Neutral Citation Number: [2023] EWCA Civ 71

Case No: CA-2022-002331

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
Mrs Justice Steyn
[2022] EWHC 2891 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2023

Before :

LORD JUSTICE WARBY

- -

Between :

RACHEL RILEY	**Claimant/ Respondent**
- and –	
MICHAEL SIVIER	**Defendant/ Appellant**

- -
- -

David Mitchell (instructed by **George Green LLP**) for the **Appellant**
John Stables (instructed by **Patron Law**) for the **Respondent**

Hearing date: 31 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 February 2023 by circulation to the parties or their representatives by e-mail and then released to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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LORD JUSTICE WARBY :

1. This is an application for permission to appeal against a judgment given after the trial of a claim in libel.

2. The claimant is Rachel Riley, a TV presenter and a campaigner against alleged anti-Semitism in the Labour Party. The defendant is Michael Sivier, a blogger who runs a website called voxpoliticalonline.com. Ms Riley sued over an article which Mr Sivier published on that website on 26 January 2019 headed "*Serial abuser Rachel Riley to receive 'extra protection' – on grounds that she is receiving abuse*" ("the Article"). Ms Riley won the case. So it is Mr Sivier's proposed appeal that I now have to consider.

Background to the application

3. The history of the case can be shortly summarised.

   (1) The meaning of the article was decided as a preliminary issue in December 2019 by Nicklin J. In summary, he held that it meant that the claimant had "*engaged upon, supported and encouraged a campaign of online abuse and harassment of a 16-year-old girl*" called Rose and that "*by so doing*" the claimant was a "*serial abuser*" who had acted hypocritically, recklessly, irresponsibly and obscenely. Nicklin J held that these meanings were defamatory at common law.

   (2) Mr Sivier pleaded three defences: truth, honest opinion, and publication on matter of public interest. All three were struck out summarily by Collins Rice J as disclosing no reasonable basis for defending the claim. Permission to appeal against the striking out of the defences of truth and honest opinion was refused. But an appeal against the dismissal of the public interest defence was heard and allowed.

   (3) The result was that when the case came on for trial before Steyn J, DBE ("the Judge") in July 2022 there were only two issues on liability. These were whether Ms Riley had shown that the publication complained of had caused or was likely to cause "serious harm" to her reputation within the meaning of s 1 of the Defamation Act 2013 and if so whether Mr Sivier had established a defence of publication on matter of public interest under s 4 of the 2013 Act.

   (4) In a judgment handed down on 16 November 2022 the Judge found for Ms Riley on the issue of serious harm, rejected the public interest defence, and awarded damages of £50,000. On 23 November 2022 she ordered Mr Sivier to pay Ms Riley's costs to be assessed, and to make a payment on account of £100,000 within 28 days.

4. Mr Sivier does not challenge the Judge's conclusion on serious harm or her assessment of damages. He wishes to appeal against her rejection of his public interest defence and her consequent finding that he was liable.

5. To pursue such an appeal Mr Sivier needs permission. To get permission he needs to show that an appeal would have a real prospect of success. Sometimes there may be a compelling reason for the court to hear an appeal even though it does not stand a chance of succeeding. But Mr Sivier does not suggest that this is such a case.

This hearing

6. The normal procedure in the Court of Appeal is for a single judge to decide whether permission should be granted after reading the papers and without a hearing; but the judge can direct a hearing of the application. In this case that is what I did, for several reasons. I know the case has attracted a fair amount of publicity and I thought it appropriate for this stage to be conducted in public. Another reason for a hearing was that before making a decision on whether the threshold for permission was crossed I needed a better understanding of Mr Sivier's arguments and those put forward on behalf of Ms Riley. I gave some directions to ensure those arguments were explained in more detail. In the meantime, I granted a stay of execution on the Judge's orders for costs and damages until after judgment on this application. I have now had some further written submissions which have helped me understand better what the rival arguments are. I have spent time before the hearing considering those arguments. And I have heard further argument at the hearing.

The issue for decision

7. To establish a public interest defence a defendant needs to prove three things: (1) that the publication complained of was on a matter of public interest (2) that the defendant believed that it was in the public interest to publish the statement complained of and (3) that this belief was reasonable. The Judge found in Mr Sivier's favour on each of the first two points but held that his belief that it was in the public interest to publish what he did was not reasonable.

8. The primary basis for that conclusion was Mr Sivier had held and stuck with his belief without conducting "such inquiries and checks as it is reasonable to expect of him in all the circumstances": see [162]. One key failure identified by the Judge was that Mr Sivier did not provide Ms Riley with any opportunity to comment before he published the Article. The Judge went on to identify a further and additional basis for her decision (at [163]): that "even leaving aside" the flaws in the process Mr Sivier's belief was "manifestly unreasonable". She held that he had no reasonable grounds to believe that his intended meaning or the meaning which the words obviously conveyed was true.

9. Mr Sivier argues that the reasoning behind these conclusions was unsound and in some respects incomplete, and that it involved errors of law. He wants the Court of Appeal to reverse the Judge's decision or to order a retrial. The issue at this stage is whether Mr Sivier has a real prospect of obtaining either of those outcomes.

The grounds of appeal

10. There are three grounds of appeal which I shall consider in turn

Ground 1

11. Ground one refers to s 4(2) of the 2013 Act. This requires a court deciding whether a defence under the section is made out to "have regard to all the circumstances of the case". The ground of appeal is that the Judge failed to do this.

12. Under that general heading, Mr Sivier makes eight separate complaints of differing kinds about the judgment. Some of these raise sub-issues. All are points of detail. Most are

complaints that the Judge made mistaken findings of fact. In many of these instances, the complaint is not really that she failed to have regard to all the circumstances but rather that she was mistaken in her assessment of those circumstances. A few are complaints that the Judge failed to have regard to particular aspects of the *evidence* about the circumstances.

13. It is therefore relevant to note the general approach to appeals of this kind. The overarching point is that an appeal is a review and not a re-run of the trial. To win on appeal the appellant has to show that there was some serious flaw in the judgment that calls for a change in the result or a retrial. When it comes to findings of fact, there are five points to make:

(1) The court will treat the factual findings of a trial judge with a generous degree of deference. To uphold an appeal on the basis of criticisms of this kind the appeal court will need to be satisfied that there was a critical finding of fact that was either unsupported by the evidence before the judge or a finding that no reasonable judge could have reached.

(2) This approach applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.

(3) The court will bear in mind that the trial judge has a whole "sea of evidence" instead of "island-hopping" as appellants are prone to do when seeking to challenge findings at first instance.

(4) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into her consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that she overlooked it.

(5) The same applies with even greater force to matters of argument. A judge is not bound to mention and address every single argument advanced.

I draw these points from the Supreme Court's decision in *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 [2014] 1 WLR 2600 and three decisions of this court: *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 [2014] FSR 29 [114]-[115], *Haringey LBC v Ahmed* [2017] EWCA Civ 1861 [30]-[31], and (most recently) *Volpi v Volpi* [2022] EWCA Civ 464 [2].

14. Applying this approach, I have concluded that Mr Sivier's multiple criticisms fall short of establishing an arguable ground of appeal. To explain that conclusion it is necessary to go into some detail.

15. **The first complaint** is about para [159] of the judgment. This was one of several paragraphs in a section of the judgment dealing with Mr Sivier's admitted failure to give Ms Riley any opportunity to comment before he published the Article and why – in the Judge's view – that failure was important. In paragraph [159] the Judge said the importance of doing so was "particularly evident in the light of the numerous matters on which Mr Sivier made assumptions" rather than making enquiries. The Judge gave three illustrative examples of such assumptions. Mr Sivier criticises the second and third

examples. This is an instance of the kind of "island-hopping" which the cases tell us is not enough. In any event, I do not believe the individual criticisms have any force.

16. Ms Riley had said in a tweet (no 107) that there came a time when she had "shrugged and moved on" and wanted nothing more to do with Rose. Mr Sivier said he believed that was a lie. His reasoning was that Ms Riley had clearly seen later tweets by Rose. She therefore "*must have been* monitoring Rose's behaviour despite being blocked" (my emphasis). The Judge said that it was unreasonable for Mr Sivier to jump to these conclusions without giving any consideration to "the possible alternative explanations (e.g. That Ms Riley saw retweets of Rose's messages as is evidently the case in at least one instance…)". Mr Sivier says this "ignores how Twitter works" because Twitter users cannot see any material from accounts that have blocked them, whether that material is original or retweeted. Therefore, he says, the retweet mentioned by the judge "*could only* have been obtained by … monitoring… by the means alleged" (my emphasis, again).

17. This is unpersuasive. The Judge's essential reasoning was that Ms Riley could have come across these tweets by Rose without covert "monitoring" and Mr Sivier should have given this some consideration rather than assuming the worst and concluding that tweet 107 was a lie. That is a fair point. It was common ground that Ms Riley could have seen Rose's tweets by various means despite being blocked. As Mr Stables points out, she could have simply viewed the tweets openly outside her account, as Twitter accounts are generally public. Rose's account was, by her own admission, public at some points. Mr Sivier's criticism seems to me to illustrate, rather than to undermine the point made by the Judge.

18. At the hearing of this application Mr Mitchell argued on behalf of Mr Sivier that the critical issue was not only - or not so much - whether Ms Riley had seen the tweets that Rose sent after she blocked Ms Riley, but the use which Ms Riley then made of them, all of which Mr Sivier reasonably believed amounted to harassment. But that is a different and separate point, which does not go to undermine the legitimacy of the Judge's second illustrative criticism. I shall come to the issue of harassment and the related question of stalking later.

19. The Judge's third illustrative criticism of Mr Sivier related to a tweet sent by Ms Riley on 12 January 2019 (tweet 213). It was a gif of a cat at a computer with a message sending "loads of love to @TraceAnnO …." for her "indefatigability" in speaking out against anti-Semitism and for being targeted for doing so. TraceAnnO is Tracey-Ann Oberman. Mr Sivier took the view that a set of tweets sent by Ms Oberman had amounted to a "campaign of harassment against Rose". He concluded that Ms Riley's tweet 213 "could only be" an indication of support for that campaign. His reasoning was that Ms Riley had seen "the entire if not the majority of the set of tweets" from Ms Oberman that he considered to be a campaign. The Judge observed that in forming that view Mr Sivier had failed to consider (a) how few of Ms Oberman's tweets were replies to or tagged Ms Riley or (b) that Ms Riley's support for Ms Oberman could have been a response to some unfair criticisms that Ms Oberman was guilty of "grooming" and (c) made no enquiry to ascertain which tweets Ms Riley had seen or why she sent her message of support.

20. Mr Sivier does not criticise the second or third of these points. His criticism goes only to the first of them. Again, this is a case of picking one point out of several on which the Judge relied. And the criticism is not persuasive. Mr Sivier says that the Judge made a false assumption that Ms Riley would only have seen those of Ms Oberman's tweets in

which she was tagged or which replied to her own tweets whereas in fact, all of Ms Oberman's tweets would have appeared in Ms Riley's timeline because she was a follower of Ms Oberman. I am not persuaded that there was such a false assumption. It has not been shown that the Judge's finding was contrary to the evidence. In any event, the essential point made by the Judge is again that Mr Sivier jumped to a conclusion without considering alternative explanations. And again, that is a fair point to make. People do not necessarily see every tweet that appears in their timeline. It depends on how much time they spend on Twitter and how many tweets they receive. Here Ms Oberman posted a large number of tweets at the relevant time, upwards of 60 according to Rose. As Mr Mitchell pointed out at the hearing, some of these were posted in the early hours of the morning. Ms Riley followed a large number of accounts (about 1,600 today). The Judge was entitled to conclude that it was unreasonable for Mr Sivier to treat Ms Riley's tweet 213 as an endorsement of what Mr Sivier saw as harassment by Ms Oberman.

21. **The second complaint** relates to the Judge's findings about Mr Sivier's pre-publication research. It was common ground that he had used two earlier articles by Shaun Lawson as sources. His evidence was that he had spent 24 hours reviewing the material that underlay those articles, and that he had read and analysed 243 tweets annexed to his Amended Defence as well as other tweets that were not so annexed. At [154] the Judge rejected that evidence, giving five reasons for doing so. Mr Sivier criticises the first of those reasons.

22. This was that it was "improbable" that Mr Sivier would have assiduously searched for material which was not hyperlinked in the Lawson articles and spent 24 hours reading and analysing the underlying material when "at the time when Mr Sivier says that he undertook this research and analysis he was not intending to write an article on the matter". Mr Sivier challenges this finding on the basis that he had already written an article on, and was interested in, Ms Riley. He also says the Judge was not "faithful" to his evidence that he was looking for "a new angle" at the time. He further suggests that there were more hyperlinks in the Lawson articles than the Judge acknowledged.

23. This is another instance of island-hopping. There is a factual dispute about how many of the relevant tweets were hyperlinked in the Lawson articles, but it is common ground that the Judge's finding was an accurate reflection of the articles in the trial bundles, so she can hardly be criticised. From what I have been told, the articles were agreed documents. Looking at the broader complaint, Mr Sivier shows no arguable basis for undermining the Judge's overall conclusion that his evidence about his pre-publication research was improbable. The evidence he relies on is not inconsistent with the Judge's finding that he was not intending to write an article *at the time*. It is in any event clear from a reading of [154] as a whole that the Judge had careful regard to all the evidence bearing on the likelihood that Mr Sivier had carried out the research he claimed. She was by no means bound to accept Mr Sivier's evidence on the matter. She was entitled to conclude that he probably did not do what he claimed. She found his evidence unreliable generally. She noted that there was no contemporary record to show what research he did. She noted also that 11 months after publication of the Article Mr Sivier had said on his own website that he had "spent the last week looking up evidence to prove the claims" it contained. She found as a fact that his pleaded defence was "based on materials gathered a substantial period after publication of the Article." All of these findings were plainly open to the judge on the evidence.

24. **Thirdly,** Mr Sivier complains that the Judge failed to mention his alleged belief that Ms Riley had juxtaposed one of Rose's tweets with an unconnected report to make her seem anti-Semitic. This is a point of no weight, given the principles I have already mentioned. There is no basis for doubting that Steyn J considered the point. Mr Mitchell spent considerable time on it in his submissions at trial. It seems to me to be a particularly weak point, relying as it does on a strained reading of the tweet in question and an extravagant inference about Ms Riley's motives. Mr Sivier's observation that Ms Riley gave no evidence on the issue is misconceived as nothing she might have said at trial could have any bearing on the reasonableness of his belief at the time of publication.

25. **The fourth point** is that the Judge failed properly to consider Mr Sivier's view that Ms Riley had been stalking Rose within the meaning of s 2A of the Protection from Harassment Act 1997. The point is without merit. A person is guilty of stalking contrary to s 2A if and only if three conditions are met: (a) they engage in a course of conduct which amounts to harassment, (b) "the acts or omissions involved are ones associated with stalking" and (c) the person knows or ought to know that their conduct amounts to harassment: see s 2A(2). The Judge dealt squarely with Mr Sivier's allegation of harassment, which was central to the defamatory imputation complained of. She found that Ms Riley's tweets afforded no reasonable basis for believing that allegation was true. The allegation of stalking necessarily fell to the ground. In addition, Mr Sivier's case depends on his further belief that Ms Riley must have been covertly monitoring Rose on Twitter after she was blocked, coupled with the fact that one of the "acts associated with stalking" that is listed in s 2A(3)(d) of the 1997 Act is "monitoring the use by a person of the internet … or any other form of electronic communication". As I have explained, the Judge dealt with Mr Sivier's belief about monitoring and rejected it as unreasonable and she was entitled to do so.

26. **Fifthly,** Mr Sivier complains that the Judge failed properly to consider his belief that Ms Oberman harassed Rose and Ms Riley expressed support for that behaviour. This belief rests in part on the twin assumptions which I have dealt with already: (a) that Ms Riley saw all or most of Ms Oberman's allegedly harassing tweets, and (b) that Ms Riley's tweet 213 represented approval of that conduct. The Judge considered these to be unreasonable assumptions and she was entitled to do so.

27. At this stage of his argument Mr Sivier adds a complaint that the Judge failed to have regard to a later Tweet by Ms Riley (tweet 227) and his belief that this was a further endorsement of Ms Oberman's alleged campaign. I do not think that is fair or right. Ms Riley's Tweet 227 was set out verbatim at paragraph [92] of the judgment. It expressed the view that adults were "using a child's profile and exploiting MH issues to fuel campaigns of hate and intimidation". At paragraph [179] the Judge cited those words and concluded that in using them "Ms Riley was plainly not blaming the 16-year-old girl or encouraging anyone else to do so, or encouraging anyone to subject her to a campaign of abuse and harassment." That conclusion was plainly open to her. In my view it was clearly correct. The Judge went on immediately to reiterate her conclusion that Mr Sivier's "belief that publication of the statement complained of was in the public interest was not reasonable".

28. **The sixth point** is a criticism of the Judge's approach to 'dogpiles', meaning a mass of critical messages from third parties. Mr Sivier says that Rose was subjected to a torrent of abuse. I do not consider it arguable that the Judge ignored this evidence as Mr Sivier alleges. She chose, quite rightly, to concentrate on whether it was reasonable to believe

that Ms Riley could be held responsible for anything of the sort by engaging in or supporting or encouraging such abuse and harassment, as the Article alleged. The Judge comprehensively rejected that suggestion. Her finding was that Ms Riley had tried to discourage such behaviour. Mr Sivier has failed to explain how, in those circumstances, evidence of dogpiling could have made any difference to the outcome. The existence of a large number of 'dogpiles' against Rose that caused her distress could not make up for the absence of evidence supporting a reasonable belief that Ms Riley was culpable in the way alleged.

29. **The seventh point** under Ground one encompasses four further criticisms of the Judge's finding that Mr Sivier unreasonably failed to contact Ms Riley for comment.

(1) The first concerns the Judge's finding at [158] that Mr Sivier assumed, "without giving any reason for his belief, that Ms Riley would not comment". That is not an unfair summary of what he said in the three paragraphs of his witness statement devoted to the topic one of which (paragraph 58) the Judge quoted verbatim (in her paragraph [157]). But Mr Sivier now says that in oral evidence he did give a reason for believing that Ms Riley would not comment if asked. This was that Ms Riley "had not responded to previous challenges concerning her behaviour made by third parties". In support of that point, he cites a number of critical third-party tweets that attracted no response from her. I have not been shown a transcript of Mr Sivier's evidence. But assuming this is an accurate summary the point was a new one; it evidently did not achieve any prominence at the trial (it did not appear in his Counsel's written closing submissions); the Judge was not bound to recite every aspect of what Mr Sivier said; and nor was she bound to accept this late addition to his evidence.

(2) Next Mr Sivier complains that the three illustrative criticisms in the Judge's paragraph [159] were not matters on which he could reasonably be expected to seek comment from Ms Riley, because they did not form part of the statement complained of. He cites no authority to support that proposition. I do not think it gets off the ground. The statement complained of alleged that Ms Riley had engaged in, supported and encouraged a campaign of online abuse and harassment. The Judge's three illustrative points were matters on which Mr Sivier relied for his belief that this was true and that it was in the public interest to say it. The Judge considered it was unreasonable for him to rely on those matters without properly exploring how sound and reliable they were. That was plainly a logical and legitimate view to take.

(3) Then Mr Sivier complains that in dealing with his failure to seek pre-publication comment the Judge did not factor in the urgency of the matter. As a matter of law, urgency can have a bearing on whether it is unreasonable not to seek comment. But that will not often be the case. It cannot be an all-purpose excuse. On the facts, all that Mr Sivier had said in his witness statement about urgency was this: "I knew that an article presenting a counter-view would need to appear as soon as possible so that its impact and relevance was not lost". The judge did not ignore this evidence. She quoted it word for word. But there was no need for her to explore it in detail. It was not Mr Sivier's pleaded case that there was such urgency as to make it impossible impracticable or unreasonable to contact Ms Riley. Nor did this passage in his witness statement amount to evidence that this was so. There was, in short, nothing before the judge that was capable of justifying a failure to contact Ms Riley on grounds of urgency.

(4) Finally, the point is made that the Article was updated in December 2019 to state that Ms Riley disputed its contents. That plainly could not make good the earlier failures to seek comment so the point is incapable of supporting an appeal on liability. Nor am I able to see how the update could support a s 4 defence for subsequent publication. The meaning of the Article remained the same and on the Judge's findings Mr Sivier still had no grounds for a reasonable belief that it was true or in the public interest to publish it.

30. **Finally,** so far as the first ground of appeal is concerned, Mr Sivier puts forward a criticism of the Judge headed "C's gaslighting of Rose and accusing her of spreading anti-Semitism." Mr Sivier says his case on this topic was "simple" but not reflected in the judgment. But this ground of appeal does need some explanation, not least because the term "gaslighting" is currently used in a range of quite different meanings. One of those meanings - perhaps the most specific and precise - is to manipulate a person so as to cause them to doubt their sanity or the evidence of their senses (as in the 1940s film *Gaslight*). That is not what Mr Sivier means by the word. He uses it to mean misleading others by misrepresenting what a person has said.

31. Mr Sivier's case on the facts was this. Rose objected to Ms Riley accusing Owen Jones and Jeremy Corbyn of being anti-Semites, calling this a "smear". Ms Riley's response did not engage with that specific charge. Instead she changed tack. She pretended that what Rose had objected to as a "smear" was a charge that the Labour Party as a whole was anti-Semitic and she sought to defend that charge. In the process she "sought to directly implicate Rose herself in anti-Semitism for questioning her". That approach led to "dogpiles" on Rose, who ultimately blocked Ms Riley for this reason. Mr Sivier's argument is that in the light of this, "it was reasonable for [him] to conclude that [Ms Riley] was gaslighting Rose and wrongly implicating her in anti-Semitism and that it was in the public interest to report as much."

32. Mr Sivier's problem is that the Judge not only understood this aspect of his case she roundly rejected it on the facts. Mr Sivier acknowledged in his written argument for this application that the Judge was "alive to the point". But there is more to it than that. The Judge set out the tweets concerned and devoted two long paragraphs ([168] and [172]) to a careful consideration of this line of argument. In the first of these paragraphs, she addressed Mr Sivier's evidence that Ms Riley's first thread to Rose was intended to intimidate, "gaslight" and patronise Rose. The Judge held that this allegation "bore no rational connection to the messages Ms Riley in fact conveyed" which were "gentle, civil and measured". In paragraph [172] the Judge dealt with the second thread and Mr Sivier's suggestion that this involved "a further attempt to gaslight Rose". She concluded, again, that this bore "no rational relation" to the messages that Ms Riley sent. She observed that the high point of Mr Sivier's argument was that Ms Riley was ignoring the subject raised by Rose in favour of a different argument. She said that would "not begin to provide any reasonable grounds for the allegations Mr Sivier made about what was plainly an amicable discussion." Mr Sivier disagrees with that analysis, but he could only succeed on appeal by showing it is one that no reasonable judge could have arrived at on the evidence. Having reviewed the judge's reasoning and the tweets I do not consider he comes close to showing an arguable case to that effect.

33. Standing back, I remind myself that the Judge gave a thorough judgment setting out the relevant factual material in considerable detail. She correctly stated the relevant legal principles and set out to apply them to the facts. She gave two separate reasons for

rejecting Mr Sivier's case that his belief was a reasonable one, and no fewer than 11 grounds for concluding that, regardless of the procedural deficiencies she identified in his approach, he had no reasonable grounds for believing that what he published was true. My conclusion is that Mr Sivier's first ground of appeal amounts in substance to nothing more than disagreement with the Judge's factual conclusions. He has identified no arguable basis for concluding that the Judge ignored any relevant circumstance or that any of her conclusions fell outside the range of findings reasonably open to her on the evidence.

Ground 2

34. The second ground of appeal relates to s4(4) of the 2013 Act. This provides that in deciding whether a person's belief that publication is in the public interest is reasonable the court must "make such allowance for editorial judgment as it considers appropriate." The Judge set out the provision at [126] and discussed it at paragraph [131] of her judgment, where she set out the legal principles; but Mr Sivier argues that she failed to consider editorial judgment at all when she came to assess the reasonableness of his belief.

35. I agree that the Judge did not mention the point in that part of her judgment. But that can be explained on the basis that she did not consider it appropriate to make any allowance for editorial judgment because, on the facts of this case, she could not see how editorial judgment could help Mr Sivier.

36. Mr Mitchell's written argument for this application is that his client's editorial judgment was this:-

> "(1) The voice of Rose, a vulnerable child who was the victim of online abuse following her exchanges with C, should be heard (2) That he should present his Article in a format that hyperlinked the *Guardian* article as well as Mr Lawson's two articles (containing the underlying Tweets) so that his readers could easily access the source material. … (3) That his Article should be published urgently as a counter-narrative to C's presentation of herself as the victim in the mainstream media."

37. I think this misses the point. This is not one of those cases where it is arguable that the court should have deferred to an editor's decision on whether it was appropriate to include some particular defamatory detail (the kind of case relied on in the written argument, which cites Lord Dyson's observations in *Flood v Times Newspapers Ltd* [2012] UKSC 11 [2012] 2 AC 273 [194]). To get this complaint off the ground Mr Sivier has to explain how "editorial judgment" could have had some bearing on whether it was reasonable for him to believe that it was in the public interest to publish the statement complained of. That statement meant that Ms Riley had, as a matter of fact, "engaged upon, supported and encouraged" a campaign of online abuse and harassment of Rose coupled with comments that by doing so Ms Riley had acted "hypocritically, recklessly irresponsibly and obscenely". The Judge held that Mr Sivier intended to convey most of that meaning, and should have been aware of the rest, as it was an obvious meaning of the words he used. The Judge held that Mr Sivier had no reasonable basis for believing in the truth of his key factual allegations, that Ms Riley had engaged in or encouraged online abuse and harassment of Rose. That being so, I am unable to see how any amount of "editorial

judgment" could have come to his rescue. I can see no arguable merit in this ground of appeal.

Ground 3

38. The third ground of appeal is that there was a "serious procedural irregularity" because (to quote the skeleton argument) "it was procedurally irregular for the judge to reach her own conclusions as to the facts in order to undermine D's reasonable belief.".

39. That is on the face of it, a rather startling complaint. It is the job of a trial judge to make findings of fact. Mr Stables's written response was that this ground is "obscure". I too found it puzzling. It turns out that the complaint is about a passage in the judgment at [163] in which Steyn J said that she had "no hesitation in agreeing with Collins Rice J's conclusion that the statement complained of was not only untrue it was not even arguably true." The argument is that those observations involved findings of fact that went beyond the scope of the issues before the Judge, infected her conclusions on the public interest defence, and were unfair to Mr Sivier.

40. In support of this ground of appeal Mr Sivier makes three main points. The first is that the underlying truth or what was published is legally irrelevant to his s 4 defence. The second is that Collins Rice J did no more than dismiss his pleading as unsustainable. She did not make a finding of fact that what he wrote was untrue. Thirdly, Mr Sivier complains that the Judge did not allow his Counsel to cross-examine Ms Riley about her tweets. Such questioning should have been permitted, he argues, "in order to inform the court's assessment of the reasonableness of [Mr Sivier's] belief."

41. Formally, Mr Sivier is correct to say that whether his Article was true or not was not one of the issues raised for decision at the trial of this action. But I do not consider this ground of appeal is sustainable. The full passage in which the words complained of appear is this:

> "The flaws in the process are, in my view, clearly sufficient in themselves to render Mr Sivier's belief unreasonable. But I have also concluded that, even leaving aside those flaws, his belief was manifestly unreasonable. Despite the summary dismissal of his truth defence, Mr Sivier maintained that his allegations were true, and in any event that it was reasonable for him to believe them to be true. Although the issue does not strictly arise, I have no hesitation in agreeing with Collins Rice J's conclusion that the statement complained of was not only untrue, it was not even arguably true. More to the point, for the reasons I give below, Mr Sivier had no reasonable grounds to believe that his intended meaning, or the single meaning which his words obviously conveyed, was true…. "

42. I reject this ground of appeal for three main reasons. The first and conclusive answer is that the phrase complained of comes after the Judge has given her first reason for rejecting Mr Sivier's defence, and that reason is sufficient in itself. Secondly, as I read this paragraph the phrase complained of was not part of the Judge's reasoning for "undermining D's reasonable belief"; it was her response to the way Mr Sivier ran his case at trial. As she explained, his attempt to plead a defence of truth had failed yet he

continued to maintain at trial that his allegations were true. This passage contains the Judge's response, which I do not regard as arguably irregular in the circumstances. Thirdly (and this is one of the circumstances), on the facts of this case the question of whether the allegations were even arguably true is very closely related to the issue of whether Mr Sivier had any reasonable grounds to believe they were true. The whole case turned on what conclusions about Ms Riley's behaviour could be drawn from the content of her tweets read in their context. Having examined the tweets in detail the Judge concluded that so far from providing a reasonable basis for believing in the allegations made, they afforded no arguable basis for those allegations. The complaint of unfairness is ill-founded because nothing Ms Riley might have said in cross-examination at trial in 2022 could have changed the answer to that question.

Conclusion

43. For the reasons I have now set out in some detail an appeal would have no real prospect of success and permission to appeal is refused.