the Appellant during Argument 2 or are relevant to the content of the document. As the Court will note the Judge treats them differently whether they could be seen to help Ms Heard or not.

clear but she refused to accept that the medical notes, which conflicted with her oral evidence, were accurate): Day 10, p.1584-1590 **[*S/B219-221*]**. The Judge accepted this, although he gives no explanation as to why he did so **[*J/370(xi)*]**.

60.2. Nurse Boerum's medical note also recorded Ms Heard having told her of a history of mental and physical disorders as well as her substance abuse; Ms Heard claimed that this note was incorrect and that despite the document being a record of the nurse taking her history, Ms Heard denied that it had happened. Day 10, p.1541-1544 ***[S/B216-217]***.

60.3. Her medical records also recorded her use of recreational drugs **[*S/B244*]**; again, Ms Heard's response was the note was incorrect in this respect (although not others) – here, she blamed the Appellant for giving the doctor false information: Day 10, p.1552 ***[S/B218]***.

60.4. The Judge uncritically accepted Ms Heard's oral evidence **[*J/294*]**. He failed to use the contemporaneous documents to assess her as a witness, as was incumbent upon him.

61. Ms Heard's refusal to accept the correctness of the documentary evidence, because of the damaging implications of what the documents stated, was further demonstrated by her response to an email which she had written on 21.9.13 to her personal assistant (Kate James). That email showed Ms Heard's willingness to be dishonest.

61.1. In the email she asked Ms James to get the Appellant's estate manager to "*procure a slightly altered health doc*" for the dogs. The email asked: "*Do we have a vet we could grease? Connection?*" ***[S/B145]***. Ignoring the fact that she was the author of the email, Ms Heard's evidence was that "grease" was claimed to be the Appellant's word: AH5 at 67 **[*S/B160*]**; Day 12, pp.1904-6 **[*S/B232]***. Her denial of responsibility was tellingly hollow.

61.2. Rather than assessing Ms Heard's performance as a witness by reference to the admitted evidence, or considering how her responses reflected upon her candour, the Judge decided that the underlying matter (procuring false documents to evade pet

travel regulations) was tangential to what he had to decide **[*J/149-J/153*]**. But the ultimate question he had to decide was whether Ms Heard was a truthful witness. He did not undertake that crucial task. He failed to assess her response to the adverse documents put to her.

61.3. The same is true of Ms Heard's denial of lying in a letter to Homeland Securities about her employment of another assistant, Savannah McMillan, something which she denied, as she did her obvious authorship of the letter. For example, the Judge dismissed the note made by Nurse Boerum contradicting her account, as he did the other conflicting documentary evidence, without explaining why. Further, he failed to take account of the impact this should have had on her credibility [***J113-4***]**.**

62. A yet further illustration of Ms Heard's refusal to accept the correctness of a document was her response to a document that recorded (in clear terms) her admission that she had "*punched*" the Appellant in the face; under cross-examination she said her words were in fact the opposite, namely a denial that she had punched him. Contrast **[Audio "File Q" and Transcript at *S/B309-310*]** and Day 11, p.1770-1771 **[*S/B225*]**. Again, this is not dealt with in the Judgment.

63. Ms Heard's responses to documents were always the same, namely to deny their accuracy: cf. Warby J's assessment of a witness in ***Dutta*** at **[42]**) that "*It was plain that her only basis for saying so was that the documents were at odds with what she was saying. She was seeking to "explain away" the problem in a way that maintained her belief in her own account, a classic symptom of cognitive dissonance"*. This Court is invited to conclude that the Judge failed to undertake the key assessment of Ms Heard as a witness.

64. The authorities make clear that findings based upon memories should be reached with some caution. For example, see ***Kimathi*** at **[96]**:
"*We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate…Events can come to be recalled as memories which did not happen at all or which happened to someone else*".

Here, the Judge's decision was based upon accepting that Ms Heard had clear recollections of the assaults which she alleged took place between seven and four years earlier; otherwise, he could not have 'accepted her account'. As is clear from the closing submissions, the Judge accepted her recollections almost wholesale despite the fact that: (a) there were numerous changes in the nature and detail of her accounts; (b) the changing number and seriousness of the alleged assaults over time, including in the days before trial and in the witness box, and (c) in her response to challenges, she said that there were many other assaults of a similar nature, e.g. Day 11, p.1776-1777 **[*S/B226/227*]**.

65. Finally, the Judge erred in law in his application of the Civil Evidence Act 1995 to a witness who attended to give evidence **[*J/573(iv)*]**. The Appellant relied as hearsay upon a deposition given by a LAPD police officer, Officer Hadden, in legal proceedings in the US. However, the Respondents obtained an order that he attend for cross-examination (CPR 33.4), and the officer did so. As explained in paragraph 41 above, the Respondents elected not to cross-examine him, and his evidence was therefore unchallenged. The factors relevant to the assessment of weight to be given to hearsay evidence (s.4 of the 1995 Act) had no role to play. Those factors are in part to ensure fairness to a party who has not had the opportunity to cross-examine the maker of the statement. The factor in s.4(2)(a) to which the Judge referred certainly had no relevance; there was no question as to whether it was 'reasonable and practicable' for the Appellant to call Officer Hadden to give oral evidence. Officer Hadden had made himself present despite the Covid-19 pandemic under an order obtained by the Respondents.

Conclusion

66. The failings described above are examples of the serious flaws in the way the Judge performed his task. The conclusion which flows from an overall assessment of the Judgment is that he decided to find for the 'victim' but failed to provide the necessary analysis to explain or justify that conclusion. Also he excluded relevant evidence from his consideration, ignored or dismissed as irrelevant matters that substantially undermined Ms Heard, made findings unsupported by the evidence, and failed to assess whether her allegations could withstand proper scrutiny. The Judge failed to properly assess her credibility by reference to documentary evidence, photographs, recordings or otherwise.

67. That conclusion is bolstered by the fact that on occasion, the Judge sought to improve Ms Heard's evidence. For example:

67.1. In relation to Incident 12, the Judge found that "*Ms Heard also saw someone (probably Nurse Practitioner Monroe Tinker) in Dr Kipper's office on 17th December. I do not attribute significance to the comment by Ms Heard that she had bumped her head (accidentally) while standing up. She had not, at that stage, decided to go public with her allegations against Mr Depp.*" **[*J/455(ix)*]**. These notes were not put Ms Heard in cross examination[5], so that cannot reflect the evidence.

67.2. Similarly, the Judge did the same in respect of Incident 14, **[*J/573(vi)(c)*]** ("*Since she was not willing at these stages to go public with her allegations against Mr Depp, one purpose of the make-up would have been to do her best to conceal the injuries and marks*"). That was not referred to in Ms Heard's evidence in relation to this incident[6].

68. The flaws revealed by the Judgment in the judicial process are serious. In order to ensure that the Appellant's Article 6 rights are meaningful, the Court is invited to grant permission to appeal so that the Judgment can be reviewed. The failure to examine the evidence and the arguments with the care that the parties were entitled to expect and which a proper resolution of the issues demanded renders the Judgment unsafe. If permission is granted, the Appellant will ask the Court to set aside the Judgment and order a re-trial.

69. It is also the case that these highly publicised findings are devastating to the Appellant. The Article was highly damaging to his reputation in contravention of his Article 8 rights and the judgment was even more harmful. This is a paradigm case where there are additionally compelling grounds for the Judgment to be reviewed on appeal.

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[5] Ms Heard was cross-examined about Incident 12, Day 12, pp. 1908-1922 ***[S/B233-236]***

[6] See **[*J/ 499(x)]*** and Day 10, pp.1685-1689 ***[S/B223-224]***