



Neutral Citation Number: [2025] EWHC 180 (KB)

Claim Number: QB-2022-001397

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

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Wednesday, 29th January 2025

Before:

MRS JUSTICE STEYN DBE

Between:

NOEL ANTHONY CLARKE	<u>Claimant</u>
- and -	
GUARDIAN NEWS & MEDIA LTD	<u>Defendant</u>

PHILIP WILLIAMS, ARTHUR LO and DANIEL JEREMY (instructed by **The Khan Partnership LLP**) appeared for the **Claimant**.

GAVIN MILLAR KC, ALEXANDRA MARZEC and BEN GALLOP (instructed by **Wiggin LLP**) appeared for the **Defendant**.

Approved Judgment

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MRS JUSTICE STEYN :

1. There are two applications listed before me today for determination. The second application is an application brought by the claimant to strike out the defence in whole or in part, specifically the public interest defence to the defamation claim. The grounds for that application are, in short, that the defendant has, it is alleged, perverted the course of justice by destroying and fabricating evidence prior to the commencement of proceedings, rendering a fair trial impossible. I have not yet heard argument on the second application, and so I will give judgment on that application in due course.
2. The first application, which is made in aid of that strike out application, is for an order pursuant to CPR 32.7 giving the claimant permission to cross-examine Mr. Paul Lewis during the hearing of the strike out application.

The law

3. CPR 32.7(1) provides:

"Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence."
4. The claimant contends that there is "*little guidance as to when the court might choose to exercise its discretion in accordance with this rule*". But he relies upon the case of *Jenington International Inc v Assaubayev* [2010] EWHC 2351 (Ch) in support of the proposition that, as Vos J (as he then was) put it, at [22.1]:

"The statutory discretion to order cross-examination is broad and unfettered. It may be ordered whenever the court considers it just and convenient to do so."
5. *Jenington* concerned an application to cross-examine on a freezing injunction disclosure of assets affidavit. Since that case, in *Stokoe Partnership Solicitors v Grayson* [2021] EWCA Civ 626, [2021] 4 WLR 87, the Court of Appeal identified the proper approach to be taken by the court in determining whether to grant an application pursuant to CPR 32.7(1). The claimant firm had brought a *Norwich Pharmacal* claim against the defendant. Their application for permission to cross-examine the defendant prior to trial was refused by William Davis J and upheld by the Court of Appeal. In *Stokoe*, Bean LJ, with whom Peter Jackson and Coulson LJJ agreed, observed at [17]:

"English law does not generally permit, save by consent, depositions, in other words oral interrogation of an opposing party, except at trial where that party has chosen to give evidence."
6. Bean LJ noted that there are exceptions, namely examination of a judgment debtor and cross-examination on an affidavit sworn in answer to an application for a freezing injunction containing an order for disclosure of the whereabouts of assets. In the former context, the purpose is to aid the enforcement of a judgment that the claimant

has already obtained. An order for cross-examination in the latter context, such as in *Jenington*, is "to protect the assets from being concealed, dissipated or transferred abroad so as to frustrate the effectiveness of any judgment which the claimant will obtain at trial". (*Stokoe*, [17])

7. Even so, cross-examination on a freezing injunction disclosure affidavit is an exceptional measure, and the court must be astute to guard against any attempt by a claimant to "extract by cross-examination under order of the court, material upon which to build his case for the substantive hearing". (*Stokoe*, [18], citing *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (The Rialto)* [1996] EWCA Civ 759).
8. The Court of Appeal upheld the refusal of permission to cross-examine on the basis that the judge's first and principal reason for refusing the application, namely that cross-examination would pre-empt cross-examination at trial, was a sound one (*Stokoe*, [33]).
9. Bean LJ observed that the phrase "*just and convenient*" is contained in section 37 of the Senior Courts Act 1981, which deals with the power of the High Court to grant an injunction, and has been held by this court to apply to applications to cross-examine a deponent to an affidavit in answer to an order ancillary to a freezing injunction.
10. In *Stokoe*, the Court of Appeal was prepared to assume, without deciding that the test of whether it was just and convenient applied, in circumstances where that had been common ground at first instance and on appeal. Nonetheless, Bean LJ observed, at [15]:

"The present case does not involve an injunction, and it is therefore less obvious that the s.37 test is the right one. But even assuming that it is, the phrase 'just and convenient' does not confer a discretion of infinite width. The discretion must be exercised in accordance with established principles."
11. Section 37 of the Senior Courts Act 1981 does not apply in this case, which does not involve any application for an injunction or an order ancillary to a freezing injunction. In my judgment, the discretion conferred by CPR 32.7(1) must be exercised in accordance with the overriding objective of dealing with cases justly and at proportionate cost (CPR 1.1), and the established principles identified in *Stokoe*. However, the outcome would be the same if I were applying the test of whether it is just and convenient to grant the application. Applying either test, the discretion is not of "*infinite width*" (*Stokoe*, [15]), or, as the claimant contends, "*broad and unfettered*".
12. In short, granting permission for an oral interrogation of an opposing party prior to trial is an exceptional measure. The two exceptions to which I have referred arise in circumstances where the court is seeking to ensure orders it has made following a trial are effective, or that orders it anticipates making are not frustrated. The discrete topic of cross-examination concerns the location of assets. Beyond those exceptions, the court has a discretion to permit cross-examination prior to trial, but that discretion should be exercised only where, exceptionally, granting permission would be just and proportionate, bearing in mind the need to guard against the obvious unfairness of

permitting one party to test and build his case on the merits, by compelling the other to submit to early, extra cross-examination.

Application to the facts

13. Mr. Lewis is the defendant's Head of Investigations. He was the principal editor responsible for supervising the main reporters, Sirin Stewart (née Kale) and Lucy Osborne, in respect of the journalism that is the subject of this litigation. Mr. Lewis has given a 49-page witness statement for trial, dated 20th November 2024, and will be called to give evidence by the defendant at trial, primarily directed to the public interest defence on which the defendant relies, pursuant to section 4 of the Defamation Act 2013.
14. Guardian News & Media Limited is currently the sole defendant. The claimant's amendment and joinder application, which is to be determined after the liability trial in respect of the defamation and data protection claim against the defendant, seeks to add Mr. Lewis as the first of six proposed new defendants, as well as, among other matters, seeking to add a new cause of action in unlawful means conspiracy.
15. The claimant's strike out application was made on 31st December 2024. The grounds for the application are given in the fourth witness statement of Mr. Khan of the same date. In essence, Mr. Khan alleged that "various employees and agents of the defendant", including Mr. Lewis, Ms. Osborne and Ms. Stewart, "deleted extensive evidence wholly relevant to these proceedings". He alleged that this "pre-litigation destruction of evidence" occurred at a time when they knew "without reservation" that "the defendant's publications would form the subject of litigation".
16. Mr. Khan also accused Mr. Lewis (at least) of fabricating evidence (Khan 4, paragraphs 9.1 and 11.1), although he has not specified what evidence is alleged to have been fabricated. Mr. Khan alleged that Mr. Lewis, Ms. Osborne and Ms. Stewart, "and potentially other editors", committed the common law offence of perverting the course of justice (Khan 4, paragraph 19).
17. The defendant filed and served statements in response to the strike out application from Mr. Lewis, Ms. Osborne, Ms. Stewart, Gillian Phillips, the defendant's editorial legal consultant, and Nick Hopkins, the defendant's executive editor for news. The claimant's application to cross-examine is directed to Mr. Lewis's 28-page second witness statement, dated 13th January 2025, in which he responds to the allegations made against him by Mr. Khan.
18. Mr. Lewis gives evidence regarding his understanding of the defendant's data retention practices, and his own practice in that regard, the communications and methods he used for investigations generally, and specifically in the investigation of the claimant, including Signal. He addresses the auto-deletion of four Signal threads, and the (as it turned out, ineffective) manual deletion of two other Signal threads and he gives evidence regarding his belief at that time as to the likelihood of litigation.
19. The claimant contends that Mr. Lewis's explanation that his instructions to the journalists to delete the two threads on which auto-delete had not been enabled, to bring them in line with those on which messages were set to disappear and the defendant's data retention policy, at a time when the first article had not yet been

published, no litigation hold had been issued, and litigation was not reasonably contemplated, is "*simply unconvincing*". The claimant submits that Mr. Lewis's conduct in deleting evidence was dishonest, and the court cannot take him at his word. In these circumstances, the claimant contends it is necessary to allow him "*to be cross-examined as to what exactly was his intention in respect of his messages*". In particular, there are six Signal messages sent on the 29th April 2021 in the hours prior to publication of the first article, in respect of which the claimant wishes to cross-examine Mr. Lewis.

20. The claimant acknowledges that normally where there exists a major dispute of fact in respect of the triable issues, this would militate towards an application for strike out failing, rather than the court conducting a mini trial of the issues. However, he contends that the issues on which the claimant seeks to cross-examine Mr. Lewis do not relate to the substantive merits of the claim. I have heard oral submissions from Mr. Lo and Mr. Jeremy on behalf of the claimant, who both urge me that the issues on which cross-examination is sought are separate; they concern the prior issue of whether there has been a perversion of the course of justice and/or whether a fair trial is possible, rather than the substantive issues for trial.
21. In my judgment, applying the principles I have outlined, the application for permission to cross-examine Mr. Lewis on this strike out application must be rejected. The proposed cross-examination on the allegation that Mr. Lewis has perverted the course of justice is not a discrete issue unconnected to the matters on which Mr. Lewis is due to be cross-examined at trial in a few weeks' time. It concerns the journalistic investigation that was undertaken, and the documents that were made and retained or deleted regarding that investigation. At trial, it will be open to the claimant to cross-examine Mr. Lewis about any gaps in the evidence regarding the investigation, including the reasons any documents were destroyed, and to invite the court to draw adverse inferences.
22. At the pre-trial review, counsel for the defendant, Mr. Millar KC, accepted that it is open to the claimant at trial to put the central propositions in his draft re-amended particulars of claim to those witnesses, including Mr. Lewis, who he alleges, have engaged in a conspiracy against him. That is a line of cross-examination that is open to him to take at trial, in the context of challenging the defendant's truth and/or public interest defences. The allegation of dishonesty, which the claimant wishes to put to Mr. Lewis in cross-examination on this interlocutory application, is a key element of the claimant's substantive response to the defendant's defamation defences, and at the heart of the claim that the claimant seeks in due course to bring directly against Mr. Lewis.
23. In my judgment, it would be unfair, unjust, and would place the parties on an unequal footing if I were to allow the claimant an opportunity to cross-examine one of the defendant's main witnesses prior to trial. I am also unpersuaded that cross-examination of Mr. Lewis would materially assist on the key question of whether a fair trial is possible. Moreover, I note that the claimant's case on the strike out application is that the messages sent by Mr. Lewis speak for themselves. This point is made repeatedly in the claimant's submissions and the evidence of Mr. Khan.
24. In my judgment, either the claimant can make out his strike out application on the written evidence, in which case cross-examination is unnecessary, or he cannot, in

which case the matter will proceed to trial. This is very far from the kind of exceptional case in which the discretion to permit oral interrogation of an opposing party prior to trial should be exercised.

25. Accordingly, the application to cross-examine is refused.

(This Judgment has been approved by the Judge)