

Neutral Citation Number: [2018] EWCA Civ 1470

Case No: A2/2018/0897

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT (Queen's Bench Division)

Sir David Eady

HQ15-X05040

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 27/06/2018

**Before:**

LORD JUSTICE NEWEY

and

LORD JUSTICE COULSON

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**Between:**

|  |  |  |
| --- | --- | --- |
|  | **Zipporah Lisle-Mainwaring** | Appellant |
|  | **- and -** |  |
|  | **Associated Newspapers Limited** | Respondent |

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**Hugh Tomlinson QC & Sara Mansoori** (instructed by **DLA Piper UK LLP**) for the **Appellant**

**Andrew Caldecott QC & Christina Michalos** (instructed by**Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing date: Thursday 24th May 2018

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 Approved Judgment

**Lord Justice Coulson :**

***1. Introduction***

1. In 2015, the claimant came fleetingly to the attention of the public when she had the exterior of her mews house in Kensington re-painted in red and white stripes. The defendant is the publisher of *The Daily Mail* and maintains the internet website at www.dailymail.co.uk. In these proceedings, the claimant alleges that between April and July 2015, the defendant pursued a course of conduct which amounted to harassment contrary to Sections 1 and 3 of the *Protection from Harassment Act 1997*. The conduct complained of centres around articles published in both the Daily Mail and on the website about the repainting, and the reasons for it.
2. On 22 February 2018, the claimant sought an order for specific disclosure against the defendant. The application was heard by Sir David Eady on 21 March. Two days later, on 23 March, the judge gave judgment, dismissing the application. No application for permission to appeal was made at the hearing. Later that day, in a written application which was sent only to the judge, and not to the defendant, the claimant sought permission to appeal. Sir David was conscious that his judicial authority expired at midnight on 23 March by virtue of his retirement from judicial office and thought, wrongly, that he was therefore obliged to deal with that application that afternoon.
3. Thus, it was that, at about 4.25 pm on the evening of 23 March, Sir David purported to grant permission to appeal against his ruling, even though the defendant, not being aware of the application, had not provided any submissions in response. Once the position became clear, Sir David emailed the claimant’s solicitors to indicate that, for a number of reasons, he probably should not have granted permission to appeal. It is the defendant’s position that the purported grant of permission was invalid, and they maintain that, if and when this court considers the matter afresh, permission to appeal should not be granted. The claimant seeks to rely on the permission purportedly granted by Sir David Eady.
4. There are three broad issues before this court. They are:
	1. Whether permission to appeal has already been validly granted;
	2. If it has not, whether permission to appeal should now be granted;
	3. Whether the substance of any appeal has been made out in any event.
5. At the conclusion of the hearing on 24 May 2018, the parties were informed that:
	1. We did not consider that permission to appeal had been validly granted;
	2. We did not consider that permission to appeal should be granted by the Court of Appeal;
	3. In reaching our conclusions on the permission application, we had concluded that the substance of the appeal had not been made out.

We said that written reasons for these conclusions would be provided to the parties following the short vacation. Those reasons are contained in this judgment.

***2. Has Permission To Appeal Already Been Validly Granted?***

***2.1 The Facts***

1. As noted above, the hearing of the claimant’s application for specific disclosure took place on Wednesday, 21 March 2018. Sir David Eady reserved judgment, and it was agreed that judgment would be given orally on 23 March 2018. On that morning, Sir David gave an oral judgment, which has been subsequently put into an approved written form. It runs to 51 paragraphs. For the detailed reasons set out there, he dismissed the claimant’s application.
2. At the hearing on 23 March, both parties were represented (although the claimant’s counsel, who had appeared at the hearing two days before, was not present). The claimant’s solicitor did not raise the question of an appeal, nor did she indicate that she wanted that aspect of the hearing to be adjourned so that an application for permission to appeal could be considered. However, at 3.25 pm on that Friday, the claimant’s solicitors sent an email to the Queen’s Bench Division List Office, with a message to be passed on to the judge, asking for permission to appeal. Three grounds were identified in the email. They were as follows:

“1. You misconstrued the scope of the pleaded issues as set out in the Statement of Case served in the action and did not properly take into account that both knowledge and motivation of the journalists writing the articles were relevant to those issues;

2. You failed to identify that the documents requested are disclosable and mistakenly proceeded on the basis that the documents requests were not identified with enough specificity for the purposes of an order for specific disclosure; and

3. You failed to appreciate that the scope of disclosure on a specific disclosure application is broad, includes the possibility of directing a party to carry out a search for documents which lead to a train of enquiry as set out in Practice Direction 31A 5.4, and to take into account all the circumstances of this case and the overriding objective (including for parties to be on an equal footing).”

1. This email was not sent or copied to the defendant’s solicitors. This has been described by the claimant’s solicitors as inadvertent. This omission means that at the relevant time, the defendant had no idea of what was going on. It is clear from his later email that Sir David Eady, not unreasonably, believed that the defendant was aware of the application.
2. Sir David dealt with the application about an hour later. He later explained that he purported to grant permission immediately because, even though he accepted that he did not have the benefit of submissions from either counsel, “I had to respond urgently because time was running out”. This was a reference to the fact that his authority to act judicially expired at midnight on 23 March by virtue of his retirement. In fact, Sir David was wrong about that: under s.27(1) of the Judicial Pensions and Retirement Act 1993, he had the power to deal with all “ancillary matters” arising from the hearing, which would plainly include the refusal or grant of permission to appeal.
3. As a result of this misapprehension, Sir David purported to grant permission to appeal late on the afternoon of 23 March. His reasons were stated as follows:

“The points raised are arguable and there is a lack of authority on the relationship between standard and specific disclosure.”

It is also right to note that the form on which his reasons for allowing permission were stated was not in the current N460 form.

1. Once the dust had settled, and following short written submissions on the issue from both parties, on 10 April 2018 Sir David emailed the parties to make plain that he understood his authority to do anything further in the case expired at midnight on 23 March, which was why he had acted as he had done. He said that the fact that the defendant’s advisers had been wholly unaware of the application was unfortunate. He went on to say that, although he could not give a ruling on the matter, it seemed to him that CPR 52.3(2) and paragraph 4.1 of Practice Direction 52A meant that a judge could only grant permission at a hearing, and had no jurisdiction to do so after the hearing had concluded. He said that if this was right, his grant of permission was invalid, and that it would then be for the claimant to apply to the Court of Appeal for such permission.

***2.2 The Law***

1. CPR 52.3 provides as follows:

“**Permission to appeal**

**52.3**

(1) An appellant or respondent requires permission to appeal—

(a) where the appeal is from a decision of a judge in the County Court or the High Court, or to the Court of Appeal from a decision of a judge in the family court, except where the appeal is against—

(i) a committal order;

(ii) a refusal to grant habeas corpus; or

(iii) a secure accommodation order made under section 25 of the Children Act 1989 or section 119 of the Social Services and Well-being (Wales) Act 2014 or;

(b) as provided by Practice Directions 52A to 52E.

(Other enactments may provide that permission is required for particular appeals.)

(2) An application for permission to appeal may be made—

(a) to the lower court at the hearing at which the decision to be appealed was made; or

(b) to the appeal court in an appeal notice.

(Rule 52.12 sets out the time limits for filing an appellant’s notice at the appeal court. Rule 52.13 sets out the time limits for filing a respondent’s notice at the appeal court. Any application for permission to appeal to the appeal court must be made in the appeal notice (see rules 52.12(1) and 52.13(3)).)…”

1. Practice Direction 52A provides as follows:

“**Where to apply for permission**

**4.1** An application for permission to appeal may be made–

(a) to the lower court at the hearing at which the decision to be appealed against is given (in which case the lower court may adjourn the hearing to give a party an opportunity to apply for permission to appeal); or

(b) where the lower court refuses permission to appeal or where no application is made to the lower court, to the appeal court in accordance with rule 52.12.

…

**Appeal in relation to case management decision**

**4.6** Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether –

(a) the issue is of sufficient significance to justify the costs of an appeal;

(b) the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision;

(c) it would be more convenient to determine the issue at or after trial.

Case management decisions include decisions made under rule 3.1(2) and decisions about disclosure, filing of witness statements or experts’ reports, directions about the timetable of the claim, adding a party to a claim and security for costs.”

1. In *Monroe v Hopkins* *(No 2)* [2017] EWHC 645 (QB); [2017] 1 WLR 3587, the parties attended the handing down of the judgment, but there was no application for permission to appeal and no application to adjourn the hearing in order to make a such an application. A formal order was drawn up and sealed. Two weeks later, the defendant wrote to the judge seeking permission to appeal. Warby J refused the application, saying that the court did not have jurisdiction to hear the application for permission to appeal. Warby J said:

“11. Normally, when a judgment is handed down, an application for permission to appeal is made or not made, and that is the end of it. But it is the fairly common practice of the court, and my common practice, to agree to adjourn a hearing to allow consideration of an application for permission to appeal. If judgment is handed down without attendance, it is common practice to adjourn the hearing to allow an application to be made, even if there has been no indication about the possibility of an appeal. As I have noted, however, in this case the parties attended the hand down there was no application for permission to appeal, nor any application to adjourn in order to make such an application.

…

14. It seems to me that the fairly settled practice that I have described above reflects a proper interpretation and application of the rules. The words of the rule and the practice direction must mean something fairly close to what they say. A reserved judgment is given, and the decision is made, when the judgment is handed down at a hearing in court. On the face of it, the application to the lower court must be made then, or at some later date to which the hearing is then adjourned for that purpose, at the request of the potential appellant or at the instigation of the court. If an application is not made at one or other of those times, it can only be made to the appeal court. This is a clear and understandable regime, which places the onus on the party who may wish to appeal to make a decision, or to ask for time to make one. The standard practice of circulating reserved judgments should make it easier for a party to decide whether to seek permission, and to identify grounds of appeal which can be argued at the hand down. It is inherently desirable to avoid afterthoughts, and to avoid the uncertainty for the opposite party that would result if these were permitted.”

***2.3 Analysis and Conclusions***

1. In my view, the correct practice, as envisaged by the CPR, is that identified by Warby J in *Monroe v Hopkins (No 2)*. A party who wishes to appeal should first seek the permission of the judge against whom the appeal is sought to be made. The application for permission to appeal should be made at the relevant handing down of the judgment. In these days when reserved judgments are so common, the parties would have seen a draft and will have no difficulty at all in being ready to make an application at the hand-down. But even if the judgment has been given orally, there should usually be no difficulty in the making of an application for permission at the hearing itself.
2. This has more than one advantage. First, if there is no application for permission to appeal at the hand-down, it allows the judge to know that his or her involvement with that case is at an end, and papers can be returned, destroyed or archived. Secondly, if an application is made at the hearing, it can be dealt with when the issues are fresh in everyone’s minds. It makes for certainty and efficiency.
3. I accept that there may be occasions when a losing party is not in a position to know whether or not an application for permission to appeal will be made at the hand-down. In my experience those cases are rare, but one potential category would be a case, like this one, where the judge did not circulate a written draft beforehand, and instead gave a lengthy oral judgment at the hearing. In such circumstances, the losing party may not know whether or not they want to appeal, and they may need to take advice on the matter before making a final decision. In those circumstances, the correct course, as identified by Warby J in *Monroe*, is to ask the judge for an adjournment of that part of the hearing only, so that, if necessary, a later application can be made for permission to appeal. If that is done, then the judge can control the making of any subsequent application, usually by imposing a very short time limit on the losing party to reach a conclusion, and then ensuring the proper provision of submissions by both sides, either orally or in writing.
4. At one point during the hearing, we were referred to the decision of Jackson J (as he then was) in *Multiplex Construction (UK) Limited v Honeywell Control Systems Limited* [2007] EWHC 236 (TCC); [2007] Bus LR 13, in which the judge allowed an application for permission to appeal to be made some two weeks after the handing down of the judgment. However, as Warby J noted, that decision was taken under an older (and rather different) version of Part 52. He said that it was not easy to read the new version of PD 52A “as leaving room for a retrospective adjournment of the kind contemplated by Jackson J”. I respectfully agree with that conclusion.
5. During his submissions, Mr Tomlinson QC, on behalf of the claimant, referred to CPR 23.8, which permits applications to be determined without a hearing if the parties agree, or if the court does not consider that a hearing would be appropriate. But that does not seem to me to have any relevance to the present issue. Whether or not a judge of the lower court grants permission to appeal is uniquely a matter for that judge. In those circumstances, it would be very rare for there to be no hearing at which such an application could be considered and decided. The only possible exception that I can think of would be where the application for permission to appeal was adjourned, and where both parties subsequently put in written submissions agreeing that there was a point of law which should be considered by the Court of Appeal. In those circumstances, if the first instance judge agrees with the parties, he or she could dispense with the need for a hearing of the application for permission to appeal under r.23.8. But in my experience, that would be an extremely rare event.
6. Another advantage of the practice and procedure referred to above is that it ensures, either at the handing down of the judgment, or at the adjourned hearing (if that was what was sought and granted), that the successful party/potential respondent has the opportunity of making submissions on the application for permission to appeal. The importance of those submissions should not be understated: for example, I note that paragraph 19 of Practice Direction 52C (dealing with appeals to the Court of Appeal) sets out detailed provisions relating to the service by a respondent of a brief statement of any reasons why permission should be refused, in whole or in part. In this way, the provision by the successful party of detailed reasons why permission should not be granted is not just a matter of form; it can have an important bearing on whether or not permission to appeal is granted or not.
7. In the present case, no element of the usual or proper practice was followed by the claimant’s solicitors. An application for permission to appeal was not made at the handing down of the judgment. An application to adjourn that part of the hearing, so that the making of an application for permission could be considered, was also not made. When the application was made to the court it was made unilaterally, and the defendant had no idea at all that it had even been made. The defendant was never given the opportunity of making any submissions at all on the application for permission to appeal.
8. For all these reasons, as Sir David Eady himself suggested in his email of 10 April, his grant of permission to appeal was invalid. Accordingly, it is for this court to consider afresh whether or not permission to appeal should be granted.

***3. Should This Court Grant Permission To Appeal?***

***3.1 The Test***

1. The general rules relating to the hearing of appeals are set out in r.52.21:

“**Hearing of appeals**

**52.21**

(1) Every appeal will be limited to a review of the decision of the lower court unless—

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing…

(3) The appeal court will allow an appeal where the decision of the lower court was—

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.

(5) At the hearing of the appeal, a party may not rely on a matter not contained in that party’s appeal notice unless the court gives permission.”

1. Of course, because Sir David Eady’s order related to a case management decision, the additional considerations set out at paragraph 4.6 of Practice Direction 52A (paragraph 13 above) are also applicable.

***3.2 The Judgment***

1. The judgment given on 23 March 2018 starts by identifying the underlying cause of action pursuant to s.1(1) of the Protection from Harassment Act 1997, namely that:

“A person must not pursue a course of conduct –

* + - 1. Which amounts to harassment of another and
			2. Which he knows or ought to know amounts to harassment of the other.”

Paragraphs [4] and [5] of the judgment expanded further on this cause of action, particularly in relation to newspaper articles.

1. Having set out the relevant articles [7], the judgment identifies five alleged inaccuracies in the articles [8].
2. The judgment then goes on to summarise the principles relating to specific disclosure [9] – [15]. In this context, at [17], the judge deals with the potentially important point relating to motivation. Sir David Eady recorded the concession made by Mr Caldecott QC at the hearing that if there were a document that said, for example, “let us hammer Lisle-Mainwaring as hard as we can”, it would be disclosable. The judge then went on to say:

“What he challenges, however, is the notion that all documents in the relevant categories need to be searched or listed by virtue merely of falling within the category. It may be asked, in relation to a possible ‘smoking gun’, how it will be traceable unless a search is carried out? It may be that there are certain categories of documents that need to be searched in case there should be found a communication which throws some light on some individual’s motivation for publishing any particular article, but it does not follow that all the documents in that category need to be identified and listed.”

In the same vein, the judge noted at [18] that an order for specific disclosure called “for a discriminating process which narrows the scope of enquiry. It must be a reasoned process.”

1. At [19], the judgment refers to an earlier judgment by HHJ Moloney QC, sitting as a High Court judge, in which he struck out large parts of the claimant’s original pleading because it went to pre-publication contact with journalists. Although HHJ Moloney ruled that those matters were relevant as background, it was expressly concluded that they were not relevant to the critical allegations of harassment. This was relevant to the specific disclosure application because it appears that Sir David considered that at least some of the categories of documents being sought were part of an attempt by the claimant to open up this debate again.
2. At [20] – [21] Sir David Eady’s judgment again stressed the need for specificity in any application for specific disclosure. Thereafter, starting at [23], the judgment then deals with each of the 31 categories of documents that were then being sought. The judge gave a variety of different reasons for why, in each case, an order for specific disclosure was not appropriate.

***3.3 Is There An Issue Of Principle?***

1. It is not easy to discern any issue of principle arising out of the refusal of the claimant’s disclosure application, either in the original grounds of appeal, or the slightly more expanded grounds set out in the claimant’s skeleton argument. The only matter which might have fallen within this category was the suggestion, encapsulated in the document by which Sir David purported to grant permission to appeal, concerning the “lack of authority on the relationship between standard and specific disclosure” (paragraph 10 above). This touches on the claimant’s general submission that the stated tests for standard and specific disclosure are different. In my view, for the reasons set out below, there is no such issue of principle on this appeal. Furthermore, I regard the current position relating to standard and specific disclosure under the CPR as being relatively straightforward.
2. The starting point is CPR 31.5(7) which provides as follows:

“(7) At the first or any subsequent case management conference, the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of the following orders to make in relation to disclosure –

(a) an order dispensing with disclosure;

(b) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;

(c) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;

(d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;

(e) an order that a party give standard disclosure;

(f) any other order in relation to disclosure that the court considers appropriate.”

1. Standard disclosure is defined at CPR 31.6 in the following terms:

“31.6 Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party’s case; or

(iii) support another party’s case; and

(c) the documents which he is required to disclose by a relevant practice direction.”

1. The rules concerned with specific disclosure are set out in CPR 31.12 as follows:

“**Specific disclosure or inspection**

**31.12**

(1) The court may make an order for specific disclosure or specific inspection.

(2) An order for specific disclosure is an order that a party must do one or more of the following things –

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search.

(3) An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2).”

1. Thus, in my judgment, the rules are intended to operate in this way:
	* 1. Where there is an order for standard disclosure, each party has to list those documents which arise in the three sub-categories of r.31.6(b). As the notes to the White Book make plain, whether or not a document falls into these sub-paragraphs must be judged against the statements of case, and not by reference to other matters: see *Paddick v Associated Newspapers Limited* [2003] EWHC 2991 (QB); [2003] All ER (D) 179 (Dec) at [11].
		2. After receipt of the other side’s list, a party may conclude that it wishes to seek specific disclosure of particular documents or classes of documents. If so, an application is made under r.31.12. The court has a discretion as to whether or not to grant such an order.
		3. The application for specific disclosure will usually arise because the applicant believes that the other party has not given adequate disclosure first time round. But that is not inevitable: sometimes, there may be documents (or a particular class of documents) which the applicant seeks by way of specific disclosure, regardless of whether or not they should have been disclosed by way of standard disclosure.
2. The fact that an application for specific disclosure can be made in either circumstance is clear from Practice Direction 31A, where the relevant provisions are as follows:

“**Specific disclosure**

**5.1** If a party believes that the disclosure of documents given by a disclosing party is inadequate he may make an application for an order for specific disclosure (see rule 31.12).

**5.2** The application notice must specify the order that the applicant intends to ask the court to make and must be supported by evidence (see rule 31.12(2) which describes the orders the court may make).

**5.3** The grounds on which the order is sought may be set out in the application notice itself but if not there set out must be set out in the evidence filed in support of the application.

**5.4** In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Part 1. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with.

**5.5** An order for specific disclosure may in an appropriate case direct a party to –

(1) carry out a search for any documents which it is reasonable to suppose may contain information which may–

(a) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure; or

(b) lead to a train of enquiry which has either of those consequences; and

(2) disclose any documents found as a result of that search.”

1. Thus, if a court concluded that the respondent to the application had failed to comply with the order for standard disclosure, then it will “usually” make the appropriate order: see paragraph 5.4 of PD 31A. If, on the other hand, the court is not so persuaded, then it may be more difficult for the applicant to obtain an order for specific disclosure. But it is not impossible. That is because, as paragraph 5.5(1) makes clear, in an appropriate case, the court may make an order for disclosure which is wider than the constraints governing standard disclosure and could even extend to an old-fashioned ‘train of enquiry’ exercise (the unlamented *Peruvian Guano* test). An order made pursuant to paragraph 5.5(1)(b) of Practice Direction 31 could never arise out of a failure to comply with an order for specific disclosure, and would only be justified in an appropriate case.
2. For these reasons, therefore, it seems to me that the interface between standard disclosure and specific disclosure is clear. It gives rise to no difficulties in practice or principle.
3. Furthermore, it gave rise to no difficulties in the present case. The claimant’s application was based, fair and square, on the assertion that the defendant had failed to comply with the order for standard disclosure. Indeed, that is central to the first two grounds of appeal. It was never suggested in the application, or in the supporting documents, or in the submissions made to Sir David Eady, that this was somehow an appropriate case for an order for specific disclosure which went beyond standard disclosure in accordance with paragraph 5.5(1)(b) of the Practice Direction. For the avoidance of doubt, I consider that the claimant has not begun to make out any submission that this was one of those rare cases where an order under paragraph 5.5(1)(b) may have been appropriate.
4. For these reasons, therefore, I take the view that no point of principle arises on this application for permission to appeal. This was an ordinary application for specific disclosure arising out of the claimant’s complaint that the defendant had failed properly to comply with the earlier order for standard disclosure.

***3.4 Other Reasons For Granting Permission?***

1. In the absence of any point of principle, it is then necessary to consider whether there is any other reason to grant the claimant permission to appeal in this case. For the reasons set out below, I consider that there are no such reasons.
2. First, there is no part of the judgment of Sir David Eady which could be described as plainly or obviously wrong. On the contrary, the judge worked through the 31 categories, giving a variety of reasons for how and why specific disclosure was not appropriate in respect of each category. Those were conclusions which he was entitled to reach. Whether or not this court would reach the same conclusion on every category is irrelevant.
3. Secondly, this was a case management decision, made by a very experienced judge. Paragraph 4.6 of Practice Direction 52A indicates that this court will be slow to entertain an appeal against a case management ruling. In my view, there is no compelling reason to depart from that practice in this case, particularly given the absence of any issue of principle.
4. Thirdly, I am left with the impression that the original application for specific disclosure, and this application for permission to appeal, were motivated by wider tactical considerations, rather than a genuine concern about missing documents. I think there is force in Mr Caldecott QC’s submission that at least part of the reason for this application was to endeavour to resurrect that part of the case (the pre-publication contact with journalists) which HHJ Moloney QC had emphatically ruled out. Furthermore, the delay in the making of the original application (the defendant’s list of documents was dated 1 December 2017 but the application for specific disclosure was not made until 22February 2018, a delay of almost 3 months), also suggests that the documents themselves were not central to the claimant’s strategy.
5. For all these reasons, therefore, I do not consider that the claimant has demonstrated that this court should interfere with Sir David Eady’s case management decision of 23 March 2018 regarding specific disclosure. The judge was entitled to exercise his discretion in the way that he did. There is no basis on which it would be appropriate to grant permission to appeal.

***4. The Individual Categories***

1. Although it is not strictly necessary to do so, I would wish, in deference to the submissions of both leading counsel, to indicate briefly, by reference to the specific categories of documents sought on the appeal, how and why I have concluded that an application for specific disclosure has not been made out in any event.

***4.1 Categories 3 - 6***

1. These categories were described in the original application in the following terms:

“(3) Copies of all instructions to and between ANL journalists and editors regarding the interest in and decision to publish any/all of the articles about the claimant and/or the stripey house.

(4) All documents, including e-mails and attachments, between the ANL journalists and editors which concern the journalistic investigations into the articles.

(5) E-mails, letters, faxes or notes of telephone calls that initiated ANL reporting of the stripey house story.

(6) E-mails, letters, faxes and notes of telephone calls that initiated ANL reporting of the claimant’s personal affairs.”

1. In essence, these are the defendant’s internal documents regarding the initiation of the stories about the claimant and then their continuation, including any particular instructions given to their journalists. Mr Tomlinson QC’s argument was that these documents went to motivation and were therefore relevant, because they might adversely affect the defendant’s case or, depending on their nature, might adversely affect the claimant’s case. The judge rejected the application in respect of these categories because they were much too widely drawn. He said [26]:

“It is accepted that any specific documents which throw light on the defendant’s motivation would be disclosable, but it cannot justify the breadth of these demands.”

1. In my view, the judge was right to reach that conclusion. As described, these categories of documents were far too unspecific to warrant an order for specific disclosure.
2. But there is a further point. It is clear that documents relating to the defendant’s motivation have already been disclosed. Taking two examples, purely at random, the defendant has disclosed:

a) an email from a Martin Clarke of the defendant dated 14 April 2015 to another journalist, which says “there’s a lot of stuff online about what a nasty piece of work she is…need a pic and to make it about her”;

b) an email from a Rosie Taylor of the defendant dated 15 April 2015 to another journalist, which describes the claimant as “definitely well dodgy”.

1. Accordingly, I am satisfied that the defendant has disclosed documents which adversely affect their case, because these emails may suggest that one motivation for the articles was a personal animus against the claimant. For the application in respect of categories 3 – 6 to succeed, therefore, the claimant needed to show that there were *additional* documents of a similar type which had not been disclosed. She has failed to do so and the widely-drawn nature of the categories of document sought merely confirms that.
2. Accordingly, although Mr Tomlinson QC spent some time on categories 3 – 6 it is plain, on a proper consideration of the issues, that no claim for any additional documents has been identified or sustained.

***4.2 Categories 7 – 8***

1. These categories include correspondence, transcripts and notes relating to interviews given by members of the claimant’s family. It is common ground that what Robert Lisle told the defendant was false. But there is no allegation that the defendant misrepresented anything that he said. Accordingly, it is very hard to see how any of these documents can have any relevance to the harassment case.
2. Sir David Eady was of the same view. He said that the purpose of seeking these documents “appears to be that of digging up a new case, different from that currently pleaded, to the effect that the defendant or its journalists misbehaved in some way.” He rejected the claim for disclosure on that basis. I agree with that: on the basis of the current pleadings, the documents sought can have no relevance.

***4.3 Categories 11 -12***

1. These categories concern the instructions to and reports from tracing agents. It is admitted that a genealogical research service was instructed to obtain information as to the claimant’s family. However, it is not pleaded that any information obtained from the genealogical research service had ultimately any relevance to the harassment case. That was the judge’s conclusion and again I agree with him.

***4.4 Categories 14 – 16***

1. These categories are again very widely drawn. The claimant seeks notes of interviews with anyone who gave information to the defendant and all notes of enquiries made with people who refused to give such interviews.
2. The judge rejected the claim in respect of these categories on the basis that the pleaded “examples” on which the claimant relied all arose post-publication, whilst categories 14 – 16 expressly relate to pre-publication events. Thus, this looked like an attempt to reopen the pre-publication history which had already been ruled out by HHJ Moloney QC. Moreover, as Sir David Eady pointed out [34], the pleaded post-publication criticisms of the defendant are simply questions of fact and do not raise any matters on which any of the notes of the interviews now sought could have a bearing. He concluded that these documents should not be the subject of an order for specific disclosure. Again, I agree.

***4.5 Categories 18 – 20***

1. These categories all relate to planning documents in one form or another. In general, therefore, the request for, for example, “any planning document” is much too wide. Most go to matters which are in the public domain anyway. The other items within these categories, such as enquiries made to the planning department of the local authority or interviews conducted with their members, are again irrelevant to the harassment allegations. As the judge noted, to the extent that these documents were allegedly concerned with the issue of ‘public interest’, the court was not going to be assisted by such documents when making a decision on that issue. As he pointed out at [36], in such circumstances the court would apply an objective test to the facts as found.
2. For these various reasons, I consider that the judge was right to reject the request in respect of categories 18 – 20.

***4.6 Category 23***

1. This category sought internal memoranda relating to the defendant’s practices regarding the establishment of copyright for photographers and drawings not owned by the defendant. A tangential issue of copyright arises in this case because of the use of particular photographs. However, as the judge noted at [40], “It is difficult to see how any pleaded copyright issue is going to be assisted by internal memoranda”.
2. There is a further point. This category is very widely drawn because it relates, not to what the defendant did in this case, but to what the defendant’s general practices were in respect of copyright. The scope of that application is potentially limitless. I do not consider that it is appropriate for an application for specific disclosure to be cast in such broad terms.

***4.7 Category 24***

1. This is also a request for general internal memoranda, this time relating to the defendant’s practices regarding “the right to reply” for people featured in the defendant’s stories. Again, as the judge noted, that was far too general. Again, it is inappropriate for an application for specific disclosure to be made on such a basis.

***4.8 Kathryn Knight***

1. Finally, there was an application that the defendant disclose information relating to Kathryn Knight’s diary and her social engagements on 17 April. Ms Knight was an independent journalist covering the story. It is said that she was uncontactable from about 7pm on the 17 April because she was deliberately making herself scarce, in order not to answer the claimant’s calls.
2. As the judge pointed out [50], “whether she was making herself scarce is a matter that can be judged, if necessary, by reference to what is known to have happened that day and when. Documents are unlikely to be of any assistance”. Again, I agree.

***4.9 Summary***

1. Accordingly, it will be seen from this brief survey of the individual categories of documents that remained in issue on 24 May 2018 that, on a proper analysis, the detail of the application for specific disclosure was, in my view, rightly dismissed by Sir David Eady on 23 March 2018.

**Lord Justice Newey :**

1. I agree.