IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **A2/2017/0897**

HOPKINS –v– MONROE

ORDER made by the Rt. Hon. Lady Justice Sharp

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision: REFUSED

An order granting permission may limit the issues to be heard or be made subject to conditions.

Reasons

1. The applicant, (D) who was the defendant in the proceedings below, seeks permission to appeal against the order made by Warby J dated 10 March 2017 following the trial of a libel action brought by the claimant (C) against D. The claim arose from two tweets sent by D about C. The judge found the meaning of the first tweet was that C *"condoned and approved of scrawling on war memorials, vandalising monuments commemorating those who fought for her freedom"*; and that the innuendo meaning of the second tweet was that C *"condoned and approved of the fact that in the course of an anti-government protest there had been vandalisation by obscene graffiti of the women's war memorial in Whitehall, a monument to those who fought for her freedom"*.
2. D raises four grounds of appeal. D also applies for permission to rely upon additional submissions on the effect of *Lachaux v Independent Print & ors* [2017] EWCA Civ. 1334 on her application for permission to appeal. Those additional submissions have been considered.
3. In my opinion, none of the grounds raised has a real prospect of success, and there is no other compelling reason why an appeal should be heard. The application for permission to appeal is therefore refused.
4. Notwithstanding D's apparent concession that the Court of Appeal's decision in *Lachaux* renders three of the grounds of appeal unsustainable (2.1, 2.2 and 3) this is not the sort of case in which contingent permission should be given, depending on the outcome of any application for permission to appeal to the Supreme Court in *Lachaux*. The case was heard by the same judge who decided *Lachaux* at first instance and it failed before the decision of the Court of Appeal in *Lachaux* was handed down. The merits of the case made below were comprehensively rejected by the judge for unimpeachable reasons. Further, as the judge said when refusing permission to appeal, this was not a case that raised any great issues of legal principle and it turned essentially on its facts.
5. *Ground 1*: The essential submission is that the judge was wrong to find that the tweets complained of had a defamatory tendency. In my view this ground is totally without merit. The judge was plainly entitled to reach the conclusion he did, having regard to the meanings he found the tweets to bear; indeed, his analysis of this issue at para 52 of his judgment is compelling. He was obviously right to say that the criminal law can generally be taken as an expression of society's shared values. He was also right to say that spraying graffiti on a public monument is a criminal offence and socially harmful; and that generally, right-thinking members of society would regard this as obnoxious behaviour and strongly disapprove of anyone who approved or condoned it. His approach was not a simplistic one however. On the contrary,

whilst he accepted there may be exceptions to these general points, he went on to give nuanced reasons, rooted in the particular facts of this case, for his conclusions, viz. that the allegation was that C had condoned the vandalisation of a war memorial, commemorating important roles played in World War II, where respect for those who gave their lives, or put themselves in danger or played a role in the World Wars is a significant aspect of the shared values of our society. The argument that there was insufficient information within the first tweet and its context as to C's actual opinion for right-thinking members of society to generally think worse of her is hopeless, as is the further argument in relation to the innuendo meaning of the second tweet, namely that right-thinking people would not think worse of C for sharing Ms Penny's views, having regard to the facts relied on in support of the innuendo.

6. *Ground 2:* The contention is (Ground 2.1 and 2.2) that the judge was wrong in law to hold that his finding that the tweets complained of had a tendency to cause harm to C's reputation of a kind that was serious for her was, of itself, a sufficient basis to infer that serious harm had been caused to C's reputation within the meaning of section 1(1) of the Defamation Act 2013. This mischaracterises the judge's approach. He held on the evidence, as he was entitled to, that this was, in effect, a classic case where the inference of serious harm could properly be drawn having regard to the seriousness of the defamatory meaning found by him, and the nature and the extent of publication: see in particular what the judge said at paras 69 and 70. This approach was a valid one before and after the decision of the Court of Appeal in *Lachaux*. The Court of Appeal would, in any event, be slow to interfere with the judge's assessment of seriousness insofar as it related to the meanings found by him, and in my judgment, there are no grounds to do so in this case.
7. It is also said that the judge was wrong in law to transfer the element of seriousness from the attitude of third parties to the words, to their effect on C, thereby impermissibly incorporating injury to feelings in his assessment of seriousness (ground 2.3). However the judge drew a careful distinction between injury to feelings and harm to reputation, and did not elide the two in determining whether the threshold requirement was satisfied: see in particular para 67 of his judgment.
8. *Ground 3:* D contends that the judge was wrong in law to rely on what was said by HH Judge Moloney QC in *Theedom v Nourish Training Ltd* [2016] EMLR 10 at 15(h) as it puts an "unhelpful gloss" on the threshold requirement of serious harm in section 1(1) of the Defamation Act 2013. However, *Theedom* contained no gloss on the threshold requirement of section 1(1) of the Defamation Act 2013, unhelpful or otherwise. The passage quoted by the judge from *Theedom* says in terms and correctly, that "actual serious harm to reputation or likely serious harm to reputation in the future" is required in order to satisfy section 1.
9. *Ground 4:* D submits that as a result of the errors in law identified in Grounds 1 to 3, once the judge had found the words were defamatory according to common law principles, the burden of proof wrongly shifted to D and D had to prove that no material harm to reputation had been caused. D also alleges that the Judge made a number of errors in his approach to the facts. This ground is unsustainable. The argument on burden of proof is rightly not pursued, having regard to what the judge said at para 74 of his judgment; and it seems to me that the remainder of this ground amounts to no more than a reiteration of D's positive evidential case that failed below, namely that for various reasons, the tweets did not cause serious harm. The judge was entitled to adopt a proportionate approach to determining the issue of serious harm, which did not require him to deal with the many sub-issues raised by D: see para 70 of his judgment; he made findings of fact that were reasonably open to him on the evidence and in my view, he was entitled to find serious harm, and reject D's positive case to the contrary, for the straightforward

reasons he gave. In the event, as the respondent points out in her PD52C submissions, D's positive case backfired because it showed that people had read the tweets, and believed them sufficiently to abuse C as a result.

Information for or directions to the parties

HER MAJESTY'S COURT OF APPEAL E & W

Mediation:

Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)? Yes ☐ No ☒

Pilot categories:

- Personal injury and clinical negligence cases;
- All other professional negligence cases;
- Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;
- Boundary disputes;
- Inheritance disputes.

If yes, is there any reason not to refer to CAMS mediation under the pilot? Yes ☐ No ☐

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation? Yes ☐ No ☒

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)

b) any expedition

Signed:

Date: 5 January 2018

By the Court

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –

a) the Court considers that the appeal would have a real prospect of success; or

b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: A2/2017/0897

DATED 5TH JANUARY 2018
IN THE COURT OF APPEAL

JACK MONROE

- and -

KATIE HOPKINS

ORDER

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