Neutral Citation Number: [2025] EWHC 222 (KB)

Case No: QB-2022-001397

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2025

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

NOEL ANTHONY CLARKE	**Claimant**
- and -	
GUARDIAN NEWS AND MEDIA LIMITED	**Defendant**

- -
- -

Philip Williams, Arthur Lo and Daniel Jeremy (instructed by **The Khan Partnership LLP**) for the **Claimant**
Gavin Millar KC, Alexandra Marzec and Ben Gallop (instructed by **Wiggin LLP**) for the **Defendant**

Hearing dates: 29 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

Introduction

1. This is a claim for defamation in respect of eight articles published by the defendant, and for breach of data protection legislation. The first and principal article, entitled, "*'Sexual predator': actor Noel Clarke accused of groping, harassment and bullying by 20 women*" was published online by the defendant at 19:35 on 29 April 2021 ('the First Article').

2. The single meaning of the First Article was found by Johnson J to be:

> "there are strong grounds to believe that the Claimant is a serial abuser of women, that he has, over 15 years, used his power to prey on and harass and sometimes bully female colleagues, that he has engaged in unwanted sexual contact, kissing, touching or groping, sexually inappropriate behaviour and comments, and professional misconduct, taking and sharing explicit pictures and videos without consent, including secretly filming a young actor's naked audition."

3. The second to eighth articles, which were published between 30 April 2021 and 28 March 2022, covered similar territory. The meanings are, similarly, at the level of strong grounds to investigate, save for the final article which means, "*there are grounds to investigate allegations against the Claimant of groping, harassment and bullying*": see *Clarke v Guardian News & Media Ltd* [2023] EWHC 2734 (KB),[55]-[62].

4. I heard the claimant's application to strike out the Amended Defence, either in whole or in part, specifically, the defence of publication on a matter of public interest provided by s.4 of the Defamation Act 2013. I announced my decision to refuse to strike out the Amended Defence at the end of the hearing, indicating I would give my reasons in writing. This judgment contains my reasons.

History of the proceedings

5. The claimant issued a claim "*protectively*" on 29 April 2022. On 12 August 2022, his (former) solicitors sent a letter before claim putting the defendant "*on notice of the claims our client intends to bring*". On 25 August 2022, the claim form was amended to remove the second to twelfth defendants, and add the data protection claim. The following day, the claim form and Particulars of Claim dated 26 August 2022 were served on the defendant. The claimant seeks, inter alia, an injunction and damages, including special damages of more than £10 million.

6. Following a meaning trial, on 1 November 2023, Johnson J handed down the judgment to which I have referred and made an order determining the meanings of the articles complained of. On 15 November 2023, the claimant served Amended Particulars of Claim.

7. The Defence and Reply were served, respectively, on 10 January 2024 and 3 April 2024. The Amended Defence and Amended Reply were served, respectively, on 3 and 17 May 2024.

8. Case management hearings took place before Master Thornett on 23 May and 4 July 2024, and a costs management hearing took place before Master Brown on 15 July 2024.

9. On 11 June 2024, the trial was listed to begin on 3 March 2025, with a time estimate of six weeks.

10. The parties exchanged simultaneous disclosure and inspection on 3 October 2024. That was nearly eight weeks later than originally envisaged in Master Thornett's order of 23 May 2024, but in accordance with various extensions of time granted by consent, following applications by the defendant. The claimant's solicitor, Mr Rao Hassan Khan, states that the defendant disclosed approximately 4400 documents for inspection (Khan 4, para 5).

11. Following a contested hearing of the claimant's application for an extension of time to exchange witness statements, resulting in the grant of a shorter extension than sought, the parties duly exchanged witness statements on 5 December 2024. The defendant served 34 witness statements, of which 28 were adduced in support of the defence of truth, and six were adduced from journalists and editors at *the Guardian*, in support of the public interest defence. The defendant has indicated its intention to call 32 of those witnesses, and to rely on the evidence of the remaining two witnesses as hearsay evidence. The claimant served 15 statements, and he has indicated his intention to call all of these witnesses.

12. On 31 December 2024, the claimant issued the application to strike out which is the subject of this judgment, supported by the fourth witness statement of Mr Khan ('Khan 4').

13. The pre-trial review ('PTR') took place before me on 20 January 2025. On 6 January 2025, the claimant requested that the PTR hearing should be used, instead, to determine his strike out application and other applications which, at that point, had not yet been issued. On 8 January 2025, the claimant issued an application to join six proposed new defendants as parties, and to re-amend the Amended Particulars of Claim to plead unlawful means conspiracy and to amend the special damages claim. On 10 January 2025, the claimant applied for an extension of time for service of the trial bundles until 21 days after the PTR (i.e. 3 weeks rather than 8 weeks before trial). By an order dated 13 January 2025 (maintained on 15 January, following the claimant's application to vary), I ordered that the PTR would deal with the trial management issues, and with directions in respect of the other applications.

14. The defendant served evidence in response to the strike out application on 14 January 2024 from Gaelyn Fuhrmann, the defendant's solicitor ('Fuhrmann 4'), Gillian Phillips, the defendant's Editorial Legal Consultant ('Phillips 1'), Nick Hopkins, the defendant's Executive Editor for news ('Hopkins 2'), Paul Lewis, the defendant's Head of Investigations and principal editor responsible for supervising the two main reporters ('Lewis 2'), Sirin Stewart (professional name, Sirin Kale), one of the two main journalists who wrote the Articles ('Stewart 2') and Lucy Osborne, the other main journalist ('Osborne 2').

15. At the PTR, I listed the strike out application for determination the following week. The claimant had also made an application for permission to cross-examine Mr Lewis. As

there proved to be insufficient time to hear the application to cross-examine at the PTR, I listed that application for determination prior to hearing the strike out application.

16. On 23 January 2025, the claimant served the seventh witness statement of Mr Khan ('Khan 7'), in reply to the defendant's evidence.

17. Following the PTR, the trial remains listed to begin on 3 March 2025. The trial will address liability (only) in respect of the claim against the defendant as pleaded in the Amended Particulars of Claim. I have adjourned the application to amend to add a new cause of action, to increase the special damages claim to over £70 million, and to add six new defendants, until after the liability trial on the defamation and data protection claims against the defendant.

18. At the outset of the hearing on 29 January 2025, I heard the claimant's application for permission to cross-examine Mr Lewis. For the reasons that I gave in my *ex tempore* judgment of the same date, I refused that application.

The Strike Out Application

19. By the application notice issued on 31 December 2024, the claimant sought an order pursuant to CPR 3.4(2), or the inherent jurisdiction of the Court, striking out the Amended Defence in its entirety, or alternatively paragraphs 104 to 161 of the Amended Defence concerning the public interest defence. The application also sought summary judgment pursuant to CPR 24.3, but the Claimant has withdrawn that part of the application: para 5 of my order of 20 January 2025 (sealed on 23 January 2025).

20. The reasons for the strike out application were set out in Khan 4. Mr Khan has made a very serious allegation against Mr Lewis, Ms Osborne and Ms Stewart, "*and potentially other [unnamed] editors*", that they have committed the common law offence of perverting the course of justice (Khan 4, para 19). There are two elements to that allegation.

21. First, it is alleged that "*various employees and agents of the Defendant*", including Mr Lewis, Ms Osborne and Ms Stewart, "*deleted extensive evidence wholly relevant to these proceedings, knowing without reservation that the Defendant's publications would form the subject of litigation*" (Khan 4, para 6). Mr Khan relied on the alleged deletion on 29 April 2021 of two threads on the Signal group chat between Mr Lewis, Ms Osborne and Ms Stewart bearing the titles "*Last Day*" and "*Final*", and, more generally, their use of "*Disappearing Messages*" (Khan 4, para 9). Mr Khan alleged there had been "*deliberate and permanent deletion of **all** personal correspondence between the three journalists that undertook the purported investigation*" (his emphasis, Khan 4, para 24), and "*deletion of all relevant communications between these individuals*" (Khan 4, para 28). ('**The suppression of evidence point**')

22. Second, Mr Khan alleged that Mr Lewis, Ms Osborne and Ms Stewart engaged in the "*fabrication of correspondence to replace these [deleted] communications, in an overt attempt to pervert the course of justice*" (Khan 4, para 28). The allegation of "*fabrication*" of evidence is made repeatedly: see Khan 4, paras 9.1, 10.4, 10.5, 11.1, 21, 24, 25 and 28. ('**The fabrication of evidence point**')

23. The allegations of suppression and fabrication of evidence are both maintained in the claimant's reply evidence, a witness statement filed by Mr Khan on 23 January 2025 ('Khan 7'). In respect of the fabrication of evidence point, Mr Khan alleges that the "*new thread would inevitably have been carefully curated to ensure that it benefits the Defendant in these proceedings*" (Khan 7 para 9(c)).

The law

24. CPR 3.4(2) provides:

> "The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

25. Paragraph 7 of CPR Practice Direction 31B provides:

> "As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. The documents to be preserved include Electronic Documents which would otherwise be deleted in accordance with a document retention policy or otherwise deleted in the ordinary course of business."

26. In *Earles v Barclays Bank plc* [2009] EWHC 2500 (Mercantile), [2010] Bus LR 566, Judge Simon Brown QC (sitting as a High Court Judge) held that under English law there is no duty to preserve documents *prior* to the commencement of proceedings ([28]), in sharp contrast to the position once proceedings have begun ([29]). However, *Earles* was decided before the duty in paragraph 7 of PD31B was introduced, albeit the express duty is on the parties' legal representatives, and it is a duty to notify. It appears to be implicit that a person who has, prior to the commencement of proceedings, been notified of the need to preserve disclosable documents (or, as it is sometimes described, issued with a 'litigation hold'), should comply. Moreover, the destruction of documents prior to the commencement of proceedings is capable, in principle and depending on the circumstances, of amounting to an attempt to pervert the course of justice.

27. The claimant relies on authorities on the availability of litigation privilege as demonstrating when litigation can be said to be "contemplated". In *Tchenguiz v Director of the Serious Fraud Office* [2013] EWHC 2297 (QB), Eder J accepted the following submissions:

> "ii) For a communication to be subject to litigation privilege it must have been made with the dominant purpose of being used

> in aid of or obtaining legal advice from a lawyer about actual or anticipated litigation: *Thanki, The Law of Privilege* (2nd ed) ('*Thanki*') paras 6.68ff and the cases there cited.
>
> iii) Where litigation has not been commenced at the time of the communication it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility: *United States of America v Philip Morris & British American Tobacco* [2004] EWCA Civ 330 at pars 67-68; *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at paras [19]-[20] (Etherton LJ)."

28. The answer to the question when litigation is contemplated for the purposes of paragraphs 7 of PD31B, such as to impose a duty to issue a litigation hold, is not necessarily the same as the test for when litigation is reasonably in prospect for the purposes of determining whether litigation privilege applies. Nevertheless, both parties adopted the test of whether litigation was in reasonable contemplation (see Hollander's *Documentary Evidence*, (15th ed. 2024 ('*Hollander*'), 12-06 to 12-07), and so that is the test I will apply.

29. In *Douglas v Hello! Ltd (No.3)* [2003] EWHC 55 (Ch), [2003] EMLR 29, Sir Andrew Morritt VC considered applications to strike out the *Hello!* defendants' defence based on both pre- and post-commencement of litigation destruction of documents, and the giving of false evidence. At [86], he observed:

> "There is, however a distinction to be drawn between those which were destroyed or disposed of before these proceedings were commenced and those which were destroyed or disposed of thereafter. With regard to the former category it is established in the very recent decision of the Court of Appeal for the State of Victoria in *British American Tobacco Australia Services Ltd v Cowell and McCabe* [2002] VSCA 197, paras [173] and [175] that the criterion for the Court's intervention of the type sought on this application is whether that destruction or disposal amounts to an attempt to pervert the course of justice. There being no English authority on this point I propose to apply that principle, not only because the decision of the Court of Appeal for the State of Victoria is persuasive authority but because I respectfully consider it to be right."

30. It is common ground, in light of *Douglas v Hello!*, that where an alleged destruction of documents took place *before* the proceedings commenced, that conduct cannot provide a basis for the Court to strike out a statement of case if it does not amount to perversion of, or an attempt to pervert, the course of justice (or, in the unlikely circumstances that such a remedy was available, contempt). I agree.

31. However, there is a dispute as to whether, as the defendant contends, even if that test is met, the court should only strike out the statement of case on that basis if a fair trial has been rendered impossible. The claimant contends that if the court is satisfied there has been an attempt to pervert the course of justice, no more is required to justify striking

out the defence. The claimant submits that the impossibility of a fair trial is another, independent ground, on which the court may strike out a statement of case.

32. In *Douglas v Hello!,* on the facts, Sir Andrew Morritt VC considered it plain that the deletion of documents *pre-action* was not evidence of an attempt to pervert the course of justice and could not justify striking out any part of the defence ([87]). In those circumstances, he did not address the impact on the ability to hold a fair trial of the destruction of those documents.

33. He went on to consider the defendants' conduct *after* the commencement of the action. He found that the defendants had presented three material but knowingly false statements, on the basis of which the interlocutory injunctions were discharged, as well as engaging in the "*wholesale destruction or disposal of material documents*" ([92]-[95]). It was in this context that Sir Andrew Morritt VC considered "*whether a fair trial is achievable*" ([88], [90]). He was not prepared to strike out the Hello! defendants' defence, in whole or in part, because he was not persuaded that a fair trial was no longer possible ([104]).

34. In *Hollander*, the author observes:

> "12-05 … Where destruction is in issue, it is important to consider when the destruction occurred, because it is not every destruction of documents which can be regarded as wrongdoing. … Everyone deletes, and thus potentially destroys, electronic documents all the time. A failure to retain the contents of overlarge mailboxes may occur without any nefarious intent. …
>
> B. LITIGATION NOT IN REASONABLE CONTEMPLATION
>
> 12-06 Until litigation is in reasonable contemplation, there is no reason to do anything other than in the normal course of business. …
>
> C. LITIGATION IN REASONABLE CONTEMPLATION
>
> 12.07 … CPR r.3.4(2)(c) provides for a power to strike out where there is a failure to comply with a practice direction. So it might in theory be possible to apply to strike out based on breach of CPR PD 31B para.7 … But unless the mental element of perversion of the course of justice is proved, how would the court exercise a power to strike out which can only be exercised where it considers the destruction would lead to a trial that was unfair? At the relevant time the proceedings have not even been started, let alone the issues crystallised.
>
> In Australia the Victoria Court of Appeal considered this issue in *Cowell*. The court concluded that prior to the commencement of proceedings there was no general duty to preserve documents such as could be relied upon in support of an application to strike out the claim or defence. The only circumstances in which the court was entitled to grant any sanction was where the conduct

> amounted to an attempt to pervert the course of justice or (in the unlikely circumstances that such a remedy was available) contempt. The question of adverse inferences was not raised and the court did not deal with it.
>
> The Victorian Court of Appeal contemplated that where document destruction prior to the commencement of proceedings constitutes a perversion of the course of justice, proved to the civil standard of proof, the court has power to strike out the subsequent claim or defence. It did not discuss the nature of the prejudice which would need to be shown to the other party before perversion of the course of justice would give rise to a strike out, but at least in England the court would only have power to prevent access to the court in this way if satisfied that a fair trial was in consequence not possible. …"
>
> It is suggested that the position prior to the commencement of proceedings is therefore as follows:
>
> (a) The court will not strike out a claim unless the document destruction amounts to perversion of the course of justice and the court determines that this has prevented a fair trial from being possible.
>
> …" (Emphasis added.)

35. At 12-13, the author considered *Arrow Nominees v Blackledge* [2000] CP Rep 59 in which the Court of Appeal overturned a decision not to strike out an action where there had been forgery of documents, observing:

> "The Court of Appeal said that in all the circumstances it was not fair either to the respondents or to other litigants for the trial to continue. A decision to stop the trial was not for the purpose of punishment but in response to the party's own continuing attempts to compromise a fair trial which would make a decision in his favour unsafe. Although the Court of Appeal emphasised the basis for the decision was whether the trial could be fair, dicta went somewhat further. Chadwick LJ said that:
>
> > 'a litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke.'
>
> … In *Dadourian Group* [[2009] 1 Lloyd's Rep. 601 at [233]] Arden LJ said about the passage from Chadwick LJ:
>
> > 'We consider that this paragraph is not to be read as meaning that a litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial is to be taken to have forfeited his right to a fair trial in every

> case. Chadwick LJ is careful to emphasise that the litigant's conduct had put the fairness of the trial in jeopardy and that the court's power to strike out the proceedings was not a penalty for disobedience with the rules.'
>
> If Chadwick LJ's dictum was read in any other way, it would be difficult to reconcile with ECHR art.6 rights of access to the court and the remedy of strike out would not be proportionate. So the court must always consider whether a fair trial is still possible. If so, it must not strike out the action or defence. The purpose of the remedy is not to punish, however deplorable the conduct of the defaulting party may be. The court must bear in mind that what it is being asked to do is to take away the access of the defaulting party to the court, which is a draconian remedy. The court must act in a manner which is proportionate. …" (Emphasis added.)

36. The claimant submits that the suggestion in *Hollander* that it is necessary both to show the document destruction amounts to perversion of the course of justice and that it has rendered a fair trial impossible is no more than the author's suggestion. The claimant contends that it is inconsistent with *Douglas v Hello!* in which the court identified the test as being, simply, whether the destruction or disposal amounted to an attempt to pervert the course of justice.

37. In my judgment, the analysis given in *Hollander*, cited above, is correct. It is not inconsistent with Sir Andrew Morritt VC's judgment. He did not address the question whether the pre-action destruction of documents rendered a fair trial impossible because he was not satisfied there had been an attempt to pervert the course of justice. If he had made a contrary finding, it seems likely he would have considered whether that rendered a fair trial impossible. Any other approach would have been inconsistent with the approach he took to post-commencement destruction and filing of knowingly false statements. There is no logical reason why the possibility of a fair trial was conclusive against the application to strike out, in respect of conduct as serious as knowingly filing false witness statements, and thereby obtaining the discharge of an injunction, as well as engaging in the "*wholesale destruction*" of material evidence after the commencement of proceedings, yet – on the claimant's argument – would have been irrelevant and of no consequence if he had found that the pre-commencement destruction amounted to an attempt to pervert the course of justice.

38. The claimant's argument also fails to address the point made by Arden LJ in *Dadourian Group* that the court's strike out power is not to be used as a punishment. The parties have rights of access to the court, at common law and pursuant to article 6 of the Convention. Any decision to take away such access should be proportionate, and so will entail considering whether a fair trial remains possible.

39. For these reasons, I conclude that the court will not strike out a claim for destruction of documents prior to the commencement of the claim unless the document destruction amounts to perversion (or attempted perversion) of the course of justice and the court determines that this has prevented a fair trial from being possible.

40. The ingredients of the common law offence of perversion of the course of justice are that the alleged wrongdoer has (i) done an act or series of acts; (ii) which has or have a tendency to pervert; and (iii) which is or are intended to pervert (iv) the course of justice: *R v Vreones* [1891] QB 360, Pollock, B, p.369; *Archbold*, 28-1. A "*course of justice must have been embarked upon in the sense that proceedings of some kind are in being or imminent or investigations which could or might bring proceedings about are in progress*": *Archbold*, 28-22.

41. In the context of these civil proceedings, the standard of proof by which the claimant must prove the alleged attempt to pervert the course of justice is the balance of probabilities. But as Andrew Smith J observed in *Fiona Trust and Holding Corp v Privalov (2)* [2010] EWHC 3199 (Comm) at [1438]-[1439]:

> "It is well established that 'cogent evidence is required to justify a finding of fraud or other discreditable conduct': per Moore-Bick LJ in *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at para 73. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: 'where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger', per Rix LJ in *Markel v Higgins*, [2009] EWCA Civ 790 at para 50. The question remains one of the balance of probability, although typically, as Ungoed-Thomas J put it in *In re Dellow's Will Trusts*, [1964] 1 WLR 415, 455 (cited by Lord Nicholls in *In re H*, [1996] AC 563 at p.586H), 'The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it'. …
>
> The principle requires flexibility in its application because it depends upon the improbability of the specific allegation that is made and the particular circumstances of the case. … Thus in the *Jafari-Fini* case at para 49, Carnwath LJ recognised an obvious qualification to the application of the principle, and said, 'Unless it is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct.'"

Application to the facts

42. When the application was filed, the allegations of suppression and fabrication of evidence were based on three messages sent by Mr Lewis on 29 April 2021, on Signal, at 14:54 (on the "*Last Day*" thread), and at 17:43 and 17:44 (on the "*Final*" thread), and the use of disappearing messages (Khan 4, paras 9.1, 9.2 and 9.3). In his reply evidence, Mr Khan relies on a further message sent by Mr Lewis the same day at 14:46 (on the "*Last Day*" thread), which was omitted from the defendant's standard disclosure, but disclosed as part of the exhibit to Fuhrmann 4. In his skeleton argument, the claimant relies on two further messages, sent by Mr Lewis at 14:56 (on the "*Final*" thread) and 15:11 (on the "*Last Day*" thread), which were contained in the defendant's standard disclosure.

43. The first in time of these messages is of a different character to the remaining messages, and raises an ancillary disclosure issue. In response to a message from Ms Stewart regarding an audio recording of a phone call made by the claimant's business partner, Jason Maza, to "*an alleged victim of abuse*", Mr Lewis wrote:

> (1) "Can you have a listen and just be really sure there's nothing in there that his QCs will use against us. Err on the side of caution on disclosing as much as possible that undermines our case."
>
> (14:46; "*Last Day*")

44. The claimant contends this message, which I shall refer to as the '*err on the side of caution message*', was clearly concerned with "*the need to suppress unfavourable evidence*" in the current proceedings, or contemplated litigation concerning the claimant (Khan 7, para 9(a)). Counsel describes it as "*highly incriminating*". Mr Khan purports to give evidence as to the meaning of this message. Leaving aside any question as to the admissibility of such evidence, he states at paragraph 9(d) of Khan 7:

> "The first sentence of the message is an instruction to verify that the relevant audio-file does not contain anything which is unfavourable to the Defendant. The second sentence follows directly from the first. In its natural and ordinary meaning, the second sentence directs the message's recipient to be careful when disclosing as much as possible, lest it undermines the Defendant's case in legal proceedings."

45. As the allegations regarding this message were raised in the claimant's reply evidence and submissions, Mr Lewis's evidence does not address this message. However, no explanation from him is necessary. Read in context the meaning is plain, and provides no support for the very serious allegations made by the claimant.

46. The message was written less than five hours before the First Article was published. There were no proceedings on foot. The "*case*" to which Mr Lewis referred was the set of allegations in the (then) draft first article. When he spoke of "*disclosing as much as possible that undermines our case*", Mr Lewis was obviously not referring to disclosure in litigation. He was directing the journalists to listen carefully to the audio recording and include in the article anything that was contrary to the allegations being made against the claimant. This instruction was of a piece with Mr Lewis's message to the journalists at 16:30, "*If any said positive things about Clarke we need to say that. PLEASE don't leave anything out*". In referring to "*his QCs*", Mr Lewis was indicating that the journalists should think about how an omission to include material in the article could potentially be made to look by a skilful lawyer, and put in "*as much as possible that undermines our case*".

47. As regards the disclosure issue, Ms Fuhrmann's evidence is that the whole of the "*Last Day*" and "*Final*" threads were provided to the defendant's Editorial Legal team in May 2023, and then duly passed to Wiggin LLP who represent the defendant. Those two threads were included by the defendant in its standard disclosure on 3 October 2024, save that "*1-page was inadvertently omitted from the middle of a 24-page thread*" (that is the message at 14:46 on the "*Last Day*") and the "*top 'title' page*" of the other thread.

48. Specifically, in relation to the err on the side of caution message, Ms Furhmann states (Furhmann 4, para 21):

> "1 page out of 24 pages of the 'Last Day' thread was not disclosed. This firm has identified through the tagging of the document on the disclosure platform that the document was coded such that it was intended to be disclosed. Presumably through manual error, a sub-tag related to privilege had been simultaneously checked which led to the document being automatically but erroneously excluded from the disclosure pool when the document production was prepared. The Defendant's e-disclosure provider had carried out extensive quality control checks to identify and correct any inadvertently conflicting tagging and it appears that this page was an anomaly."

49. In reply, Mr Khan suggests that the fact that this message was omitted from the "*Last Day*" thread when standard disclosure was given by the defendant, and only disclosed appended to Ms Fuhrmann's fourth witness statement, is inexplicable. He states (Khan 7, para 12):

> "This needs to be considered in light of the incriminating nature of the message. In what manner this relevant and incriminating evidence could somehow be 'inadvertently omitted' by the Defendant's extensive internal team and large legal team is plainly questionable."

In their oral submissions, counsel for the claimant submitted that the omission could not be "*innocent*".

50. I accept Ms Fuhrmann's evidence as to how the omission occurred. Although it is unfortunate that the error occurred, there is absolutely no reason to doubt her explanation as to how it occurred. As Ms Furhmann rightly acknowledges, the message is not privileged. But it is understandable that the terms of the message led someone on the disclosure team to incorrectly tag it as privileged. In light of Ms Fuhrmann's evidence, there is no basis for the accusation that the omission was not an innocent and inadvertent error. In any event, no support for the strike out application can be derived from a minor, now corrected, disclosure error.

51. The other five messages from Mr Lewis, relied on by the claimant, in chronological order, are as follows:

> (2) "Can we all clear all of our Signal messages please? Delete this entire thread. I'll create a new one, which will likely be disclosable in court, [sic]"
>
> To which Ms Stewart and Ms Osborne both replied "yep".
>
> (14:54; "*Last Day*")
>
> (3) "Final thread. We can delete all previous ones."

(14:55; first message on "*Final*" thread.)

(4) "Can we delete all these threads and use Final thread from now on"

(15:11; last message on "*Last Day*" thread.)

(5) "Also please delete all Signal threads, including this one and individual one on one discusisns w'eve had, or you've had with each other [sic]"

(17:43; "*Final*")

(6) Sirin Kale: "Should we ask survivors to delete their histories with us? Or are they not usable in court?"
Paul Lewis: "No"
Paul Lewis: "Don't ask them to delete anything"
Sirin Kale: "ok"
Paul Lewis: "But deletet his connvo just noow [sic]"
Sirin Kale: "Ok"

(17:44-17.45; "*Final*")

52. It is not disputed that Mr Lewis intended that the "*Last Day*" and "*Final threads*" should be deleted. When bringing the strike out application, the claimant appears to have been under the misapprehension that those threads had been deleted. In fact, they still exist and had been disclosed to the claimant. Mr Lewis realised, when providing material to the defendant's Editorial Legal team for consideration of whether it was disclosable, that when deleting those two threads he had only removed them from one device, and they remained on another. As I have said, in May 2023 he provided those threads to the defendant's Editorial Legal team.

53. Mr Khan alleged that there has been "*deliberate and permanent deletion of **all** personal correspondence between the three journalists that undertook the purported investigations*" (Khan 4, para 24; his emphasis). That is not true. There has been disclosure not only of the "*Last Day*" and "*Final*" threads but also of emails between them. Nevertheless, the claimant relies on message (5), and the lack of one-to-one communications between the journalists in the defendant's disclosure, in support of the contention that such communications were deleted.

54. In addition, the claimant relies on the fact, confirmed by Ms Fuhrmann, that four Signal threads, on which Mr Lewis, Ms Osborne and Ms Stewart communicated, were auto-deleted. Ms Fuhrmann states (Fuhrmann 4, para 18):

> "Mr Lewis's usual approach in respect of Signal messages was to set them to auto-delete, as he explains in his statement. Messages sent in threads after auto-delete had been enabled were automatically erased either 1 day or 1 week after they were sent (depending on which auto-delete setting was chosen). 4 threads relevant to the investigation had auto-delete enabled shortly after they were created; these were called 'Noel Clarke',

> 'Conference', 'Clarke aftermath', and 'Nc' (the 'Auto-deleted Threads'). With respect to the Auto-deleted Threads, the only messages which were preserved beyond 1 day or 1 week (as applicable) were those few which had been sent at the start of the thread, before the auto-delete function was enabled."

55. The disclosed threads show:

    i) The 'Noel Clarke' thread was created on 7 April 2021 and, the same day, after a few messages had been exchanged, Mr Lewis set the disappearing message time to 1 day. The thread remained in use until about 28 April 2021 (Lewis 2, para 35(a)).

    ii) The 'Conference' thread was created by Mr Lewis on 7 May 2021 and, the same day, after a few messages had been exchanged, he set the disappearing message time to 1 week.

    iii) The 'Clarke aftermath' thread was created by Ms Osborne on 1 June 2021 and, the same day, after a few messages had been exchanged, Mr Lewis set the disappearing message time to 1 week.

    iv) The 'Nc' thread was created by Ms Stewart on 28 May 2022 to share an interview with the claimant published in the Mail on Sunday. Mr Lewis set messages to auto-delete after 1 day (Lewis 2, para 35(f)).

56. The claimant contends that "*actual deletion took place, of (at least) four Group Chats, one-on-one personal correspondence between each of the journalists, possible audio recordings and perhaps further correspondence*". There is no evidence of deletion of audio recordings or further correspondence. It follows that the suppression of evidence point can only be based on the deletion of the four Auto-deleted Threads, the possible deletion of some one-to-one communications between the journalists, and the failed attempt to delete the 'Last Day' and 'Final' threads.

57. As the passage from *Hollander* cited above states, everyone deletes electronic documents all the time. The questions that arise, here, are whether the deletions or attempted deletions occurred when litigation was in reasonable contemplation, whether those acts have a tendency to pervert the course of justice, and whether the alleged wrongdoers intended to pervert the course of justice.

58. The claimant alleges that Mr Lewis, Ms Osborne and Ms Stewart were "*aware that litigation was clearly contemplated prior to deletion*" (Khan 4, para 10). The primary basis for this allegation is correspondence sent to the defendant by the claimant's (then) solicitors, Simkins, on 27, 28 and 29 April 2021 (which was cc'd and/or forwarded to Mr Lewis, Ms Osborne and Ms Stewart). The claimant also relies on the fact that Mr Lewis arranged a meeting at 5.30pm on 27 April 2021, bearing the title "*Noel Clarke / Legal / Public Interest*", attended by, among others Ms Phillips. In addition, he draws attention to Mr Lewis's references to court and QCs in the messages quoted above, a suggestion by Ms Stewart in a message to a friend that publication was "*unbelievably high risk*", and "*I think he will sue us*".

59. Simkins sent a letter on 27 April 2021 at 08:59 in which they expressed their client's strong denial of "*any and all allegations of abuse, assault and/or unlawful behaviour*", requested an extension of time to respond, and asserted "*our client's rights are reserved in full*". The same day at 16:56, they sent a 29-page letter addressing the allegations, asserting that they contain "*false and highly defamatory accusations*" which are denied, referring to the "*inherent legal risk*", asserting that "*any defence of truth is bound to fail*", and that "*you cannot reasonably be expected to succeed with a defence of publication on a matter of public interest*", addressing misuse of private information, and again stating "*our client's rights are reserved, including the right to bring defamation proceedings in respect of any false and defamatory allegations published about him*".

60. On 28 April 2021, at 17:09, Simkins alleged that the steps taken by the defendant's journalists to investigate "*has resulted in our client being defamed in and of itself, quite separate from whether or not the Proposed Article is ultimately published*". They stated their client would hold the defendant responsible for such harm and asked the Guardian to "*cease and desist from further defaming him*", again asserting "*Our client's rights are fully reserved*".

61. On 29 April 2021, at 10:43, Simkins requested an extension of time and again reserved their client's rights. Later the same day, at 16:03, Simkins provided a further substantive response, in which they identified what they described as "*very considerable legal risks*" of publication, asserted that their client "*will not hesitate to hold the Guardian fully responsible if it proceeds to publish any highly defamatory allegations*", and reserved their rights in full.

62. All of these letters were written prior to publication of the First Article, and so before any cause of action had arisen (other than that alleged in the 28 April letter, in respect of which no intention to sue was asserted). None was a letter before action. No letter before action was sent until 12 August 2022, more than 15 months after the First Article was published, and more than three months after the claimant issued a protective claim on the final day of the limitation period. The letter before action stated it was to put the Guardian "*on notice of the claims our client intends to bring*". Simkins' letters did not state the claimant *intended* to bring any claim; they reserved his rights to do so.

63. Ms Phillips was the defendant's Director of Editorial Legal Services at the material time. She has given evidence that pursuant to paragraph 7 of PD31B,

> "the practice at GNM, and I believe at other media organisations, is for the legal department to issue a notice often called a 'litigation hold' to the editorial staff when it is clear that a legal claim is contemplated. This alerts the staff to the need to retain all documents that are or might be disclosable under the CPR. Until such litigation hold is issued, the practice to encourage staff to review, and where they feel appropriate delete, any non-essential investigation documents remains.
>
> In the case of the investigation that led to the publication of a series of articles about the Claimant, I did not send a litigation hold at the pre-publication stage because I did not consider

> litigation was reasonably in contemplation at the time. I believe that I was correct not to do so."
>
> (Phillips 1, paras 15-16).

64. Mr Hopkins states that:

> "GNM's Editorial Legal function issued preservation notices in respect of this case after we received a letter before action from Mr Clarke's then-solicitors on 12 August 2022."

65. Ms Phillips addresses Simkins' letters at paragraphs 17-26 and explains in detail why she did not understand those letters, written in response to the invitation to comment sent by the journalists, to amount to *"any sort of real or current intention to sue such that it should be said that litigation is contemplated and a 'litigation hold' notice is required*". The language used was "*simply part of the cut and thrust of pre-publication correspondence*", the aim of which, generally speaking, is to stop the article being published or restrict what is said about their client. The wording used in Simkins' letters was, Ms Phillips states:

> "just standard generic wording that lawyers like to include in their pre-publication letters. I did not regard its use in this instance as being any more indicative of the likelihood of litigation, let alone that litigation was reasonably contemplated, than in any other instance where it was used. Not least because, at this point in time, nothing had actually been published, and unless and until something was published, there was never anything for proceedings to bite on. Any legal action is going to be entirely contingent on whether, and if so what, is published. Taken at its highest the use of such language in legal correspondence might be taken to indicate the future possibility of legal action."

66. Mr Lewis states:

> "I have always understood that the point at which I should take steps to preserve relevant materials in anticipation of legal proceedings is when I receive a preservation notice, or 'litigation hold', from my legal department. The date on which I intended these messages to be deleted was 16 months before the Claimant sent a letter before claim to the Guardian, which is the point at which my legal department sent me a litigation hold notice."

(Lewis 2, para 45 and 50. Counsel for the claimant queried the reference to a 16-month period, but it is obvious that it is a reference to the letter before claim of 12 August 2022.)

67. Mr Lewis has addressed Simkins' letters and given clear evidence as to why they did not prompt him to believe litigation was likely in this instance. He states (Lewis 2, paras 49-50):

> "If anything, the language about the Claimant's rights being reserved was less threatening, and less specific than that which I had read in pre-publication letters from law firms in the preceding months and years.
>
> In none of these cases did the legal threats contained in law firm letters I had read up until that point result in their clients issuing proceedings against us after we published articles. And none of these threatening letters prompted my legal department to issue me with a document preservation notice, which I have always understood to be the point at which I should take steps to preserve relevant materials in anticipation of legal proceedings."

68. Ms Osborne explains that she did not believe when asked by Mr Lewis on 29 April to delete messages that she was under any duty to preserve the messages, "*as we had not received a preservation order from the Guardian's legal team*" (Osborne 2, para 12). Similarly, Ms Stewart's evidence is that she "*did not believe at the time that we were under a legal duty to preserve documents*", or that deleting the "*quickfire back-and-forth queries that would have formed in-person conversations if we'd been able to work in an office … would have any consequence for any future proceedings*" (Stewart 2, para 11).

69. The claimant asserts that it is "*inconceivable that the Defendant had not already been advised that they had a duty to preserve evidence*". However, the clear and consistent evidence of the defendant's witnesses is that the litigation hold was issued on receipt of the letter before action and not before. There is no basis for challenging that evidence.

70. Nor does the meeting Mr Lewis set up on 27 April 2021 provide any support for the contention that the threshold for document preservation had by then been reached. It is obvious that on a publication of the kind at issue here, legal input would be sought. That does not begin to show that litigation was by then reasonably contemplated.

71. In my judgment, the defendant's legal team cannot fairly be criticised for taking the view they did that litigation was only in reasonable contemplation when the letter before action was sent on 12 August 2022. But even if that were wrong, it would indicate nothing more than a misjudgement by lawyers on an issue which, as *Hollander* puts it at 12-05, is not simple.

72. The allegation of perversion of the course of justice is made against Mr Lewis, Ms Osborne and Ms Stewart. I am unpersuaded that the deletion of documents they undertook had a tendency to pervert the course of justice. The nature of the threads is apparent from the two that survived the attempt to delete them. I bear in mind the importance of not pre-judging any issue which the court will ultimately have to determine in the course of the present proceedings, but on the face of it, it is hard to see how anything in those threads would be capable of changing the outcome of this case, in which there is a mass of other evidence that the court will need to consider in due course at trial.

73. But, again, if I were wrong, this application inevitably fails at the stage of lack of intention to pervert the course of justice. Mr Lewis, Ms Osborne and Ms Stewart were free to delete these peripheral documents in accordance with their organisation's data

minimisation policy, at a time when the legal department had not instructed them to preserve potentially disclosable documents. They are not lawyers and cannot fairly be criticised for following their legal department's lead on when a duty to preserve documents applied.

74. I note that three of the threads which have been deleted post-date publication of the First Article. But the deletion occurred at a time when there had been no legal correspondence since publication of the First Article, and long before the letter before action was sent.

75. I can take the fabrication of evidence point shortly. Although this extremely serious allegation has been made, repeatedly, by solicitors and Counsel for the claimant, it has no foundation. The claimant's application and supporting evidence left entirely vague what, if any, evidence Mr Lewis, or anyone else, is accused of fabricating. At one stage, it was tenuously suggested that the 'Final' thread is fabricated evidence. That was an extraordinary suggestion given (i) the messages are provided by all three journalists, so any fabrication would have had to be agreed by all of them; (ii) the rapid back-and-forth content of the 'Final' thread is very far indeed from anything that smacks of fabrication; and (iii) Mr Lewis intended that this thread should be deleted. I reject it.

76. In oral submissions, Counsel for the claimant, sought to assert that the term fabrication was justified because the deletion of documents altered the overall impression. It was said that the deletion of some threads of evidence, modifying the story, was "an attempt to swindle" the claimant. The approach taken by the claimant's representatives is unacceptable: deletion is not fabrication, and such a grave allegation should not have been made and publicly aired without foundation. Ultimately, leading Counsel for the claimant, Mr Williams, made clear that the claimant does not allege that Mr Lewis (or Ms Osborne, Ms Stewart or anyone else on the part of the defendant) has created a false document.

77. I reject the contention that the defendant has perverted or attempted to pervert the course of justice. There has been no fabrication of evidence. Some documents were deleted prior to the commencement of proceedings, and over a year before a letter before claim giving notice of the intended claims was sent to the defendant. But such deletion was not in breach of any rule or duty to preserve document, and in any event it neither had the tendency to pervert, nor was it intended to pervert the course of justice.

78. As the allegation of perversion of the course of justice fails, it follows that the strike out application must inevitably be rejected in its entirety. However, it also, independently, fails on the ground that such deletion of evidence as has occurred does not render a fair trial impossible. Far from it. The truth defence is primarily dependent on the evidence that the court will hear at trial from the numerous witnesses to be called by both parties. Thousands of documents have been served in respect of the public interest defence, as well as substantial witness statements. The deletion of a small number of documents is a matter the court can consider, if and to the extent it is appropriate to do so. It does not render a fair trial impossible. Finally, I note that no basis for suggesting a fair trial of the data protection claim would be impossible was even put forward.

Conclusion

79. For the reasons I have given, the application to strike out the Amended Defence fails both on the grounds that the defendant has not perverted or attempted to pervert the course of justice, and because such limited pre-action deletion of documents as has occurred is not such as to preclude a fair trial of the claim.