

The show won't go on—permission to appeal refused in the Depp libel claim (Depp II v NGN and another)

This analysis was first published on Lexis®PSL on 01/04/2021 and can be found [here](#) (subscription required)

TMT analysis: The Court of Appeal has refused to grant permission to Johnny Depp to appeal his unsuccessful libel claim on the grounds that he had failed to show that the judge's conclusions were 'even arguably...vitiating by any error of approach or mistake of law' and also that he failed to show that his criticisms of the first instance judge's reasoning or conclusion had any real prospect of success. The court also dismissed Mr Depp's application for permission to adduce further evidence for the purposes of the appeal, on the basis that it was not satisfied that the relevant evidentiary issue (whether Ms Heard had, in fact, donated the \$US 7m she obtained in the divorce settlement as she had said she would do) 'would probably have had an important influence on the result of the case'. Written by Mathilde Groppo, associate, at Carter-Ruck Solicitors.

Depp II v News Group Newspapers Ltd and another [\[2021\] EWCA Civ 423](#)

What are the practical implications of this case?

The decision is noteworthy primarily because of the high-profile nature of the case, and the fact that in refusing Mr Depp permission to appeal it has now made the first instance decision definitive.

The substance of the judgment applies well-established legal principles regarding the issue as to the grounds on which permission to appeal may be brought. It reiterates the fact that the bar to interfering with a judge's findings of fact is very high, and (adopting Lord Justice Lewison's reasoning in *FAGE UK Ltd v Chobani UK Ltd* [\[2014\] EWCA Civ 5](#)) stresses that this reasoning extends 'not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them'.

The judgment also makes it clear that the exceptionally high-profile nature of the trial did not constitute a compelling reason to allow the appeal to proceed in the absence of a real prospect of success, whether in isolation or seen together with other characteristics of the case—namely, the devastating nature of the outcome for Mr Depp and the potential 'wider repercussions' for alleged victims of domestic violence or those accused of it.

Lastly, the judgment reiterates and applies the principles for adducing fresh evidence as set out in *Ladd v Marshall* [\[1954\] 3 All ER 745](#), restating that fresh evidence should only be admitted for the purpose of an appeal if it:

- could not have been obtained with reasonable diligence for use at the trial
- would probably have had an important influence on the result of the case, and
- is credible

What was the background?

This is the judgment given on Johnny Depp's application for permission to appeal the first instance decision in the libel proceedings Mr Depp brought in connection with an article published on www.thesun.co.uk on 27 and 28 April 2018, entitled 'How can JK Rowling be 'genuinely happy' casting wife beater Johnny Depp in the new Fantastic Beasts film?'.

The defendants relied on a defence of truth, arguing, on the basis of 14 incidents of serious physical assault, that Mr Depp did beat his then wife Amber Heard, causing her to suffer significant injury and on occasion leading to her fearing for her life. Mr Justice Nicol found that 12 of the incidents relied on by the defendants had occurred, and that on three occasions Ms Heard had feared for her life. The defence of truth succeeded at first instance.

Mr Depp's argument was that some aspects of the judge's reasoning and fact-finding exercise were flawed, as developed in a number of individual complaints. The focus in oral submissions was on three such complaints, only two of which are dealt with in the open judgment.

The first related to admissions made in taped conversations by Ms Heard, which were said to contradict her evidence throughout, and to which the judge gave 'no great weight'.

The second related to the defendants' changing evidence regarding an incident having taken place in March 2013, which the defendants argued at trial should lead the judge to conclude that the event had been fabricated.

Mr Depp also sought to adduce fresh evidence obtained since the judgment regarding the issue as to whether Ms Heard had, in fact, donated to charity the \$US 7m she obtained in the divorce settlement as she had publicly announced she would do, and as it is accepted she reiterated in her witness evidence.

What did the court decide?

The court dismissed both of Mr Depp's applications.

The application for permission to appeal

Two main points come out of the Court of Appeal's judgment, namely that:

- the judge did not make a general assessment of the credibility of Ms Heard, the defendants' main witness, which fed into his conclusions of the incidents substantiating the allegation that Mr Depp was a 'wife-beater', and
- his central findings of fact were made on the basis of evidence specifically relating to each of the incidents forming the basis of the allegation, with special attention to the contemporaneous evidence, including texts, emails, photographs and tapes of conversations between Mr Depp and Ms Heard. In this regard, it is worth noting that parts of the evidence had been set out in confidential schedules to the pleadings and the witness statements, and that parts of the trial took place in private

Having considered and dismissed each of the grounds of appeal in turn at paras [24]–[30], the court concluded at para [31] that they did not show any real prospect of success. It stated that the high-profile nature of the case, the devastating nature of the outcome of the trial for Mr Depp, and the potential repercussions of the judgment for victims or alleged perpetrators of domestic abuse did not justify allowing the appeal to proceed absent a real prospect of succeeding.

The fresh evidence application

The Court of Appeal also dismissed the fresh evidence application, which was based on new evidence obtained since the trial regarding whether Ms Heard had, in fact, donated to charity the \$US 7m she obtained in the divorce settlement as she had said she would do.

Applying the well-established *Ladd v Marshall* principles, the court considered that the second limb was not satisfied because that issue had been peripheral to the judge's findings of fact, and Ms Heard had not even been asked about it in cross-examination. The appellate judges did not consider whether the third limb was satisfied, but doubted that it would have been.

Case details

- Court: Court of Appeal
- Judges: Lord Justice Underhill and Lord Justice Dingemans
- Date of judgment: 25 March 2021

Mathilde Groppo is an associate at Carter-Ruck Solicitors. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk

FREE TRIAL