

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

Royal Courts of Justice Strand, London WC2A 2LL

Thursday, 18th March 2021

Before:

LORD JUSTICE UNDERHILL LORD JUSTICE DINGEMANS

BETWEEN:

JOHN CHRISTOPHER DEPP II Appellant

- and -

(1) NEWS GROUP NEWSPAPERS LTD (2) DAN WOTTON Respondents

(Transcript of the Stenograph Notes of Marten Walsh Cherer Limited, 2nd Floor Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP. Telephone Number 020 7067 2900. Fax Number 020 7831 6864 e-mail: info@martenwalshcherer.com)

MR. ANDREW CALDECOTT QC, MR. DAVID SHERBORNE and MS. KATE WILSON (instructed by Schillings International LLP) appeared for the Appellant.

MS. SASHA WASS QC, MR. ADAM WOLANSKI QC and MS. CLARA HAMER (instructed by Simons Muirhead & Burton LLP) appeared for the Respondents.

PROCEEDINGS

(Transcript prepared without access to appeal bundles)

1 ANDREW CALDECOTT QC
2 to say. That is the only point.
3 LORD JUSTICE UNDERHILL: Yes. I certainly reinforce that. Copies
4 of the order are available and can be consulted by anyone who
5 is in any doubt.
6 MR. CALDECOTT: My Lord, thank you. Can I state the background
7 very briefly, because everyone is aware of it.
8 LORD JUSTICE UNDERHILL: Can we just get a feel for the timing.
9 Have you spoken to Ms. Wass about this?
10 MR. CALDECOTT: My Lord, no, because your Lordship's direction
11 rather implied that the court would be flexible about it and
12 would take a view. I am certainly aiming to leave a little
13 time at the end for the other side to have their say. I
14 cannot honestly be sure, because I anticipate there will be
15 some questions.
16 LORD JUSTICE UNDERHILL: Of course. We will be flexible, with a
17 view to the estimate, which is two hours. The formal position
18 I think I did not quite accurately state in the order, on the
19 further evidence application, the respondent has a right to
20 respond.
21 MR. CALDECOTT: My Lord, yes.
22 LORD JUSTICE UNDERHILL: On the permission to appeal application,
23 as you do not need telling, there is no automatic right for
24 the respondent to respond. But the court may want the help on
25 certain points. And we will want enough time left to see what

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2 LORD JUSTICE UNDERHILL: ... or photos made of it. Still less
3 should anything be retransmitted on social media or any other
4 way. That applies to anyone viewing. Of course, that does
5 not prevent ordinary reporting by journalists and others
6 watching in the usual way. Yes, Mr. Caldecott?
7 MR. CALDECOTT: My Lord, on these applications I appear with
8 Mr. David Sherborne and Ms. Kate Wilson for the applicant,
9 Mr. Depp, and my learned friends Ms. Sasha Wass, Adam Wolanski
10 and Ms. Clara Hamer appear for the respondents, News Group
11 Newspapers, the publishers of The Sun newspaper, and the
12 journalist Mr. Wootton who is the author of the article
13 complained of.
14 My Lord, there is a privacy order in place which
15 I thought I should just mention. It has already been made.
16 I just mention it so that the media can obtain copies. I hope
17 it is outside court on display, but if anybody want to see it
18 they obviously can.
19 LORD JUSTICE UNDERHILL: Yes, in fact, it does not apply to
20 anything I think that you are intending to say.
21 MR. CALDECOTT: Correct, my Lord.
22 LORD JUSTICE UNDERHILL: But it does explain why certain documents
23 that might otherwise be available are not.
24 MR. CALDECOTT: Yes. It would also explain why if any of the
25 media ask anybody what we were referring to it would be wrong

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2 we need help on.
3 MR. CALDECOTT: Yes.
4 LORD JUSTICE UNDERHILL: I think if you could aim to have
5 completed your submissions in something like an hour and a
6 half, we will then take stock. But that will leave time for
7 Ms. Wass and as I have been told, Mr. Wolanski as well, to
8 make any submissions that we require from them.
9 MR. CALDECOTT: Yes. Mr. Depp brought this libel action against
10 the respondents in relation to an article published on 27th
11 April 2018. Its meaning is set out at paragraph 80 of the
12 judge's judgment. Just to give your Lordships the reference,
13 it is bundle A, orange tab 5, page 74.
14 LORD JUSTICE UNDERHILL: Just one more thing, Mr. Caldecott, and
15 then I will let you get on. I should say I quite understand
16 you want briefly to open it and that is understood, but we
17 both found your note extremely helpful.
18 MR. CALDECOTT: I am grateful.
19 LORD JUSTICE UNDERHILL: We have pre-read everything that you
20 specifically referred to there. Plus a bit more. We have
21 also listened to the piece of audio that you wished us to
22 listen to. So, as I say, I am sure you want to open it, and
23 that is entirely reasonable, but you can take it we are very
24 familiar with the background and have done a lot of
25 pre-reading.

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MR. CALDECOTT: My Lord, I will be very brief. For the benefit of those watching ---

LORD JUSTICE UNDERHILL: Of course, but I wanted to say that.

MR. CALDECOTT: My Lord, that is very helpful. The judge found for the respondents on their plea of truth under section 2, that the 14 pleaded incidents of violence all but two were found to be made out. The ones that were not were incidents 6 and 11.

[REDACTED]

Following the verdict, Mr. Depp issued the two applications. The first in time was for permission to appeal and then as a result of documents becoming available and through some subpoenas in the United States and through Ms. Heard's own disclosure in the Virginia defamation action later in January, the application for permission to adduce fresh evidence.

I propose to follow my reading list if I may in terms of the order and deal with the fresh evidence first. My Lord, I do need your Lordship's permission to add two further witness statements. They are de bene esse, as it were, at tabs 11 and 12 of bundle C. Your Lordship will have noted that there is an apology for this, because there was an omission. It is obviously something your Lordship should be aware of.

LORD JUSTICE UNDERHILL: Let us see. I cannot imagine there is an objection to being referred to them without prejudice to any

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to take up time reading them but that is where they are to be found.

My Lord, there is one issue of law between us. I am going to take our position very briefly. The respondents rely on a case called Braddock, which imposes a very high threshold indeed, but we say that is not the applicable threshold in this case. In Braddock there was no deception of the court at all, there was a subsequent discovery of historic convictions, in fact of uncertain date, and it solely went to credibility and there was no deception of the court. We submit that where there has been a deception of the court, which is our case, we say the correct test is the "real danger" test which is that which appears in Hamilton v Al-Fayed, at paragraph 34 and it is in the authorities bundle. There has to be a real danger that it influenced the judge in terms of the outcome or not merely as to one or two incidents.

My Lord, there is one other point I should just mention. Your Lordships will no doubt be aware of the famous case of Meek v Fleming. In most of these cases, though not Braddock, it is the party who has been responsible for the deception. In this case it is not a party, but we say that the same principle must apply, and indeed the Hamilton test, which I think is paragraph 34, does not put it in terms of the party having to be responsible for the deception; it would be a

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decision we may ultimately make about their admissibility.

MS. WASS: My Lords, Mr. Wolanski is going to be dealing with the second part of this application, namely the fresh evidence and I will let him deal with that. I am going to be dealing with any assistance I can give the court in relation to the permission to appeal.

LORD JUSTICE UNDERHILL: Very well. Thank you. Mr. Wolanski, no need to come forward to deal with this. There cannot be any difficulty about our reading those witness statements, indeed we already have.

MR. CALDECOTT: My Lord, the legal principles here are very well known. If your Lordships want a convenient place to find them, without having to turn to any authorities, pages 1798 to 1799 of CPR volume 1 set out the principles. Just to give your Lordships some shorthand, the well known original Ladd v Marshall test, the first one is reasonable diligence, I am using shorthand, the second is probable important influence and the third is apparently credible. As we know, the position is now these are not rules but they are principles to which the court will still always have regard, but just bearing in mind that the overriding objective is to do justice. There is a case called Terluk and a citation from Hamilton v Al-Fayed in those notes on those two pages, I suspect your Lordship is well aware of them. I am not going

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nonsensical description, really, if one is concerned with a just outcome. Here the key witness for the defendants was Ms. Heard. They would have had no defence without Ms. Heard. There were many other witnesses, but she was, on any view, centre stage.

My Lord I am going to follow, if I may, the order in my reading list.

LORD JUSTICE UNDERHILL: Yes.

MR. CALDECOTT: The first question is the meaning of the evidence which we say was false. My Lord, it is quite convenient, just so as not to jump around, to keep to the green bundle, which is the fresh evidence bundle for these purposes. If you kindly go, please, to page 9 of C3 -- I beg your pardon, it is C9, I should say. That is entirely my fault. If you could, please, just go to Ms. Howell's witness statement, she deals with the relevant extract from the witness statement at paragraph 16. "As for what Johnny says about my so-called agenda in marrying him, the financial benefit would somehow further my career, that is preposterous. I remained financially independent from him the whole time we were together and the entire amount of my divorce settlement was donated to charity. In fact my desire to remain financially independent was one of the main sources of conflict during our relationship." The context has some importance here. The

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<p>1 ANDREW CALDECOTT QC</p> <p>2 divorce was settled by a joint statement in August 2016, which</p> <p>3 was a basic part of the background narrative at the trial, and</p> <p>4 the witness statement from Ms. Heard was put in on 26th</p> <p>5 February 2020. Your Lordships will recall that there was an</p> <p>6 original trial date in March, which was later adjourned.</p> <p>7 There is no reference at all in the witness statement to</p> <p>8 future intentions or pledges. It means what it says we say,</p> <p>9 that all 7 million have been given to charity and I have not</p> <p>10 kept a sent. That is clearly how the judge understood it.</p> <p>11 If one looks at paragraph 20 on the adjacent page,</p> <p>12 please, at C10, in tab 3, he deals with the gold-digger</p> <p>13 scenario in the first part of that quote. Then about six</p> <p>14 lines up, he says this: "Ms. Heard's evidence that she had</p> <p>15 given that sum away to charity was not challenged on behalf of</p> <p>16 Mr. Depp, and the joint statement issued by Mr. Depp and</p> <p>17 Ms. Heard as part of the deal point memorandum acknowledged</p> <p>18 that this was her intention. I recognised that there were</p> <p>19 other elements to the divorce settlement as well, but a</p> <p>20 donation of \$7 million to charity is hardly the act one would</p> <p>21 expect of a gold-digger."</p> <p>22 My Lords, I will come back, if I may, to some further</p> <p>23 messages which we say that conveys. That is the literal</p> <p>24 meaning. Can I just deal with the literal true position</p> <p>25 first? There were two charities that received money from</p>	<p>1 ANDREW CALDECOTT QC</p> <p>2 Where do we get 24th August from?</p> <p>3 MR. CALDECOTT: My Lord, I think it is an error in my note.</p> <p>4 I think your Lordship is right.</p> <p>5 LORD JUSTICE UNDERHILL: It does not matter.</p> <p>6 MR. CALDECOTT: I am reading down to the next document. It is</p> <p>7 18th August. That is my fault. My Lord, page 31 -- I am</p> <p>8 dealing, first of all, if I may with The Children's</p> <p>9 Hospital -- is a donation letter from Mr. White. Can I just</p> <p>10 explain. Mr. White is an accountant, a senior partner in his</p> <p>11 firm, who is advising Mr. Depp.</p> <p>12 LORD JUSTICE UNDERHILL: Just before we leave the previous</p> <p>13 document, as I have understood it, for reasons which of course</p> <p>14 are explained, that document was not before the judge, because</p> <p>15 there was no challenge to her statement that she had given 7</p> <p>16 million, details of who she gave it to and what exactly she</p> <p>17 said outside were not before the court. Is that right?</p> <p>18 MR. CALDECOTT: My Lord, it is not quite right. If I say the</p> <p>19 position is this, this document was in the trial bundle, but</p> <p>20 it was not referred to in evidence.</p> <p>21 LORD JUSTICE UNDERHILL: Yes.</p> <p>22 MR. CALDECOTT: And it is fair to say, and I was going to come to</p> <p>23 this later, that the judge does not refer to it in his</p> <p>24 judgment and we simply do not know whether he read it or not.</p> <p>25 LORD JUSTICE UNDERHILL: It is one of the documents which was</p>
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<p>1 ANDREW CALDECOTT QC</p> <p>2 Ms. Heard. The Children's Hospital of Los Angeles and the</p> <p>3 American Civil Liberties Union. On 18th August, this is 2016,</p> <p>4 Ms. Heard had publicly stated that the \$7 million would be</p> <p>5 equally divided between them. Again in the same file, if you</p> <p>6 could kindly go to page C29 in the same tab 3, this is the</p> <p>7 green file still, you will see that there is an italicised</p> <p>8 statement from Ms. Heard, the second paragraph: "As reported</p> <p>9 in the media, the amount received in the divorce was 7 million</p> <p>10 and \$7 million is being donated. This is over and above any</p> <p>11 funds that I have given away in the past and will continue to</p> <p>12 give away in the future. The donation will be divided equally</p> <p>13 between the ACLU with a particular focus to stop violence</p> <p>14 against women and The Children's Hospital of Los Angeles,</p> <p>15 where I have worked as a volunteer", and so on. That was</p> <p>16 issued on August 24th, 2016, shortly after the previous joint</p> <p>17 statement. The true position as to the hospital ----</p> <p>18 LORD JUSTICE UNDERHILL: Sorry, can I be absolutely clear how</p> <p>19 these documents fit together. At C27 we have something of</p> <p>20 August 18th. I have read the text that follows -- in fact it</p> <p>21 is clear the text that follows at C28 is the text that goes</p> <p>22 with that picture at C27.</p> <p>23 MR. CALDECOTT: Yes.</p> <p>24 LORD JUSTICE UNDERHILL: And indeed the text that follows that is</p> <p>25 clearly page 3 of 6, so it is clearly the same document.</p>	<p>1 ANDREW CALDECOTT QC</p> <p>2 asked to be put into the trial bundle by your team.</p> <p>3 MR. CALDECOTT: Yes, it is a point the other side make, my Lord,</p> <p>4 yes.</p> <p>5 LORD JUSTICE UNDERHILL: Sorry, you were about to refer to</p> <p>6 Mr. White.</p> <p>7 MR. CALDECOTT: Not at all, my Lord; it is important to get these</p> <p>8 matters right. Page 31 is the only donation that was ever</p> <p>9 made to The Children's Hospital on the evidence. It is a</p> <p>10 donation sent by Mr. White, whose position is as I have</p> <p>11 explained, and he says: "This donation has been made in</p> <p>12 accordance with Ms. Heard's pledged gift of \$3.5 million to</p> <p>13 The Children's Hospital Los Angeles Foundation. This cheque</p> <p>14 represents the first of multiple scheduled instalments to</p> <p>15 honour the full amount of Ms. Heard's \$3.5 million pledged</p> <p>16 gift." My Lord, that is obviously, as it were, parasitical on</p> <p>17 the public announcement you have just looked at. Indeed it is</p> <p>18 sent only six days later. The instalment point reflects the</p> <p>19 obvious fact that the payment of the \$7 million was to be by</p> <p>20 instalments.</p> <p>21 My Lord the next important letter, and this is an</p> <p>22 important letter, is at page 42, and this is three years ----</p> <p>23 LORD JUSTICE UNDERHILL: I am sorry, can I ask one other question</p> <p>24 about C31?</p> <p>25 MR. CALDECOTT: Yes, my Lord.</p>

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 2 LORD JUSTICE UNDERHILL: I think I saw, though I have not, I am
 3 afraid, noted the reference, that Mr. White says he had a
 4 discussion with Ms. Heard, not saying that he would make this
 5 payment, because that was contentious once it happened, but
 6 nevertheless about certain tax aspects. I cannot remember the
 7 exact detail. Do we have evidence as to whether he had spoken
 8 to Ms. Heard before the letter of 24th August?
 9 MR. CALDECOTT: There is no evidence that I am aware of of him
 10 speaking to Ms. Heard but there was a letter from Ms. Heard's
 11 attorneys taking exception ----
 12 LORD JUSTICE UNDERHILL: That is afterwards.
 13 MR. CALDECOTT: Yes.
 14 LORD JUSTICE UNDERHILL: Did not Mr. White say somewhere that he
 15 had had a discussion with Ms. Heard about ----
 16 MR. CALDECOTT: My Lord, he says he had a discussion with
 17 Mr. Depp's attorneys, and he got no answer. That is my
 18 recollection.
 19 MS. WASS: Can I help?
 20 LORD JUSTICE UNDERHILL: I think Ms. Wass knows what I am
 21 referring to.
 22 MS. WASS: Yes, I do. My Lord may be assisted by the agreed
 23 chronology that appears at bundle A behind divider 3. Indeed,
 24 it would be, I hope, of assistance to my learned friend to
 25 refer to that as well, because the dates are all ----

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 2 LORD JUSTICE UNDERHILL: Yes.
 3 MS. WASS: At page A48.4, at item 131 -- does my Lord have that?
 4 LORD JUSTICE UNDERHILL: I have.
 5 MS. WASS: That is a passage of a transcript. As my Lord knows
 6 ----
 7 LORD JUSTICE UNDERHILL: I am sorry, I have page 48 but I do not
 8 have the particular entry you want us to look at.
 9 MS. WASS: A48.4 is where it start, at the bottom of that page.
 10 It is day 5, cross-examination of Ed White by the defendants'
 11 counsel. On the top of page 48.5, the answer at the top of
 12 that is the question ----
 13 LORD JUSTICE UNDERHILL: Thank you. That is exactly what I had in
 14 mind. Mr. Caldecott, his evidence was therefore that during
 15 that time -- I am not quite clear what that means --
 16 I suggested to her she did not need non-taxable income. I do
 17 not understand the details and it does not matter. Is it
 18 clear from that that before he made that payment, he had some
 19 discussion with her about the correct approach to the payment
 20 she said she wanted to make? It rather looks like that.
 21 MR. CALDECOTT: My Lord, what is slightly difficult about this,
 22 and I do not want to spend too much time on it, is that there
 23 obviously was a disagreement about this, as we know, because
 24 her attorneys then write back and take exception. It is a
 25 little uncertain whether he is talking about her or her

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 2 attorneys, or ----
 3 LORD JUSTICE UNDERHILL: I do not want to take up your valuable
 4 time, but part of the value of this hearing is to pin down --
 5 I think there is a slight uncertainty as to whether this was
 6 entirely out of the blue or whether there had been some prior
 7 discussion.
 8 MR. CALDECOTT: Yes, there is a suggestion that there may have
 9 been some contact about the tax situation.
 10 LORD JUSTICE UNDERHILL: Yes. Thank you, Ms. Wass, for that
 11 reference.
 12 MR. CALDECOTT: Yes, thank you. My Lord, can we go, please, to
 13 page 42, which I know your Lordships will have looked at from
 14 the reading list.
 15 LORD JUSTICE UNDERHILL: Yes.
 16 MR. CALDECOTT: There are two letters here. There is an earlier
 17 letter to Mr. White on 14th June, on page 41, and this is the
 18 letter that Mr. White says never reached him. I will have to
 19 come back to that when I look at reasonable diligence. But on
 20 the question of the true position, this letter is important.
 21 "I am following up on the correspondence with The Children's
 22 Hospital Los Angeles, received on August 26th, 2016 when it
 23 was notified by Mr. White", and so on. That is a reference
 24 back to the letter we have just looked at. "I am inquiring if
 25 you have knowledge if the hospital should expect further

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 2 instalments on your behalf or if the pledge will not be
 3 fulfilled. I appreciate any insights on this matter and I can
 4 be reached at via a direct line", and so on. My Lord, there
 5 are two important points about this letter. First, there is
 6 no evidence that it was ever replied to.
 7 LORD JUSTICE UNDERHILL: The letter was obtained on the subpoena
 8 to CHLA, so one would expect that if there was a reply, it
 9 would be on their file and it would have been disclosed.
 10 MR. CALDECOTT: Yes, and also, my Lord, there has now been
 11 disclosure by Ms. Heard in the Virginia proceedings and no
 12 reply has been disclosed.
 13 LORD JUSTICE UNDERHILL: Thank you.
 14 MR. CALDECOTT: There are a number of points about this. First of
 15 all, the only evidence of a pledge which this letter suggests
 16 exists is drawn from Mr. White's own letter. There is no
 17 reference here to any independent pledge from Ms. Heard.
 18 Secondly, I just make this point, that it is an entirely
 19 understandable letter for a charity to send, and one would
 20 reasonably have expected a reply if there was some genuine
 21 future commitment to continue to give. In short, on the
 22 evidence as to The Children's Hospital, it appears from what
 23 we can see that there was no apparent pledge produced by
 24 Ms. Heard and the only donation was \$100,000, not the 3.5
 25 million, which we say the court was led to believe was the

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<p>1 ANDREW CALDECOTT QC</p> <p>2 true position.</p> <p>3 LORD JUSTICE UNDERHILL: Do you say that the evidence supports the</p> <p>4 inference that her appearance on the roll of honour donors, if</p> <p>5 I have the name right, is also based on Mr. White's letter of</p> <p>6 ---</p> <p>7 MR. CALDECOTT: My Lord, we do.</p> <p>8 LORD JUSTICE UNDERHILL: I see.</p> <p>9 MR. CALDECOTT: We do.</p> <p>10 LORD JUSTICE UNDERHILL: Thank you.</p> <p>11 MR. CALDECOTT: The position is different in relation to the</p> <p>12 American Civil Liberties Union. It received \$350,000 from</p> <p>13 Ms. Heard, which is of course a tenth of \$350 million, and</p> <p>14 again an additional \$100,000 from Mr. White sent on the same</p> <p>15 day. I do not think we need look at it, but the letter of</p> <p>16 acknowledgment of receipt of the \$350,000 is at page 281 of</p> <p>17 tab 3. Mr. White's cheque, again on 24th August, is at</p> <p>18 page 174 of tab 3. There is an unsigned pledge, as</p> <p>19 your Lordship will have seen, at page 279. There is no</p> <p>20 equivalent document for The Children's Hospital. It is not</p> <p>21 signed and it does not specify what the instalment payments</p> <p>22 will be. It merely says they will start on 19th August 2016.</p> <p>23 LORD JUSTICE UNDERHILL: You are right that it is not signed, but</p> <p>24 it is also the case that C281 is a letter from ACLU to</p> <p>25 Ms. Heard, referring to "your very generous pledge". So they</p>	<p>1 ANDREW CALDECOTT QC</p> <p>2 honesty is the timeline. The final divorce instalment was</p> <p>3 paid on 1st February 2018. The third point is her stance in</p> <p>4 the American subpoena proceedings. If I could just take</p> <p>5 your Lordship to the chronology that my learned friend</p> <p>6 helpfully referred to at tab 3, the various steps that she</p> <p>7 took, and there is in fact one additional one, you will see at</p> <p>8 cell 129 the trial finished on 28th July 2020. We know that</p> <p>9 as against The Children's Hospital -- I will have to come back</p> <p>10 to the extension on reasonable diligence, if I may -- the</p> <p>11 extension of the documents were due on 29th July. The</p> <p>12 following day, if we look at cell 137, this is right after the</p> <p>13 conclusion of the trial, on the very day that the documents</p> <p>14 are due, she files a petition to quash the subpoena. That is</p> <p>15 cell 137. She appeals the decision against her on 23rd</p> <p>16 November at cell 142. That was dismissed on 18th December.</p> <p>17 That is at cell 146. We also know now from Ms. Vasquez's</p> <p>18 witness statement at tab 12 of the fresh evidence green</p> <p>19 bundle, at paragraph 38 on page 584, that even then she sought</p> <p>20 to have the documents designated as confidential, meaning that</p> <p>21 they could not be used in these proceedings and Mr. Depp,</p> <p>22 through his attorneys, had to reply to have them</p> <p>23 de-designated.</p> <p>24 Now, there is a further important point which is not</p> <p>25 quite so obvious. If your Lordships would kindly just look at</p>
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<p>1 ANDREW CALDECOTT QC</p> <p>2 certainly thought that they had an effective pledge.</p> <p>3 MR. CALDECOTT: Absolutely, my Lord. There is this distinction</p> <p>4 between The Children's Hospital and ACLU on the evidence.</p> <p>5 Unlike The Children's Hospital, the ACLU was aware of a</p> <p>6 pledge, and that appears to be from Ms. Heard. It certainly</p> <p>7 cannot be said that it was only from Mr. White with any</p> <p>8 clarity.</p> <p>9 So the position in relation to the ACLU is that they</p> <p>10 received \$450,000 as against \$3.5 million. Now, the next</p> <p>11 question is the position as to honesty. There is at the</p> <p>12 moment no evidence before the court from Ms. Heard herself,</p> <p>13 either directly or indirectly, about this, by which I mean</p> <p>14 post-trial evidence. The inference from the true position</p> <p>15 against the reality is the first point we make. The gap is so</p> <p>16 large ---</p> <p>17 LORD JUSTICE UNDERHILL: Sorry, you say there is no evidence from</p> <p>18 her directly. Obviously, that is the case. Indirectly, have</p> <p>19 we not got a transcript of what her counsel said ---</p> <p>20 MR. CALDECOTT: Yes, your Lordship has that.</p> <p>21 LORD JUSTICE UNDERHILL: That, as I understand it, is a statement</p> <p>22 on her behalf that the full payments have not been made.</p> <p>23 MR. CALDECOTT: Yes.</p> <p>24 LORD JUSTICE UNDERHILL: But he says they will be.</p> <p>25 MR. CALDECOTT: Yes. My Lord, the second important point on</p>	<p>1 ANDREW CALDECOTT QC</p> <p>2 The Children's Hospital subpoena at C3, the same file, please,</p> <p>3 page 207, this is about, really, the opportunity to correct.</p> <p>4 At C207, your Lordships will see under "Certificate of</p> <p>5 Service": "I hereby certify that I caused a true and correct</p> <p>6 copy of the enclosed subpoena", can I pause to say your</p> <p>7 Lordships will remember subpoenas are issued originally in</p> <p>8 Virginia and then you have to have a subpoena issued in</p> <p>9 California to be effective. This is the Virginia one.</p> <p>10 "I enclose a true and correct copy of the enclosed subpoena</p> <p>11 for production to be sent by e-mail on this 29th day of</p> <p>12 counsel of records, signed by Mr. Choo", who was Mr. Depp's</p> <p>13 attorney. There is a service list on the right-hand side. It</p> <p>14 is obvious Ms. Heard did know, because she makes her</p> <p>15 application on 29th July. But this is on 29th May, when the</p> <p>16 subpoena is issued. It's counsel, at the bottom left column,</p> <p>17 counsel for the defendant, Amber Laura Heard, is Mr.</p> <p>18 Rottenborn (?). So she knows subpoenas have been issued on</p> <p>19 29th May. She is in court, and your Lordships have seen, I am</p> <p>20 not going to take you to it, there is a reference in closing</p> <p>21 and there is a reference in the judgment, sometimes there is</p> <p>22 no doubt errors are made in witness statements in haste and</p> <p>23 they are corrected, and it is commonplace. But at this stage,</p> <p>24 as at May 29th, she can be assumed to have been told this by</p> <p>25 her attorneys, she knows that subpoenas are being pursued and</p>

[5] (Pages 16 to 19)

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1 that must have focused her mind on the true position, we say,
2 and whether or not that witness statement required revision.
3 We obviously invite the inference that that step was not taken
4 because it was appreciated how damaging a correction might be.
5 That does to some extent go to my next heading, which is
6 obviously the important one, of materiality. I am going to
7 deal with reasonable diligence last.

8 My Lord, the evidence has, we say, two obvious effects
9 which would have been apparent to the judge. The first is,
10 this is a wholly remarkable act of philanthropy, if true. It
11 is a remarkable thing to do. On any view, it is, if I can put
12 it this way, a considerable boost to her credit as a person.

13 The secondary message, and I accept the judge does not
14 allude to this in terms, but we say it is a potent subliminal
15 message, "I want him to pay, but I do not want to keep a dime
16 of his money because of the way I have been treated". And
17 obviously, in the context of this case, it implies revulsion
18 at the way he has treated her physically.

19 Your Lordship, if I may say so, pertinently put me a
20 third proposition this morning and I cannot say that the judge
21 was aware of this, which is the third point, that the focus of
22 the ACLU contribution in her public statement was to victims
23 of domestic violence. But it would be mere speculation as to
24 whether the judge did or did not read that document. I am not
25

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1 credit. This evidence, we say, does not go solely as to
2 credit, because of the secondary message I have referred to
3 that she wanted him to pay but did not want any of his money
4 because of the way he treated her. Of course, there is a
5 third category, which is where the evidence goes directly to
6 the believability on a detailed primary issue, namely, for
7 example, whether he assaulted her in incident 2. I am not
8 suggesting it is that kind of evidence. But equally, it is
9 not evidence solely as to credit.

10 LORD JUSTICE UNDERHILL: So tell me again so I can note it down,
11 exactly what you say it goes to, which is not credit, it goes
12 to whether ----

13 MR. CALDECOTT: It goes to the likely starting point the judge
14 would have taken as to whether she was a likely victim of
15 domestic violence, having given away the entirety of her
16 financial divorce settlement.

17 LORD JUSTICE DINGEMANS: Is there any indication in the judgment
18 that the judge took that view?

19 MR. CALDECOTT: The words the judge uses are simply this, "these
20 are certainly not the actions of a gold-digger", but that begs
21 the question, what are they the actions of? One would not
22 expect the judge to go into what he subliminally thought about
23 this, but we say the message is very clear. When he says it
24 is not the actions of a gold-digger, it has a quite additional
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1 aware that it was referred to in evidence. There were a huge
2 number of bundles, and I would not be right to try and draw
3 that inference.

4 My Lord, this is a very different case from Braddock.
5 First of all, it is evidence in the case to which the judge
6 refers to in his judgment; secondly, it creates a very potent
7 starting point when considering the kind of person Ms. Heard
8 appears to be, and thirdly, it does go, we say, to some
9 degree, to the likelihood of her being a victim of grave
10 domestic violence. It tips the scales against Mr. Depp from
11 the very beginning.

12 May I deal with one argument which is made against me,
13 which I understand, and the argument is this. It only came in
14 as an answer to the gold-digging allegation which was not
15 pursued at the trial. That is correct. But our case in this
16 court is not based on the suggestion that in fact she was a
17 gold-digger, but on the very different but equally, in fact,
18 if anything, more potent message, that these are the actions
19 of a very virtuous person and a victim.

20 LORD JUSTICE UNDERHILL: So, do not take this as a pointed
21 observation, but just for clarity, effectively you are asking
22 for it to go in as to credit.

23 MR. CALDECOTT: My Lord, there is a very interesting -- every case
24 has its own geography. Some evidence goes solely as to
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1 positive force as to the kind of person she is.

2 LORD JUSTICE UNDERHILL: If you read that passage in the judgment,
3 perhaps you are going to take us back to it, but it all starts
4 with Mr. Depp's repeated characterisation of her as a
5 gold-digger, and his theory that he had an insurance
6 policy ----

7 MR. CALDECOTT: Yes.

8 LORD JUSTICE UNDERHILL: ---- which he equates with being a
9 gold-digger, which, as you say, certainly at one point
10 Mr. Sherborne had disavowed but the judge thought it might
11 still be live in one form or another.

12 MR. CALDECOTT: Yes.

13 LORD JUSTICE UNDERHILL: He is certainly not directly dealing with
14 it as going to credit at all, is he, even in your sense?

15 MR. CALDECOTT: No. No. Your Lordships will know as trial judges
16 there are commonly potent background material about a person
17 which influence the way in which you can consider, is it
18 likely that they were the victim or they were the perpetrator
19 or whatever. In fairness, the other side did not put it on
20 that basis, I also accept. But that is not the point. It is
21 the tilting of the scales from the outset. It is a false plus
22 to her and it is a false minus to him, if I can put it that
23 way.
24

25 LORD JUSTICE UNDERHILL: Yes. Can you just help me on one point

[6] (Pages 20 to 23)

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1 of actually how the point was deployed. I have seen several
2 references to Mr. Depp having made this point in his evidence,
3 and indeed in things he said in texts and so forth. I have
4 read the passage to which we were referred in which
5 Mr. Sherborne disavowed that as part of the case. But it
6 slightly reads, or one gets the impression from paragraph 577
7 that Mr. Sherborne, I do not mean this rudely, might have gone
8 back on that a little and it might have formed part of the
9 closing submissions. We have not got to that passage of the
10 closing submissions, or, if we have, I have overlooked it. It
11 may not matter very much, but because we are focusing on this
12 paragraph it would be quite useful to know why the judge was
13 addressing it. Are you in a position ---

14
15 MR. CALDECOTT: My Lord, I have explored this. I will ask
16 Mr. Sherborne again, but my understanding is that he did not
17 pursue gold-digger in closing at all. Can I make one other
18 point while we are on this. Ms. Heard had a perfectly valid
19 answer in her witness statement to this allegation, which was
20 the statement almost immediately preceding the one we complain
21 of, where she said, "I always insisted on being financially
22 independent". She says that in the witness statement in the
23 very same passage. She had no need to put this in at all.
24 She had a perfectly good answer.

25 Now, my Lord, to assist on reasonable diligence, I have

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1 him: see paragraph 8 of his third witness statement, tab 8,
2 page 565.

3 LORD JUSTICE UNDERHILL: It is a bit surprising, is it not, the
4 letter to him apparently at his office ---

5 MR. CALDECOTT: Can I advance some reasons why it does seem to be
6 the likely result. First of all, there is no reply from
7 Mr. White, as you would certainly expect if he had received
8 it; secondly, the letter never got through to the applicant's
9 US attorneys and you would have expected Mr. White to have
10 forwarded it if he had received it -- bearing in mind the
11 Virginia defamation action had begun in March before this
12 letter was received -- and those two, we say, support the
13 probability.

14 LORD JUSTICE UNDERHILL: Yes.

15 MR. CALDECOTT: I understand, your Lordship is quite right, one
16 instantly says, one usually does receive one's post, but there
17 it is. Those are the Mr. White group of points. The next
18 group of points are taken on alleged inaction before the
19 trial. First of all it is said it is not included in the
20 application made against (unclear due to audio distortion)
21 third party disclosure in this action. There is a very short
22 answer to that. First of all, the application which was made
23 was rejected in its entirety; and, secondly, there was no
24 prospect whatever of satisfying the very stringent rules in
25

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1 divided them up into different groups of points, so a slightly
2 more easier way of looking at it. The first group of points
3 made against me all relate to Mr. White whom I have already
4 introduced. It is said that he knew that Ms. Heard's donation
5 to the hospital was to be paid in instalments by reason of the
6 letter from him of 24th August. That is true, but it is just
7 after the divorce has been announced and it merely reflects
8 the fact that the payment was going to be made in instalments
9 by Mr. Depp to Ms. Heard. It does not take us any further on
10 the issue.

11 The second is a reference to Mr. White's
12 cross-examination, just to give your Lordships a reference, at
13 tab 4, page 348, internal transcript, top right, page 811. He
14 in fact gave some evidence about incident 13 because he was at
15 the dinner party. It is said Mr. White did not ask the
16 charities but he could have done. He explained why he does
17 not in paragraph 7 of his third witness statement at tab 8,
18 page 565 of the same bundle. And as to the other inquiries,
19 he deals with those in the same witness statement. He says
20 they were made of the US attorneys and they did not have any
21 information.

22 The respondents also point to the letter at page 41,
23 dated 14th June 2019, which we very briefly looked at. And
24 Mr. White confirms that this letter did not get through to
25

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1 31.17(3)(a) of the CPR at page 1033. Because if you are
2 applying against a third party, as the court will know, you
3 have to show it is likely to either damage the case or advance
4 the case, the usual disclosure rule. If you have no evidence
5 to show that it is likely and it is simply a speculative
6 application you do not get over the basic hurdle.

7 The second point made about pre-trial conduct is that we
8 did not seek to adjourn the trial, have the evidence produced.
9 If we could quickly go back to the chronology for these
10 purposes at tab 3. Your Lordships will see from cell 104 that
11 the trial was originally scheduled to start on 23rd March, and
12 to run to 3rd April. It was adjourned on 20th March and by
13 now, of course, we are into full Covid, a lockdown was at the
14 very beginning of that month. The defendants opposed that
15 first application to adjourn and they said in open court,
16 which was widely reported, that Mr. Depp was running scared
17 and would never turn up. It is wholly fanciful to suppose
18 that the court would have granted a second adjournment of a
19 trial, and those of us who deal with adjournments regularly
20 know -- and Dingemans LJ will know this -- the courts are very
21 reluctant to adjourn trial dates and particularly second trial
22 dates.

23 The third point, which I accept requires closer
24 consideration, is the true suggestion that the US subpoenas
25

[7] (Pages 24 to 27)

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2 could -- could -- have been issued earlier. We say that the
3 dates none the less require scrutiny, because the question is
4 whether we could have obtained the evidence with reasonable
5 diligence. Cell 88, just to remind us, is that this becomes
6 evidence in the case on 26th February 2020. It is when the
7 third witness statement is put in. That obviously raises the
8 profile of the issue.

9 I do not ask your Lordships to go through them now, but
10 you will see from cells 89 to 111 that there is an enormous
11 amount of interlocutory activity going on in the case, all the
12 kind of skirmishing with which I am afraid these cases tend to
13 have as they come close to trial.

14 Covid intervenes. I think lockdown was 23rd March. We
15 of course now are living an experience at the other end of the
16 tunnel, not quite at the end of it, but getting to the end of
17 it. But it is very easy to forget the complete disruption
18 that the Covid lockdown had, and of course we know, for
19 example, the ACLU closed its offices, which caused
20 considerable problems for service. The subpoenas were in fact
21 issued on 29th May. That is cell 112.

22 Now, The Children's Hospital request for an extension
23 which of course is something that I have to deal with ---
24 LORD JUSTICE UNDERHILL: It is clear they did make a request.
25 MR. CALDECOTT: The important point is, this is a children's

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2 give on the topic. The reference is page 373, internal
3 transcript page 153.
4 The next question, point, rather, that is put against us
5 is that Ms. Heard was not cross-examined on the issue. It is
6 perfectly true that there was a general view that she was
7 untrustworthy and there was scepticism about this claim, but
8 there was no evidence to gainsay her evidence and we say it
9 was a perfectly reasonable decision not to cross-examine on
10 them in those circumstances.

11 LORD JUSTICE UNDERHILL: It would have been perfectly possible to
12 ask her a neutral question, along the lines of, to whom has
13 the money been donated, what sums were paid and when.

14 MR. CALDECOTT: Yes.

15 LORD JUSTICE UNDERHILL: We do not know what answer -- well, we
16 know now what a truthful answer would have had to have been,
17 but she was not given the opportunity to say, as she might
18 have done, "Well, I have only paid a comparatively small sum
19 so far but I have made a pledge to both and I will be paying
20 it over X years". We just do not know what she would have
21 said.

22 MR. CALDECOTT: But even supposing hypothetically the question had
23 been asked, it would not have produced these documents. You
24 cannot properly ask ---

25 LORD JUSTICE UNDERHILL: No, but if she had answered that you

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2 hospital. The letter is sent on 26th June. It does not
3 actually get through until the 29th, which is over a weekend,
4 and the real point about it is they expressly refer to
5 staffing problems at the hospital as a result of Covid. The
6 evidence -- and I may not go to it in detail because of
7 time -- is that refusing the extension would have just brought
8 trouble.

9 LORD JUSTICE UNDERHILL: We have read that evidence. Speaking for
10 myself, I can understand it.

11 MR. CALDECOTT: Yes. What is revealing is that even with
12 The Children's Hospital, it took many months to resolve
13 Ms. Heard's opposition. This is obviously a very important
14 causative element. The last group -- and we say this is not a
15 counsel of perfection, I accept the subpoenas could have been
16 issued earlier but we say causatively the probability is they
17 would not have produced anything in time -- relates to the
18 applicant's position at trial. First of all a witness called
19 Kristina Sexton, who is important on a quite different point,
20 was called by the defendant and asked questions about the
21 donations when she was deposed in the US. But that subject
22 was not pursued with her at the trial of this action. I am
23 going to give your Lordships a reference if I may. The simple
24 reason is that Ms. Sexton's answers during the US deposition
25 make it absolutely clear that she had no useful evidence to

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2 would not have needed the documents. That would have shown
3 what the documents you have had so far have in fact
4 established.

5 MR. CALDECOTT: For example, we say that the letter from
6 The Children's Hospital has a far wider significance than
7 that. It suggests there was no pledge at all, just the
8 original \$100,000. We say first of all, if you are talking
9 about reasonable diligence, it is a perfectly reasonable
10 decision by an advocate to make not to challenge a clear
11 statement and it is a clear statement that she had donated it
12 all. There was nothing, no evidence to suggest she had not.
13 I cannot dispute your Lordship's proposition that a neutral
14 question could have been asked. But with respect, there is no
15 real reason to assume that it would have produced what we now
16 have.

17 LORD JUSTICE UNDERHILL: It is a point you are perhaps going to
18 come to. Clearly that was at least in contemplation, because
19 documents that would have lay behind such a question were
20 included in the bundle, at your request.

21 MR. CALDECOTT: Well, the documents were put in the bundle. The
22 subpoenas were outstanding. The subpoenas were not effective
23 in time for the trial for the reasons we have looked at.
24 Your Lordship is quite right that there was a decision to put
25 those documents in. They do have a potential bearing on one

[8] (Pages 28 to 31)

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1 or two other issues potentially, particularly the relevant
2 publicist, but your Lordship is right. I think it is accepted
3 there were suspicions about the claim. Ms. Heard's view was
4 untrustworthy and Mr. Depp was sceptical about it, but he had
5 no evidence. My Lord, it is taking a number of speculative
6 steps to assume that even a neutral question, had it been
7 something we should have done, which is what it really has to
8 be, even if that hurdle is got over, it is very speculative to
9 assume it would have produced this evidence, bearing in mind
10 the great lengths to which (unclear due to audio distortion).

11 Your Lordship also, I ask you to bear in mind the
12 failure to correct during the trial. My Lord, two points, I
13 mean, two points, one of the ones I have just dealt with, the
14 other one was we did not put the request for admissions
15 document in the trial. It is about the most disproportionate
16 document I think I have ever seen. It is 157 browbeating
17 requests. In fact under the American rules apparently you
18 only have to answer 30. The fact there was a refusal to
19 answer it takes one absolutely nowhere.

20 My Lord, can I just say one last concluding matter on
21 this issue before I move on. That is this; that we do say
22 there is a connection between our examples in our skeleton
23 argument on permission to appeal as to the way in which the
24 judge approached evidence adverse to Ms. Heard, does, we would
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1 submit, provide some support for the real danger scenario, the
2 test which we have to satisfy. Because we say that if you
3 look at the judgment, material of a similar type against
4 Mr. Depp is time and again acted on, but evidence against
5 Ms. Heard -- and your Lordships will know there is a
6 submission about contemporary documents which is very
7 important on the permission to appeal application -- we say
8 one view of this is that the judge had a very favourable
9 starting point of Ms. Heard and was not really particularly
10 interested in this adverse evidence.

11 My Lord, I was going to develop it a little bit (unclear
12 due to audio distortion). Would your Lordship want me to go
13 ahead and deal with the permission to appeal or to ---

14 LORD JUSTICE UNDERHILL: I think that makes sense, yes.

15 MR. CALDECOTT: Thank you. If ever there was something this court
16 does know about, it is the principles and I am not proposing
17 to, other than to give your Lordships the obvious reference,
18 the starting point test for permission to appeal is CPR
19 52.6(1)(a) at pages 1762-3 to be read with the ultimate test
20 for an appeal, the Court of Appeal's powers to intervene,
21 which are 52.21(3)(a) and (b).

22 I am very conscious, in this position, of the natural
23 cautions which an appellate court always has about reviewing
24 the trial verdicts. If I can put it in very simple language,
25

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1 because your Lordships are very familiar with these concerns,
2 there are really two. One is the judge's privileged position
3 as having heard the witnesses and having a much closer
4 familiarity with the evidence and the second is a question of
5 resource. Both those aspects are visited in the Central Bank
6 of Ecuador v Conticorp case which is at tab 7 of the
7 authorities bundle. Paragraphs 5 and 6 deal with the question
8 of resource and the privileged position of the judge.

9 My Lord, however, those principles do not apply if there
10 is a material self-misdirection as to the fact-finding
11 exercise. Your Lordships will know that we say that there is.

12 Can I take you to one case and just ---

13 LORD JUSTICE UNDERHILL: Of course. It would help me. You say
14 that there is a material misdirection. What are you referring
15 to? How do you formulate it?

16 MR. CALDECOTT: The judge appears to take the view that there is
17 an inherent superiority as a matter of principle to evidence
18 given to the witness box over contemporary documents. Now, it
19 is perfectly true that Lord Goff's well known observation in
20 The Ocean Frost that contemporary documents are an essential
21 check on credibility is not a rule of law, and your Lordship
22 will see that that is referred to in one of the cases, but the
23 contrary proposition, we say, is simply erroneous.

24 LORD JUSTICE UNDERHILL: Yes, okay I now see what you are
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1 referring to. This is the proposition you get out of that
2 paragraph 175.

3 MR. CALDECOTT: Yes.

4 LORD JUSTICE UNDERHILL: We will wait till we get there. I was
5 not sure what you were referring to. You wanted to refer us
6 to ---

7 MR. CALDECOTT: Just one case if I may. It is in the authorities
8 bundle D at tab 9. The only two paragraphs with this in mind,
9 I would ask your Lordships to perhaps quickly read to
10 yourselves if you would be so kind, is 48 and 49 on page 242
11 under the heading "The importance of contemporary documents".
12 It conveniently includes Goff LJ (as he then was) famous
13 observation in The Ocean Frost.

14 LORD JUSTICE UNDERHILL: (Pause for reading) Yes.

15 MR. CALDECOTT: The first sentence at paragraph 49, your Lordships
16 will have noticed my point about the rule of law in that
17 sentence just above the quote from the The Ocean Frost:
18 "Although this cannot be regarded as a rule of law, those
19 documents are generally regarded as far more reliable than
20 oral evidence of witnesses, still less their demeanour." And
21 then the very important first sentence in 49, which is where
22 we say this case went materially adrift.

23 My Lord, we have taken three examples only in this case.
24 Of course, if there was full permission, there would no doubt
25

[9] (Pages 32 to 35)

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1 be much more to say. Can I say they overlap in this respect,
2 these three examples. They all betray on the applicant's case
3 an error of legal approach, we say, to the judicial
4 fact-finding exercise. Secondly, they all relate to
5 significant rather than peripheral issues. Thirdly, they show
6 a disparity of approach to the evidence of Ms. Heard and
7 Mr. Depp, including the treatment of their out of court
8 statements, which we submit amounts to substantial unfairness.

9 LORD JUSTICE UNDERHILL: Hang on, one second.

10 MR. CALDECOTT: Sorry, my Lord. Which we submit amounts to
11 substantial unfairness. Fourthly, they all require a
12 consideration of the proper approach in law to consistent and
13 inconsistent statements when credibility is a central issue.

14 LORD JUSTICE UNDERHILL: Hang on one second. (Pause) Require a
15 consideration of the proper approach to?

16 MR. CALDECOTT: To consistent and inconsistent statements where
17 credibility is a central issue. And fifthly, we say they
18 support the concern that the judge was unduly influenced by
19 Ms. Heard's favour by the charity claim evidence.

20 My Lord, can I just add one postscript, a point I should
21 have made earlier. The analysis in Meek v Fleming shows that
22 you do not only look at the effect of the false statement at
23 the trial when presented as true; you also look at what would
24 the effect of the trial have been if the statement (unclear
25

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1 invite your Lordships to listen to a short section. Because
2 time is short, can I just notice that the judge himself takes
3 four examples at 171. These are all taken from this tape. If
4 one looks only at the last statement, just that alone, where
5 Ms. Heard says: "... I can't promise you that I'll be
6 perfect, I can't promise you that I won't get physical again.
7 God, I fucking sometimes get so made I lose it. I can fucking
8 promise you I'm ... I'll do everything to change ...", this
9 argument too was heavily relied on by the applicant both in
10 his opening and in his closing submissions, for reasons which
11 must be fairly obvious. If one goes back to 169, you will see
12 the judge summarises Ms. Heard's position on the evidence.
13 "Ms. Heard maintained that it had always been Mr. Depp who had
14 been the aggressor. She said that the ----"

15 LORD JUSTICE UNDERHILL: Sorry, where are you?

16 MR. CALDECOTT: 169, at the bottom. "She said that the only
17 occasion when she hit him back had been in the course of
18 incident 9 ... when, in defence of herself and her sister ...
19 she had struck Mr. Depp." So, her evidence, which the judge
20 appears to have accepted, was that she was always the victim.
21 It is not quite a dismissal but it is very close to argument
22 2, which is dealt with at 175. "In my view no great weight is
23 to be put on these alleged admissions by Ms. Heard to
24 aggressive violent behaviour. It is trite to say, but
25

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1 due to audio distortion) to be false. In Meek v Fleming, you
2 will see the court look at both. So you have to consider what
3 would have been the effect on Ms. Heard's credibility if the
4 untruth had been exposed.

5 My Lord, the treatment of contemporary documents. There
6 are only two examples -- I am only going to take two of the
7 three -- in the yellow bundle. I know your Lordships have
8 been kind enough to read what is on the reading list and for
9 that reason I am not going to go through it, but can I just
10 remind your Lordships. It is at tab 34 of the yellow bundle.
11 This was a recording which was made consensually as a
12 therapeutic step to try to resolve the difficulties of the
13 relationship. The judge does not refer to the timing, but for
14 your Lordships' assistance my understanding is it is September
15 (unclear due to audio distortion), which is between incidents
16 10 and 11, quite late in the story, but not (unclear due to
17 audio distortion). Crucial is to understand that Ms. Heard's
18 position was that she was innocent of any violence against
19 Mr. Depp, who was always the aggressor, save for I think one
20 minor act which she presented as self-defence, and that is
21 referred to by the judge. For present purposes, we will now
22 be in the judgment for a bit of time, so orange bundle A,
23 please. For your Lordships' note it is tab 5. We gave fairly
24 wide number of examples. I hope not impertinently, I would
25

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1 nonetheless true, that these conversations are quite different
2 to evidence in court. A witness giving evidence in court does
3 so under an oath or affirmation to tell the truth, the whole
4 truth and nothing but the truth. Questioning can be
5 controlled by the judge. Questions which are unclear can be
6 re-phrased. If a question is not answered, it can be pressed
7 (subject to the court's control) and if still unanswered may
8 be the proper object of comment. None of those features
9 applied to these conversations", then there is a second reason
10 which I will deal with as well, "which, in any event,
11 according to Ms. Heard had a purpose or purposes different
12 from simply conveying truthful information."

13 My Lord, we put it very simply. Self-evidently, if in a
14 contemporary, consensual tape-recorded conversation with a
15 clear audio and more than enough length for proper context,
16 the alleged victim admits to assaulting the alleged
17 perpetrator on more than one occasion -- we would say several
18 occasions on a fair view of the recording -- and says that she
19 cannot promise that she will not get physical again. When it
20 is her case that she has never been violent to the
21 perpetrator, such evidence requires the most careful
22 consideration by the judge.

23 LORD JUSTICE UNDERHILL: Just before we get to your important
24 points about this, my understanding, I should say, having read
25

[10] (Pages 36 to 39)

<p style="text-align: right;">[Page 40]</p> <p>1 ANDREW CALDECOTT QC</p> <p>2 through the whole of the argument 2, or at any rate all the</p> <p>3 relevant parts, is that, on a fair reading, she appears to</p> <p>4 admit to two occasions, one the previous night, which is in</p> <p>5 the extract on page A91, above the hole punch, where she says:</p> <p>6 "... hit you across the face in a proper slap, but I was</p> <p>7 hitting you, I was not punching you." So that is the first</p> <p>8 thing she refers to. Then she also refers to having thrown</p> <p>9 pots and pans and I think probably a vase, which looks like</p> <p>10 Australia, although actually if you look at the evidence about</p> <p>11 Australia, there is reference to a vase but not to pots and</p> <p>12 pans. We can be too finicky about this, but those appear to</p> <p>13 be the two occasions. You were saying several occasions.</p> <p>14 I am bound to say I did not read it that way.</p> <p>15 MR. CALDECOTT: My Lord, I am prepared to accept two for present</p> <p>16 purposes.</p> <p>17 LORD JUSTICE UNDERHILL: Obviously your point stands whether it is</p> <p>18 to or four.</p> <p>19 MR. CALDECOTT: My Lord, can I just say this? I accept</p> <p>20 your Lordship's point, subject to correction behind me, that</p> <p>21 it is only two. But it is not in the context where it can be</p> <p>22 said to be only two. Your Lordship is right that it is only</p> <p>23 two that she admits to, but it is not the kind of context</p> <p>24 where you can say it has only happened twice, which is all she</p> <p>25 is accepting. More to the point, the promise about future</p>	<p style="text-align: right;">[Page 42]</p> <p>1 ANDREW CALDECOTT QC</p> <p>2 themselves obvious and very important advantages, the most</p> <p>3 obvious being that their contemporaneity makes them a more</p> <p>4 potent guide to the probabilities and also it is inherently</p> <p>5 less likely to be self-serving. Be it two occasions or more,</p> <p>6 it is a fundamentally important check against the reliability</p> <p>7 of Ms. Heard's case that she was never an aggressor and always</p> <p>8 a victim. The judge has to, we say, go through the text</p> <p>9 carefully, see what it amounts to, and then he does not do</p> <p>10 that exercise at all.</p> <p>11 The second reason that the judge gives was that the</p> <p>12 recorded conversations, according to Ms. Heard, and I think it</p> <p>13 is common ground that they had a therapeutic purpose -- can I</p> <p>14 give your Lordships a reference to Ms. Heard's witness</p> <p>15 statement 5, at paragraphs 5 to 6, bundle B17, 147. One of</p> <p>16 the things she says is, "I did not want to provoke him", and</p> <p>17 I will come back to that. There is one passage in there which</p> <p>18 is perfectly obvious that she was not remotely concerned about</p> <p>19 provoking him. The judge does not say in terms that he</p> <p>20 accepts Ms. Heard's explanation or not, but in so far as the</p> <p>21 purpose was therapeutic, we have a number of submissions to</p> <p>22 make. First, it is hard to imagine any therapist advising a</p> <p>23 couple to lie to each other. Secondly, on the face of the</p> <p>24 conversation, its two dominant characteristics are candour and</p> <p>25 spontaneity. If you listen, neither side is holding back, if</p>
<p style="text-align: right;">[Page 41]</p> <p>1 ANDREW CALDECOTT QC</p> <p>2 conduct suggests that this is not necessarily a one-off</p> <p>3 problem, if your Lordship understands me. That is the last</p> <p>4 quote. Mr. Sherborne points out that there is a reference</p> <p>5 more generally to physical fights.</p> <p>6 LORD JUSTICE UNDERHILL: It is rather complicated. They use the</p> <p>7 term "fight" a lot. It is pretty clear mostly they mean what</p> <p>8 most people call a row.</p> <p>9 MR. CALDECOTT: My Lord, it was common grounds at the trial, your</p> <p>10 Lordship is absolutely right, that fight in the American sense</p> <p>11 is of a fairly heated argument.</p> <p>12 My Lord, the first point I make is this. It is</p> <p>13 obviously true that oral evidence in court has formal</p> <p>14 characteristics which contemporary documentary evidence does</p> <p>15 not have.</p> <p>16 LORD JUSTICE DINGEMANS: Are you equating the transcript or the</p> <p>17 tape with a contemporaneous document?</p> <p>18 MR. CALDECOTT: No, my Lord, I am making the contrast the judge is</p> <p>19 drawing between oral evidence in court and a contemporary</p> <p>20 recording. The judge says oral evidence in court is superior</p> <p>21 for the reasons he gives. We say he is obviously right that</p> <p>22 it has some advantages over other evidence, precisely because</p> <p>23 of those formalities. But he is quite wrong, simply as a</p> <p>24 basic matter of the law of evidence, to down grade the</p> <p>25 significance of contemporary documents, because they have</p>	<p style="text-align: right;">[Page 43]</p> <p>1 ANDREW CALDECOTT QC</p> <p>2 I can put it that way. The example that I was going to give</p> <p>3 when she says she was not concerned to provoke, but if you</p> <p>4 take one example, at tab 34, 271, he says, just to take the</p> <p>5 side bars of the speakers up: "Because you start physical</p> <p>6 fights?" She says: "You're such a baby. Grow the fuck up."</p> <p>7 He says: "Because you start physical fights?" and she says:</p> <p>8 "I did start a physical fight." That response, "You're such a</p> <p>9 baby. Grow the fuck up" is not the statement we say of</p> <p>10 someone who is worried about provoking Mr. Depp. But it is an</p> <p>11 example of why you simply cannot, if you were doing a proper</p> <p>12 fact-finding exercise, not deal with this argument too</p> <p>13 closely.</p> <p>14 My Lord, there is another problem about this aspect of</p> <p>15 the evidence, which is J172, which is page A92. This is a</p> <p>16 separate recording.</p> <p>17 LORD JUSTICE UNDERHILL: Just before we leave that, at 176 the</p> <p>18 judge makes a reference to another recording. It is not one</p> <p>19 of the ones we have been given, I do not think, or is it?</p> <p>20 Have I misunderstood?</p> <p>21 MR. CALDECOTT: No, we do not have that one, my Lord.</p> <p>22 LORD JUSTICE UNDERHILL: That is fine. I just wanted to check.</p> <p>23 Nor have we got, I think, the transcript of Ms. Heard's</p> <p>24 cross-examination about this conversation.</p> <p>25 MR. CALDECOTT: My Lord, no. There is the tight problem with the</p>

[11] (Pages 40 to 43)

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<p>1 ANDREW CALDECOTT QC</p> <p>2 a complete departure from the previous case. It starts at</p> <p>3 (viii), bottom of page 102: "Mr. Sherborne submitted that it</p> <p>4 was significant that Ms. Heard had originally given a</p> <p>5 different date for Incident 2 and she and her sister had been</p> <p>6 caught out in a lie which had led them to change their story</p> <p>7 and split Incident 2 into two separate incidents", and so on.</p> <p>8 "I was not persuaded by in submission. I accept Ms. Heard's</p> <p>9 explanation for how she originally came to give the date of</p> <p>10 8th March. Ms. Heard said that Mr. Depp inflicted a number of</p> <p>11 assaults on her in March 2013. Only one is pleaded, but</p> <p>12 I accept that is why in some respects Ms. Heard's account was</p> <p>13 confused." He does not consider at all her original evidence</p> <p>14 that this incident stood out in March as the first time</p> <p>15 anything of this gravity had happened. Only one assault had</p> <p>16 been put to Mr. Depp in cross-examination. No details of the</p> <p>17 other alleged assaults had been given. We say this is</p> <p>18 fundamentally unfair.</p> <p>19 I hope your Lordships understand why with these three</p> <p>20 examples I do say they all have an element of a thread that</p> <p>21 Ms. Heard's evidence is simply accepted, if I may put it not</p> <p>22 rudely, too glibly without proper forensic examination of the</p> <p>23 inherently probabilities and contemporary document.</p> <p>24 LORD JUSTICE UNDERHILL: Although it does not need saying, we</p> <p>25 appreciate in the skeleton argument there are other examples,</p>	<p>1 SASHA WASS QC</p> <p>2 MS. WASS: ... is that the judge found Ms Heard to be a compelling</p> <p>3 witness, on the one hand, and Mr. Depp to be a witness who</p> <p>4 lacked credibility, on the other hand. If one looks at</p> <p>5 various instances, and this is borne out by evidence of</p> <p>6 support that was presented in those instances, it is suggested</p> <p>7 that there was no analysis of either credibility or event. We</p> <p>8 suggest that is wrong. It is suggested in the documents that</p> <p>9 the judge failed to explain his reasons. Again, we say this</p> <p>10 is wrong. Furthermore, the suggestion is made that no witness</p> <p>11 was found to have lied. Again, we disagree. The learned</p> <p>12 judge did find on multiple occasions that Mr. Depp had lied.</p> <p>13 He did not use the word, but he used phrases such as "I cannot</p> <p>14 accept the evidence of Mr. Depp" in whatever regard it was.</p> <p>15 So, our broad submission in terms of the criticism of the</p> <p>16 judgment is that it is erroneous. Each of the 14 incidents of</p> <p>17 violence were subjected to forensic analysis and Ms. Heard's</p> <p>18 allegations were subjected to forensic analysis during the</p> <p>19 course of the judgment. In reaching his conclusions, the</p> <p>20 judge in respect of each of the allegations itemised the</p> <p>21 wealth of supporting evidence in this case, because this was</p> <p>22 not a case where there was simply Ms. Heard's evidence on the</p> <p>23 one hand and Mr. Depp's on the other. Many of the allegations</p> <p>24 included complaints that were made at the time by Ms. Heard,</p> <p>25 and I refer in particular to diary entries in electronic form.</p>
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<p>1 ANDREW CALDECOTT QC</p> <p>2 but you have appropriately chosen the most ---</p> <p>3 MR. CALDECOTT: One has to be selective at this stage.</p> <p>4 My Lord, can I lastly say this for clarity. We</p> <p>5 acknowledge this court is in absolutely no position to decide</p> <p>6 whether these allegations are true or false. If I may just</p> <p>7 take hypothetically the optimist's view that we got permission</p> <p>8 and there was a full appeal and we succeeded, the only relief</p> <p>9 that we seek is a retrial, because plainly these would have to</p> <p>10 be re-examined. We say there should be in this exceptional</p> <p>11 case and by a proper fact-finding exercise where the fresh</p> <p>12 evidence would be part of the exercise.</p> <p>13 My Lords, I am very grateful.</p> <p>14 LORD JUSTICE UNDERHILL: Thank you. We will just take a short</p> <p>15 time to consider where we go from here. Thank you very much.</p> <p>16 (A short break)</p> <p>17 LORD JUSTICE UNDERHILL: Yes?</p> <p>18 (Link lost to the transcriber)</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 SASHA WASS QC</p> <p>2 There was an e-mail of 11th June 2013 when she described the</p> <p>3 behaviour of Mr. Depp, which was borne out in later instances,</p> <p>4 and which caused Mr. Depp to say that this was part of an</p> <p>5 elaborate hoax before the couple had even become engaged.</p> <p>6 There were texts sent at the time of these various</p> <p>7 assaults that were either sent or received by Ms. Heard or</p> <p>8 indeed by Mr. Depp or those working for Mr. Depp, and</p> <p>9 I particularly will refer in a moment to incident 4, an</p> <p>10 incident on an aeroplane. Photographs of injuries were</p> <p>11 produced during the course of the trial, some of which were</p> <p>12 particularly important where metadata showed, for example,</p> <p>13 that Ms. Heard's injuries were recorded digitally and timed</p> <p>14 before police even attended her home. Medical evidence was</p> <p>15 produced, or evidence was produced as to what a nurse found</p> <p>16 about injuries to Ms. Heard. Apologies by Mr. Depp were sent</p> <p>17 by text, accepting his behaviour had been abominable and</p> <p>18 indeed Mr. Depp's assistant apologised to Ms. Heard again in</p> <p>19 relation to incident 4, that Mr. Depp had kicked her on the</p> <p>20 plane, which was exactly the allegation that Ms. Heard made.</p> <p>21 In addition, during the course of his evidence, Mr. Depp</p> <p>22 admitted for the first time that he had head-butted Ms. Heard</p> <p>23 in incident 13, in December 2015, although, having made this</p> <p>24 astonishing disclosure for the first time, he sought to temper</p> <p>25 it by suggesting that it was an accident.</p>

[14] (Pages 52 to 55)

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<p>1 SASHA WASS QC</p> <p>2 Can I very briefly deal with incident 2 and correct one</p> <p>3 matter. There was cross-examination of Mr. Depp suggesting</p> <p>4 that there were other incidents in March. More particularly,</p> <p>5 against the background of incident 2, Mr. Depp accepted that</p> <p>6 he had, in his own words, fallen off the wagon in March 2013,</p> <p>7 and there was a wealth of evidence to suggest that he was</p> <p>8 engaged in taking large quantities of cocaine, drinking</p> <p>9 alcohol and that engaged what became known as the "monster",</p> <p>10 which he described as his alterego and the judge indeed</p> <p>11 accepted was a description of Mr. Depp's alter ego, the</p> <p>12 Mr. Hyde he turned into having consumed too many drugs and</p> <p>13 drunk too much alcohol.</p> <p>14 The mistake about the date of incident 2 came to light</p> <p>15 very close to the trial. Mr. Caldecott is absolutely right.</p> <p>16 However, all documents that flowed from that, and there was</p> <p>17 more disclosure of text messages, photographs and the like, in</p> <p>18 fact supported that incident 2 must have taken place at the</p> <p>19 later date in March, not the earlier date in March. So, what</p> <p>20 we have is nothing more than a genuine mistake by a</p> <p>21 complainant who is the subject of long-term domestic abuse who</p> <p>22 has muddled up one incident with another at a time when she</p> <p>23 was making statements about this matter over three years</p> <p>24 later, because chronologically, the painting incident was</p> <p>25 2013, in March. That is the March we are talking about. The</p>	<p>1 SASHA WASS QC</p> <p>2 witness box by Mr. Depp, having seen texts he had written to</p> <p>3 an actor colleague of his, that he had consumed large amount</p> <p>4 of alcohol, two bottles of champagne on the aeroplane, had</p> <p>5 consumed pills and drugs, which he accepted was a reference to</p> <p>6 illegal drugs, and he accepted that he had blacked out. His</p> <p>7 memory was simply imperfect in respect of the entire episode.</p> <p>8 All of that demonstrates or would have enabled any judge</p> <p>9 to say that the account given by Ms. Heard was preferable to</p> <p>10 that of Mr. Depp. There was a careful analysis of this</p> <p>11 incident in the judgment. Any of the criticism made simply</p> <p>12 cannot be applied to that episode. More importantly,</p> <p>13 Ms. Heard was never cross-examined about that incident on the</p> <p>14 aeroplane and her evidence remained uncontradicted. The judge</p> <p>15 found that Mr. Depp had kicked her.</p> <p>16 Complaint is made in the schedule, which is at tab B1,</p> <p>17 where each allegation is set and they are saying no judicial</p> <p>18 findings. Complaint is made in relation to incident 4 that</p> <p>19 the judge did not make any findings about the fact that</p> <p>20 Mr. Depp threw objects at Ms. Heard or pushed a chair at</p> <p>21 Ms. Heard. It is not necessary, in our submission, for any</p> <p>22 fact finder to deconstruct an assault and say within a court</p> <p>23 setting that they believe this part of the incident happened</p> <p>24 but were not sure about another part. It is the overall</p> <p>25 effect of that plane journey which was the subject of incident</p>
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<p>1 SASHA WASS QC</p> <p>2 marriage only came to an end in May 2016, when of course all</p> <p>3 this was put in documentary form for proceedings and the like.</p> <p>4 So a mistake about a date can hardly, in our submission, be</p> <p>5 fundamental to a witness's credibility.</p> <p>6 Can I just deal by way of example, and I am very mindful</p> <p>7 of the time, with two incidents that formed part of the 14 and</p> <p>8 part of the 12 in respect of which the learned judge found in</p> <p>9 the defendants' favour, and they are incident 4 and incident</p> <p>10 8. Incident 4 dealt with a plane journey from Boston to</p> <p>11 Los Angeles during which the allegation made by Ms. Heard was</p> <p>12 that the defendant arrived on the aeroplane drunk, under the</p> <p>13 influence of alcohol, he was argumentative and he kicked her</p> <p>14 in the back. The response by Mr. Depp at first was that he</p> <p>15 was entirely lucid during the course of the journey and that</p> <p>16 no such incident occurred. Text messages which came to light</p> <p>17 during the disclosure exercise demonstrated, first of all,</p> <p>18 that Mr. Depp had apologised to Ms. Heard for his behaviour.</p> <p>19 These are all set out, if I can give my Lord the reference</p> <p>20 rather than going through it, between paragraphs 239 and 265</p> <p>21 at the judgment. There were text messages comprising</p> <p>22 apologies by Mr. Depp, an apology to Ms. Heard by Mr. Depp's</p> <p>23 assistant Mr. Deuters saying that Mr. Depp had cried "when I</p> <p>24 told him he had kicked you", admissions by Mr. Depp to</p> <p>25 friends, to his sister and, finally, an acceptance in the</p>	<p>1 SASHA WASS QC</p> <p>2 4, and the judge found in accordance with the uncontradicted</p> <p>3 evidence in that case.</p> <p>4 Incident 8, if I can take my Lords through that, I hope,</p> <p>5 briefly, was the Australia incident. Contrary to what has</p> <p>6 been suggested this morning, the judge did criticise Ms. Heard</p> <p>7 by saying she described it in a hostage situation. It was</p> <p>8 hyperbole, but he went through the incident itself and the</p> <p>9 allegations and was satisfied that they occurred in the way</p> <p>10 that Ms. Heard had described. It has to be borne in mind that</p> <p>11 again Mr. Depp was proved to have lied about his drug intake</p> <p>12 immediately before and during that incident. Again, in the</p> <p>13 course of the judgment, which can be found in relation to</p> <p>14 incident 8 between paragraphs 287 and 370, the judge goes</p> <p>15 through what became known as the Nathan Holmes drug tests.</p> <p>16 Before Ms. Heard even arrived in Australia, Mr. Depp was</p> <p>17 involved in securing that he had adequate quantities of</p> <p>18 cocaine and pills. Happy pills as he called them. The texts</p> <p>19 by Mr. Depp again supported Ms. Heard's case on that incident,</p> <p>20 but did not support the case that he tried to advance at</p> <p>21 trial. Mr. Depp admitted that he had cut off his own finger</p> <p>22 during the course of this incident.</p> <p>23 LORD JUSTICE UNDERHILL: Not cut off.</p> <p>24 MS. WASS: Cut his own finger. I think he actually used the words</p> <p>25 "I cut off my finger", but that is not ----</p>

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1 SASHA WASS QC
 2 LORD JUSTICE UNDERHILL: He did, but it is not what happened.
 3 MS. WASS: Absolutely, and I apologise.
 4 LORD JUSTICE UNDERHILL: He did serious injury to his finger.
 5 MS. WASS: Yes, he did serious injury to his finger. Instead of
 6 seeking medical attention, his immediate following text was to
 7 demand more cocaine. Mr. Depp admitted in his own evidence
 8 that it was he who used the blood from the seriously injured
 9 finger to deface property in the house. Photographs were in
 10 the bundle of abusive messages written to Ms. Heard,
 11 suggesting that she had been unfaithful to him. When the
 12 blood source dried up from the finger, Mr. Depp went on to use
 13 paint, and the entire house was vandalised.
 14 LORD JUSTICE UNDERHILL: We have read his findings about that.
 15 MS. WASS: Yes. It was during the course of that that Ms. Heard
 16 said that she was assaulted in a variety of ways, one of which
 17 was that glass which had been broken by Mr. Depp had broken on
 18 the floor and she had been dragged on the floor and had
 19 injuries to her forearms and injuries to the bottom of her
 20 feet. Those injuries were, first of all, seen by Mr. Depp's
 21 staff, as is clear from the secretly recorded five-hour tape
 22 that emerged later, although the staff tried to absolve
 23 Mr. Depp of any responsibility. Another member of staff,
 24 having become aware of that secret recording, remembered
 25 during the course of the trial that he too had seen injuries

1 SASHA WASS QC
 2 making of it?
 3 MS. WASS: Can I just qualify what my Lord is suggesting, because
 4 I do not say those were the best examples? There were other
 5 examples where there were people who saw Ms. Heard's injuries,
 6 make up artists, people who saw her after the May incident and
 7 there were witnesses who heard her shouting when a telephone
 8 was thrown at her face.
 9 LORD JUSTICE UNDERHILL: Very well.
 10 MS. WASS: So we do not say these ----
 11 LORD JUSTICE UNDERHILL: I was not saying they were the only
 12 examples. I just wanted to know what the point was that you
 13 were making from these two examples.
 14 MS. WASS: The point I am making is that there is supporting
 15 evidence in both of those examples. There is also supporting
 16 evidence in many other examples.
 17 LORD JUSTICE UNDERHILL: Certainly.
 18 MS. WASS: And the judge clearly, by refraining from simply making
 19 a fact-finding basis on the full house of all 14, was
 20 analytical and did question and apply the burden and standard
 21 of proof quite properly, because as this court has been
 22 reminded, there was hesitance to find in the Thanksgiving
 23 incident and another incident on a train. So, we say that
 24 this is a perfectly rational decision and it was analysed
 25 accordingly, and there is no reason to accede to the

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1 SASHA WASS QC
 2 on Ms. Heard.
 3 LORD JUSTICE UNDERHILL: Ms. Wass, I see exactly what you are
 4 saying about this. We have read the findings which were very
 5 full. I am not quite sure what particular point you are
 6 making. Are you simply making the point there was ample
 7 evidence?
 8 MS. WASS: If I am being unclear, I apologise. It is not only
 9 that there was ample evidence, but there was ample supporting
 10 evidence. This was not simply one woman giving oral evidence
 11 with no support whatsoever. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 18 LORD JUSTICE UNDERHILL: Is your submission really this, that
 19 taking those two examples as your best examples, where you say
 20 there is ample supporting evidence that she was telling the
 21 truth and he was not, the judge was absolutely entitled to
 22 approach the other incidents which were much more, he says, on
 23 the basis of the findings he made on those two and perhaps one
 24 or two other, but those two in particular, incidents where her
 25 evidence was plainly supported? Is that the use you are

1 SASHA WASS QC
 2 description that it lacked analysis on credibility or events.
 3 LORD JUSTICE UNDERHILL: Yes. What are you going to say about
 4 paragraph 175 of the judgment?
 5 MS. WASS: As far as paragraph 175 is concerned, that is the
 6 tapes. Now, Ms. Heard was questioned about these tapes.
 7 These tapes were at the highest as my Lord has described,
 8 admissions, if indeed they were genuine admissions, to one
 9 hitting incident and one throwing of a pot or pan. The tape
 10 itself which was referred to many times in the judgment,
 11 really amounted to a -- it is described as argument 2, but it
 12 was bickering between two people who were in the very final
 13 stages of a relationship. The judge was entitled to say that
 14 he was not prepared to give what was said in those tapes the
 15 same weight that he gave to a witness who came to court, who
 16 took the oath to tell the truth, and who subjected themselves
 17 to analysis, that is to say, cross-examination of what they
 18 were asserting. These were incidents that were quite
 19 different. To describe them as documentary, to describe this
 20 as documentary evidence, in our submission, is not ----
 21 LORD JUSTICE UNDERHILL: I take your point about that, but
 22 I think, Mr. Caldecott's real point is that they are
 23 contemporaneous tapes containing an admission, and that of
 24 course there may be respects in which they are different from
 25 evidence in court, inferior to evidence in court, but in other

[16] (Pages 60 to 63)

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<p>1 SASHA WASS QC</p> <p>2 respects they are better than evidence in court because they</p> <p>3 are what people said at the time.</p> <p>4 MS. WASS: The learned judge heard the tapes, he was asked to</p> <p>5 listen to the entire two-hour argument and he did so. It was</p> <p>6 referred to many, many times during the course of evidence in</p> <p>7 this case and indeed closing speeches. The judge was</p> <p>8 perfectly entitled, having seen the witnesses, having heard</p> <p>9 the witnesses, having seen how they withstood</p> <p>10 cross-examination or did not, to say that he preferred that</p> <p>11 evidence to this evidence and that is all he said. He was</p> <p>12 there and he was able to do so. There may be cases, for</p> <p>13 example, where there are covert recordings by the police,</p> <p>14 people make admissions against their self-interest and that</p> <p>15 can be extremely powerful evidence. But that was not the</p> <p>16 situation that we had in argument 2.</p> <p>17 And finally this, and I want to leave Mr. Wolanski more</p> <p>18 time, the position is that even if the judge had found,</p> <p>19 because the argument of Mr. Depp was that, "Well, she hit me</p> <p>20 more than once", although that was in dispute, even if she was</p> <p>21 feisty and had slapped Mr. Depp as she admitted on that tape,</p> <p>22 that does not disqualify her from being a victim of serious</p> <p>23 domestic violence. So, whatever the criticism may be levelled</p> <p>24 in respect of 175, it does not actually matter.</p> <p>25 LORD JUSTICE UNDERHILL: That is not the basis on which the judge</p>	<p>1 ADAM WOLANSKI QC</p> <p>2 MR. WOLANSKI: Can I address the court from here?</p> <p>3 LORD JUSTICE UNDERHILL: You cannot be seen on the live stream</p> <p>4 camera, so if you can just do a quick swap with Ms. Wass.</p> <p>5 (Pause)</p> <p>6 MR. WOLANSKI: On the fresh evidence ----</p> <p>7 LORD JUSTICE UNDERHILL: Yes, take your time.</p> <p>8 MR. WOLANSKI: ---- I will address first of all reasonable</p> <p>9 diligence, then materiality and finally say a few points on</p> <p>10 the law. Reasonable diligence. It is important to understand</p> <p>11 what this fresh evidence demonstrates. It is that Ms. Heard</p> <p>12 had not yet paid all the money to these two charities which</p> <p>13 she had pledged to pay in 2016. We say there are six means by</p> <p>14 which the claimant and his very well resourced team could have</p> <p>15 obtained this information before the trial started in July</p> <p>16 2020. I will run through them first of all and then address</p> <p>17 them in a little more detail. First, from the two charities</p> <p>18 by means of subpoena in the US proceedings but earlier in</p> <p>19 those proceedings; secondly, by means of subpoena or</p> <p>20 disclosure application from Ms. Heard in the US proceedings,</p> <p>21 but earlier; thirdly, and perhaps most obviously, by asking</p> <p>22 Ms. Heard questions on this topic in cross-examination;</p> <p>23 fourthly, by means of Mr. Depp's accountant, Mr. White, asking</p> <p>24 the charities directly for the information; fifthly, by</p> <p>25 seeking documents relating to the payments from Ms. Heard by</p>
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<p>1 SASHA WASS QC</p> <p>2 decided it, though, this is not a judgment that says fault on</p> <p>3 both sides but the important thing is ----</p> <p>4 MS. WASS: No, but that could have been his approach and indeed he</p> <p>5 was addressed on the basis that all he had to find was one</p> <p>6 incident of serious violence or a defence of truth to be</p> <p>7 established.</p> <p>8 My Lord, I am mindful of the time and I am going to let</p> <p>9 Mr. Wolanski ----</p> <p>10 LORD JUSTICE UNDERHILL: Thank you. That has been very helpful,</p> <p>11 Ms. Wass.</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 ADAM WOLANSKI QC</p> <p>2 way of third party disclosure in the UK proceedings; and,</p> <p>3 sixthly, and finally, by seeking the documents from the</p> <p>4 charities for use in these proceedings but by way of a</p> <p>5 disclosure order in the United States.</p> <p>6 Dealing with the first of those, the US proceedings,</p> <p>7 could Mr. Depp have obtained the documents before ----</p> <p>8 LORD JUSTICE UNDERHILL: They do not need very much amplification,</p> <p>9 do they?</p> <p>10 MR. WOLANSKI: They do not need very much but I am going to</p> <p>11 amplify them a little. The US proceedings, we know, started</p> <p>12 on 1st March 2019. They were listed for trial on 3rd August</p> <p>13 2020. Why did it take Mr. Depp's team so long to issue the</p> <p>14 subpoenas? They were not issued till 30th May 2020. We do</p> <p>15 not know, because Mr. Depp's legal team has not told us. What</p> <p>16 we do know is that once the subpoena was issued on 30th May,</p> <p>17 or the subpoenas were issued on 30th May 2020 it took just</p> <p>18 under seven months to obtain the documents, but perhaps taking</p> <p>19 into account a number of features which need not have applied</p> <p>20 had the application been made more promptly in those</p> <p>21 proceedings.</p> <p>22 LORD JUSTICE DINGEMANS: I had understood or misunderstood</p> <p>23 Mr. Caldecott to say they had not sought subpoenas until</p> <p>24 Ms. Heard had put this point in her witness statement in</p> <p>25 February 2020.</p>

[17] (Pages 64 to 67)

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1
2 MR. WOLANSKI: That may be right. That may be right. But
3 importantly, the issue had already come up in the US
4 proceedings at the end of ---
5 LORD JUSTICE UNDERHILL: In the US proceedings, yes, but what
6 about the UK proceedings or the English proceedings?
7 MR. WOLANSKI: In the UK proceedings, in the English proceedings
8 the point had not come up because Ms. Heard did not address it
9 until February. But in the US proceedings we know that
10 already in November 2019, Mr. Depp's legal team was asking
11 Ms. Heard to address questions on this topic by way of the
12 request for admissions, and in December 2019, was asking
13 Ms. Sexton questions on this topic in her deposition. So it
14 was already a live issue at the end of 2019, in the US
15 proceedings.

16 So, why is it then that no effort was made to issue the
17 subpoena in the US proceedings until the end of May 2019? We
18 do not know, because Ms. Vasquez, who is the witness who has
19 given a witness statement on this topic for this appeal does
20 not address the point. As I say, it took just under seven
21 months to get the documents once the subpoena had been issued
22 in May 2020. That includes a month of an agreed stay, if you
23 like, while the hospital dealt with other matters, but it also
24 includes a number of other delays. For example, it took many
25 months for Ms. Heard's motion to quash the subpoena to be

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1 dealt with by the court. Then there are a number of other
2 delays.

3 Now, we do not know whether or not, if the subpoena had
4 been issued earlier, those delays would have occurred. It may
5 well be of course had the subpoena been issued pre-pandemic,
6 many of those delays would not have occurred at all. We do
7 not know. But there is no reason why this court should not
8 conclude it was perfectly possible for Mr. Depp's lawyers to
9 issue the subpoenas much earlier in the proceedings and
10 therefore to get the documents by July.

11 Next is by getting the documents off Ms. Heard in the US
12 proceedings. Now, we know an application was made for
13 disclosure against Ms. Heard in the US proceedings that was
14 heard on 18th December 2020. And that succeeded. But we know
15 nothing else at all about that application. We are not told
16 when it was issued. We are not told why it was not issued
17 earlier. The evidence is silent on that topic. Again, there
18 is no reason for this court to suppose that had a subpoena or
19 application for disclosure been made earlier in the US
20 proceedings against Ms. Heard, the documents or the
21 information could not have been obtained earlier from her.

22 The third route is by asking Ms. Heard questions in
23 cross-examination at trial. The explanation that is given by
24 Mr. Depp's legal team for not doing this, we say, does not
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1 hold water. It is said that it did not occur to Mr. Depp's
2 legal team to question what Ms. Heard had said on this topic,
3 and that Ms. Heard's word was accepted at face value. It is
4 also said it did not occur to Mr. Depp's team to challenge
5 this part of the evidence at all.

6 Now, we find this very difficult to understand. First
7 of all, as your Lordship knows, by the time of the trial in
8 the UK the US legal team had already issued the subpoenas, so
9 plainly the US team knew or had reason to believe that there
10 were at least questions to be answered about these donations,
11 so this is a live train of inquiry in the US proceedings. But
12 of course, this concern on the part of the claimant and his
13 team goes much further because Mr. Depp himself had been
14 asking the questions about the donations as far back as 2016.
15 Your Lordships will have seen the texts in which he raises the
16 issue in very colourful terms with third parties.

17 The matter was also addressed by Mr. Waldman, who is
18 Mr. Depp's US lawyer, when he gave comments to a magazine
19 article, the blast article, in June 2020. Where he discloses
20 the fact that the subpoenas had been issued and he says there
21 is, as he puts it, "a trail of unanswered questions about the
22 relationship between Ms. Heard and the ACLU; with this
23 subpoena we hope to get to the bottom of those questions".
24 So, Mr. Waldman was plainly hot on the trail of this
25

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1 information before this trial started. So, if there were
2 these questions in the mind of Mr. Depp's team, why an earth
3 did they not ask Ms. Heard any questions on this topic at
4 trial?

5 We also know, of course, that Mr. White was asking
6 questions about this matter well before the trial started. He
7 had had conversations about it with Mr. Depp's legal team, he
8 tells us. And then of course, as your Lordships have noted,
9 documents were added to the trial bundle on this topic, and
10 the only reason they could have been added to the trial bundle
11 is because it was planned to ask Ms. Heard questions about
12 them in cross-examination. Two examples of documents that
13 were added, which can only have been added for that purpose,
14 there is no other possible reason, one is The Children's
15 Hospital roll of honours, which of course includes Ms. Heard
16 as one of the donors, and another is the Dutch interview which
17 is the interview in which Ms. Heard discusses the fact that
18 she had made these donations to charity. So, those were
19 plainly included in order to form the basis for questions of
20 Ms. Heard. A decision was made not to question her, and the
21 obvious answer to the question, well, why not, is because the
22 claimant's legal team knew that it was not a matter that was
23 going to get them anywhere at trial, regardless of how
24 Ms. Heard answered the questions.
25

[18] (Pages 68 to 71)

<p style="text-align: right;">[Page 72]</p> <p>1 ADAM WOLANSKI QC</p> <p>2 The fourth way in which this information could have been</p> <p>3 obtained is from the charities directly. The court has seen</p> <p>4 the letter that The Children's Hospital wrote to Mr. White on</p> <p>5 16th June 2019, which Mr. White says he did not receive.</p> <p>6 Importantly, that letter volunteers the information that no</p> <p>7 further payments had been made in pursuance of what is</p> <p>8 described as the multiple scheduled donations. Therefore, had</p> <p>9 Mr. White approached the charity directly to ask about the</p> <p>10 donations, this court can conclude they would have volunteered</p> <p>11 the information to him again. They were quite happy to</p> <p>12 volunteer it to him in June 2019, they would have been</p> <p>13 perfectly happy to volunteer it to him later had Mr. White</p> <p>14 taken the trouble to ask. He says it would have been</p> <p>15 professionally inappropriate and it was confidential</p> <p>16 information which the charity would not have provided, but</p> <p>17 that is not supported by the fact that the charity sent him</p> <p>18 the letter unprompted by anything he had asked many months</p> <p>19 beforehand. As I say, it is particularly odd Mr. White did</p> <p>20 not take this step because he tells us he had suspicions about</p> <p>21 whether or not these payments had been made by Ms. Heard.</p> <p>22 The fifth thing that Mr. Depp's legal team could have</p> <p>23 done is seek information from Ms. Heard by way of third party</p> <p>24 disclosure in these proceedings. I will say no more about</p> <p>25 that. An application was made. No effort was made to seek</p>	<p style="text-align: right;">[Page 74]</p> <p>1 ADAM WOLANSKI QC</p> <p>2 The labelling of Ms. Heard as a gold-digger was a misogynistic</p> <p>3 trope. The gold-digger theory was hopeless and indeed the</p> <p>4 hoax theory was hopeless.</p> <p>5 So the gold-digger theory was not pursued at trial. It</p> <p>6 was not mentioned in closing submissions on behalf of the</p> <p>7 claimant. And even if the judge had had the fresh evidence</p> <p>8 and decided that it did demonstrate Ms. Heard was a</p> <p>9 gold-digger, this would not, of course, have driven him to</p> <p>10 conclude she had constructed a hoax, still less that she had</p> <p>11 not been subject to violence at the hands of Mr. Depp. So the</p> <p>12 whole theory was nonsensical. The evidence went to no issue</p> <p>13 in the case. It solely went to credit.</p> <p>14 As to credit, the question of Ms. Heard's credit was</p> <p>15 very extensively investigated at trial. Your Lordships will</p> <p>16 have seen that a number of matters were raised by Mr. Depp's</p> <p>17 team, and explored at great length by the judge at trial and</p> <p>18 explained in his evidence. Each one was rejected. This was</p> <p>19 not a case in which the defendant was deprived of material</p> <p>20 with which to attack Ms. Heard 's credit or indeed the chance</p> <p>21 to deploy it at trial. It was very fully explored. This</p> <p>22 material would have made no difference at all to the credit of</p> <p>23 Ms. Heard.</p> <p>24 As Ms. Wass has explained, the findings of the judge</p> <p>25 were rooted not just in Ms. Heard's evidence but in</p>
<p style="text-align: right;">[Page 73]</p> <p>1 ADAM WOLANSKI QC</p> <p>2 these documents by way of that application.</p> <p>3 Finally, it was open to Mr. Depp's legal team to issue</p> <p>4 an application in the US courts against the charities for</p> <p>5 access to the documents in pursuance of these proceedings.</p> <p>6 The reason why we know that that might have got somewhere is</p> <p>7 because the defendants' legal team made a very similar</p> <p>8 application by way of what is known as a section 178(2)</p> <p>9 application under Article 28 of the US code, for an order</p> <p>10 compelling witnesses in the US to give evidence in the UK</p> <p>11 proceedings. So, there is no reason why Mr. Depp's legal team</p> <p>12 could not have done exactly the same thing. They could have</p> <p>13 gone to the US court and said, "We have a trial in the UK</p> <p>14 coming up, this is an important matter, we need the</p> <p>15 documents". He did not do it. He does not tell us why.</p> <p>16 Briefly on the second stage of Ladd v Marshall</p> <p>17 materiality. This material, if produced before trial would</p> <p>18 not have had any effect at all on the outcome of the case. We</p> <p>19 make three points on this. First of all, whether or not</p> <p>20 Ms. Heard had donated the sums was not a pleaded issue. The</p> <p>21 judge was therefore not required to decide it. It could only</p> <p>22 have had any bearing at all on the pleaded issues if it was</p> <p>23 prayed in aid of the so-called "gold-digger" thesis. And that</p> <p>24 was of course a thesis that was expressly abandoned by</p> <p>25 Mr. Depp's legal team during the trial. Correctly abandoned.</p>	<p style="text-align: right;">[Page 75]</p> <p>1 ADAM WOLANSKI QC</p> <p>2 corroborative evidence that was very extensive. So the</p> <p>3 proposition that her evidence would have been rejected as a</p> <p>4 result of this material is, we say, fanciful.</p> <p>5 Finally, in any event, the information does not</p> <p>6 demonstrate that Ms. Heard lied. What she said in her witness</p> <p>7 statement was that she had donated the money, not that she had</p> <p>8 paid it. A donation is not the same as a payment, and we know</p> <p>9 that, not least because this is how the charities themselves</p> <p>10 have understood what Ms. Heard has done. The ACLU, your</p> <p>11 Lordships have seen the document, they understood what</p> <p>12 Ms. Heard to have done was to have made a pledge to pay over</p> <p>13 10 years. That is a donation. Similarly, with The Children's</p> <p>14 Hospital, Ms. Heard is listed on the list of donors in the</p> <p>15 1 million to 5 million category because she has pledged this</p> <p>16 amount. She is a donor. Therefore, there is nothing wrong,</p> <p>17 let alone dishonest about Ms. Heard's description of what she</p> <p>18 has done as making a donation.</p> <p>19 Moreover, Ms. Heard has made a number of payments</p> <p>20 already in pursuance of these pledges. There is the \$100,000.</p> <p>21 There are a number of other payments either been made by her</p> <p>22 or in her name. In total, some \$950,000 to the ACLU, 850,000</p> <p>23 to the CHLA, either as a grant for an anonymous donor which</p> <p>24 has been in honour of her or designated as a donation.</p> <p>25 LORD JUSTICE UNDERHILL: I do not think it matters. I think it is</p>

[19] (Pages 72 to 75)

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<p>1 ADAM WOLANSKI QC</p> <p>2 not prudent to assume that the amounts from anonymous donors</p> <p>3 in honour of her can be counted against the 7 million or the</p> <p>4 3.5 million. One does not know enough about who paid them or</p> <p>5 on what basis. I do not think that affects your substantive</p> <p>6 point which is that she has paid money out of her own pocket.</p> <p>7 MR. WOLANSKI: She has. As your Lordships have observed, her</p> <p>8 explanation when this came up in the US court was she had made</p> <p>9 these pledges and fully intended to fulfil them. There is no</p> <p>10 reason to suppose that had she been questioned in this trial</p> <p>11 she would not have given exactly the same explanation to the</p> <p>12 court here that her lawyer gave to the US court when the</p> <p>13 matter arose in December last year. She said nothing</p> <p>14 dishonest in her witness statement whatsoever.</p> <p>15 So, my Lord, the evidence would have made absolutely no</p> <p>16 difference to the case. The judge found that she had in his</p> <p>17 words, made a gift and a donation. He did not find she had</p> <p>18 made payments. Therefore, what he found about what she had</p> <p>19 done was correct. So that is what we say on the fresh</p> <p>20 evidence.</p> <p>21 Very briefly on the law. I see the time. The test for</p> <p>22 evidence going purely to credit is the higher test and this is</p> <p>23 evidence purely going to credit. That is the test explained</p> <p>24 in Braddock v Tillotson's Newspapers. It is a test which</p> <p>25 requires the court to find that no reasonable jury or court</p>	<p>1 ADAM WOLANSKI QC</p> <p>2 you nothing to say. We will give you the five minutes.</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
[Page 77]	[Page 79]
<p>1 ADAM WOLANSKI QC</p> <p>2 could be expected to act upon the evidence of a witness whose</p> <p>3 character had been called into question. That simply cannot</p> <p>4 apply to this case.</p> <p>5 Next, there is of course no distinction to be drawn</p> <p>6 between the claimant and his legal representatives -- I do not</p> <p>7 think there is any issue between us on that -- in terms of</p> <p>8 reasonable diligence. The fact that the US lawyers took a</p> <p>9 step rather than the UK lawyers does not matter.</p> <p>10 Finally, Mr. Caldecott sought to draw a distinction</p> <p>11 between cases involving fraud and cases not involving fraud.</p> <p>12 Of course, what is not being alleged in this case is that a</p> <p>13 fraud was perpetrated on the court by the defendant. That is</p> <p>14 a different kind of case. As your Lordships will be aware,</p> <p>15 where that is what is being alleged, the proper course for the</p> <p>16 court is to refer the matter to trial for the issue of fraud</p> <p>17 to be resolved by the court. And there has been no suggestion</p> <p>18 that this is a case in which that referral should occur. This</p> <p>19 is pure Ladd v Marshall. It is not a case where what is being</p> <p>20 alleged is that a fraud has been perpetrated by a party.</p> <p>21 So, my Lord, unless you have any questions for me, those</p> <p>22 are my submissions.</p> <p>23 LORD JUSTICE UNDERHILL: Thank you very much indeed, Mr. Wolanski.</p> <p>24 That has been very succinct and helpful. Do not worry,</p> <p>25 Mr. Caldecott, we are not going to insist on rising, giving</p>	<p>1 ANDREW CALDECOTT QC</p> <p>2 MR. CALDECOTT: I will not be longer than that, my Lord. Can I</p> <p>3 just remind your Lordships of the test. Paragraph 34 of</p> <p>4 Hamilton v Al-Fayed. It is different where there is a</p> <p>5 deception of the court because, in Meek v Fleming,</p> <p>6 paragraph 32, it was held that "there was no need to consider</p> <p>7 whether it was satisfied as another principle applied where</p> <p>8 the Court had been positively misled". The test in 34(2) is:</p> <p>9 "Where it is clearly established by fresh evidence that the</p> <p>10 Court was deliberately deceived in relation to the credibility</p> <p>11 of a witness, a fresh trial will be ordered where there is a</p> <p>12 real danger that this affected the outcome of the trial." We</p> <p>13 say that is the right test and not Braddock.</p> <p>14 My Lord, typically, I have prepared incident 12 because</p> <p>15 that was the one referred to in my learned friend's</p> <p>16 submissions but can I make two very quick points about those</p> <p>17 two incidents.</p> <p>18 LORD JUSTICE UNDERHILL: Yes.</p> <p>19 MR. CALDECOTT: First of all, incident 4 was found by the judge as</p> <p>20 a kick to I think her behind or bottom. We are dealing with</p> <p>21 an article that alleged beating Ms. Heard to the fear of her</p> <p>22 life. Incident 4 is not a fear of life incident on any view.</p> <p>23 That is the only point I am going to say about that, to save</p> <p>24 time. Just to show that Australia is nothing like as</p> <p>25 straightforward as it is presented, and to show its overlap</p>

[20] (Pages 76 to 79)

1 ANDREW CALDECOTT QC
 2 with argument 2, and with other contemporary documentary
 3 evidence, can I quickly go to one or two paragraphs of the
 4 judge's judgment. There is another curious fact, at 323, a
 5 mobile phone by was left on at the relevant time to the
 6 Australia incident. It contains two very significant
 7 statements: "There's been bottles thrown" -- this is the first
 8 paragraph -- "and she admits to me she threw the first..."
 9 Then in the next paragraph, three lines down, "And she
 10 admitted that she hit him first".
 11 Now, argument 2 at page 10 has got a broadly similar
 12 reference to the throwing of cans by her and this was a room,
 13 I think, where there were cans of paint. I mention that just
 14 to show that the contemporary documentation on this is by no
 15 means all one way. If your Lordships were to look, for
 16 example, at 354, just another piece of evidence, this is from
 17 Mr. King on the plane back after Australia: "Have you ever
 18 been so angry with someone that you just lost it?" This is a
 19 question from Ms. Heard. 355: she says she did not recall
 20 having that conversation. The judge then picked up the
 21 point ---
 22 LORD JUSTICE UNDERHILL: If you are going to read that, you should
 23 read the second sentence as well.
 24 MR. CALDECOTT: Yes. "She said if she had, she would have been
 25 referring to Mr. Depp rather than to herself." We will see

1 ANDREW CALDECOTT QC
 2 to be with me about this, would it have affected the judge's
 3 overall approach to her credibility? And we say of course it
 4 would. Just to give you a reference in Meek v Fleming as to
 5 where that question is actually asked in Meek v Fleming, which
 6 of course is the really quite extraordinary case, at
 7 tab 2 ---
 8 LORD JUSTICE UNDERHILL: Do you want us to go to it?
 9 MR. CALDECOTT: My Lord, I will just read it. It is tab 2,
 10 page 384: "If the purport of the fresh evidence had become
 11 known in the course of the trial, it would have shown both
 12 that the defendant had taken part in the deception of
 13 a court in the matter for which he was demoted..." So they
 14 do examine not only the effect of the true representation ---
 15 LORD JUSTICE UNDERHILL: This is the point you made earlier.
 16 MR. CALDECOTT: Yes, thank you. My Lord, there is just the point
 17 that there is obviously a potential for cross-contamination
 18 once particular incidents start to be -- the reason looks
 19 unsound. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

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 2 how the judge deals with this. Then the judge makes a
 3 fleeting reference to argument 2, that promise. Then, if we
 4 go to 370 at (xxiv), we see again how this is all dismissed:
 5 "I accept that it is possible that Ms Heard made the remark
 6 which Mr King attributed to her. It certainly has an uncanny
 7 echo of exactly the same phrase which Ms Heard used in
 8 Argument 2. But, even if she did make that remark and intend
 9 it to refer to herself, rather than Mr Depp, my conclusions
 10 remain the same for all the other reasons I have given."
 11 I use that to illustrate.
 12 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] Can I just say, I am going to say
 16 very little about reasonable diligence. I have been over the
 17 objections and I am not going to repeat anything. Two things
 18 which arise, which is this. If this evidence is entirely
 19 neutral, why does Ms. Heard go to such lengths to suppress it?
 20 No explanation is offered for that by my learned friend at
 21 all. It goes both to materiality and to the likely answer we
 22 might have got if we had asked a question.
 23 The last thing is this. What my learned friend's
 24 analysis about the effect of it does not analyse at all is, if
 25 it were known that it was a lie, and obviously the court has

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 2 LORD JUSTICE UNDERHILL: Yes, I see that. Well, we are very
 3 grateful to counsel for very effective and well-focused
 4 submissions. We are not going to reach an immediate decision
 5 today, but because this is a permission to appeal application
 6 we will make it very shortly. But it will be handed down in
 7 writing in the usual way. I do not think there is anything
 8 else we need say. Thank you.
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