FORM 269C1

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **A2/2015/4230**

(CS 08.03 16)

Her Majesty's Court of Appeal

31 AUG 2016

[SEAL]

Brand & Anr –v– Berki

ORDER made by the Rt. Hon. Lady Justice Arden

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

Decision: granted, refused, adjourned. An order granting permission may limit the issues to be heard or be made subject to conditions.

Refused. Stay of costs order for 7 days pending any application for renewal of this application and if it is renewed then until disposal of the application

Reasons

1. The skeleton argument shows no grounds on which permission to appeal could be granted:
   a. There are no grounds of appeal drafted in accordance with the Court's rules of procedure;
   b. The skeleton exceeds the permitted 25 pages without any or any proper explanation;
   c. The complaints in the skeleton argument are generalised. For example, the appellant contends that the police were incompetent or worse. (Provisionally) it seems to me (as regards this aspect of the case) that she would have to show a real prospect of success in establishing a rational belief that there remained proper grounds for prosecution cross-referenced to the witness statements or other admissible evidence. By way of further example, the skeleton argument says that the police failed to collect material evidence but the evidence in question is not identified (see eg 243), and then that she is threatening legal proceedings of some unspecified kind. It is not enough for the appellant to convey her belief in the rightfulness of her cause: if there is a trial she has the burden of proving her allegations. It is wholly unclear why she has any legal complaint about the dog which appears to have behaved as another dog might do by jumping up.
   d. The right to freedom of expression is not unqualified. Paras 143-196 +203 to 241 of the skeleton argument are hornbook law which do not take the appellant's case any further forward. The Judge applied the 1997 Act and not the law of privacy. Paras 246 -276 of the skeleton argument are irrelevant.
   e. The appellant's complaints that Jay J was too closely connected with the second claimant to hear this case because he was counsel in the Leveson inquiry and because he studied at Oxford at the same time as Hugh Grant are totally without merit and may not be renewed.
   f. As to disability, it is not clear what adjustments the appellant sought on account of her disability. Without knowing what application was made, it is impossible to form a view that there is any prospect of showing that the judge was in error in not making particular adjustments. The appellant also has to show that because she did not have the requested adjustment she was unable to make some point that she desired to make. Moreover, provisionally, in the absence of more information it seems to me that the evidence (and the judge acting impartially could only act on evidence) did not necessarily show any substantial disability as required by the Equality Act 2010.
2. On the other hand:
   a. I do not have a full copy of the transcript of the proceedings before the judge. Nor do I have a copy of the skeleton argument(s) filed for use before the judge.
   b. The Judge held in the appellant's favour that the defendant could rely for the purpose of responding to the summary judgment application on her first four witness statements and on a record of an interview with the police.
   c. The Judge proceeded on the basis that he had before him an application for summary judgment, but the only one which I have seen is for summary judgment in default of filing any witness statements. It is not clear to me what happened but it seems that he dealt with the application as one for summary judgment on the injunction from harassment claim.
   d. The Judge referred to threats which the appellant had made without specifying them and I do not know precisely what they were. He also held that there were inconsistencies in the appellant's case.
   e. Nonetheless he held in the appellant's favour that the appellant had a real (ie non-fanciful

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prospect of success) in proving her case on the events of 7 June (including an assault and an attack by the first claimant's dog) (paragraph 42).

f. The judge accepted that the appellant's actions consequent on those events (communications with the media and tweets, which he considered had been admitted by the appellant) qualified as harassment in any event.

g. The Judge then had to consider whether there was any defence open to the appellant on which she had a non-fanciful prospect. In the appellant's favour, he rejected any suggestion that the appellant's motives were to obtain money.

h. The Judge drew the inference that appellant's motives were to harass the claimants "regardless of the rights and wrongs of what occurred on 7 June". He held that she had no prospect of success on establishing any defence and that she was highly unlikely to persuade any court that she had reasonable grounds for embarking on the admitted course of conduct.

i. The Judge did not give any reasons for this last conclusion. The fact that she was highly unlikely to succeed did not necessarily mean that she had no prospect.

j. The Judge appears to have made findings about the appellant's motives on the basis of her submissions (and not on evidence given in her witness statements or in the witness box), and on the material before me it is not clear that the appellant had an opportunity to deal with these matters.

k. The judge had not considered whether any defence was available to her under section 1(3) PHA 1997. The appellant's case involved a challenge to the police decision not to prosecute the claimants (Carr J, 43). The judge did not consider whether there was any real prospect of showing the relevant belief. The fact that he would or might have concluded this against the appellant may not mean that the point is immaterial .

3. The respondent's submissions by email to the Civil Appeals Office dated 30 December 2015 do not deal with any of the matters in paragraph 2, above.

Information for or directions to the parties

If this application is renewed, the appellant must within 21 days file grounds of appeal and a skeleton argument in compliance with the CPR and precisely identifying her complaints as explained above. Pages of the skeleton argument must be numbered and not exceed 25. That means that the appellant will have to refine her case and concentrate on the events in this case, not generalities (which are likely to be totally irrelevant: see eg paragraph 121-2). Time for the respondents to file their skeleton argument for any appeal will run from the later of the date on which any permission is granted and the date on which such grounds and skeleton argument are served on them.

If this application is renewed, the appellant must also, not less than 7 clear days before the hearing of the renewed application file:

- a complete copy of the proceedings before Jay J if available
- copies of the skeleton arguments used before him and
- if she relies on the CCTV, a copy of the recording that the Court is able to watch.

If there is a renewed application, the appellant must expect that she will have no more than 15 minutes to make any point orally.

If the application is renewed, the respondents must not less than 7 clear days before the hearing lodge a note not exceeding 5 pages dealing with the points made under Reasons, above, paragraph 1(f) and 2.

This case falls within the Court of Appeal Mediation Scheme automatic pilot categories*. Yes ☐ No ☐

Recommended for mediation Yes ☒ No ☐

If not, please give reason:

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment)

b) any expedition

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By the Court

Signed:

Date: 31 08 16

Notes

(1) Rule 52.3(6) 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) Rule 52.3(4) and (5) provide that where the appeal court, without a hearing, refuses permission to appeal that decision may be reconsidered at a hearing, provided that the request for such a hearing is filed in writing within 7 days after service of the notice that permission has been refused. Note the requirement imposed on advocates by paragraph 16(1) of CPR PD 52C.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 7 days of the date of the listing window notification letter and seek to agree the bundle within 21 days of the date of the listing window notification letter (see paragraph 21 of CPR PD 52C).

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By the Court