FORM 269F1

(GS 01.07.2013)

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **A2 2015/2839A**

[SEAL]

Paris and Garden –v– Lewis and Byng

ORDER made by the Rt. Hon. Lord Justice Simon

On consideration of an application to reopen an application or appeal, previously refused or dismissed

Decision: granted, refused, adjourned.
Refused

Reasons

In their application to reopen their appeal, the applicants rely on a passage in a letter from the respondents' solicitors, dated 22 October 2014 and headed 'Without Prejudice, Save as to Costs'. They draw attention to a passage in which the 2nd defendant offers to email a statement to a specified list of recipients a statement to the effect that her husband had made no clinical assessment of the 2nd claimant's mental health, she had not been his patient and had never been diagnosed with any mental health issues. There was an acknowledgement that any comments made by the 2nd defendant which suggested otherwise were untrue and would have been understandably distressing to the 2nd claimant.

The applicants seek to argue that this passage fatally undermines the judgment and order made by HHJ Seys-Llewellyn QC for the reasons set out in detailed grounds dated 4 October 2016, which conclude with the request to reopen the two appeals under CPR 52.17(1) (now CPR 53.30(1)).

CPR 52.30 provides that the Court of Appeal will not reopen a final determination of an appeal unless (a) it is necessary to do so in order to avoid real injustice, (b) the circumstances are exceptional and make it necessary to reopen the appeal, and (c) there is no alternate effective remedy. The circumstances in which the Court will reopen an application for permission to appeal are confined to exceptional cases, in which the integrity of the earlier litigation process has been critically undermined.

I have now seen the respondent's response to the application which clarifies, what is apparent from the letter itself, that the contents of the letter were privileged. The respondents contend that (a) they have not waived privilege in respect of the letter; but in any event, (b) the extract relied on by the applicants is consistent with the evidence given by the 2nd defendant at trial, (c) does not show malice and (d) the applicants have had prior opportunities to deploy this material either at trial or at the prior hearing for permission to appeal.

It is clear that 'without prejudice' communications cannot be used as cloak for impropriety. This contents of the letter were known to the applicants before the trial and, if it could properly have been deployed at trial, it would have been. The reason that it was not used was because (as the applicants knew) not only were the contents of the letter privileged, they did not materially assist their case, not least because the evidence given by the 2nd defendant was consistent with the contents of the letter: namely, that 2nd claimant was not her husband's patient and he had never diagnosed her (evidence at AD p.38 line 22-23). Such views as the 2nd defendant expressed as to the 2nd claimant's state of mind were her own (AD p.34 line 15-17).

The new material does not satisfy the test for reopening the application for permission to appeal, which is accordingly refused.

I should add that I have considered the applicants' further submission of 14 November 2016 that I should recuse myself on the grounds of bias. I note that this submission was not made in the original application to reopen the application for permission to appeal; and appears to be a response to my order that the respondents be given an opportunity to answer the application. The submission is, in any event, without merit.

HER MAJESTY'S COURT OF APPEAL E & W

Note:	Where the application is refused the decision of the judge is final and the application cannot be renewed to an oral hearing - see *Taylor v Lawrence [2002] EWCA Civ 90*

Signed: Peyvi Soori
Date: 28.11.2016

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By the Court