Neutral Citation Number: [2025] EWHC 517 (KB)

Case No: QB-2022-001397

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2025

Before :

THE HON. MRS JUSTICE STEYN DBE

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Between :

NOEL ANTHONY CLARKE	**Claimant**
- and -	
GUARDIAN NEWS AND MEDIA LIMITED	**Defendant**

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- -

Philip Williams, Arthur Lo and Daniel Jeremy (instructed by **The Khan Partnership LLP**) for the **Claimant**
Gavin Millar KC, Alexandra Marzec and Ben Gallop (instructed by **Wiggin LLP**) for the **Defendant**

Hearing dates: 5 March 2025

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Approved Judgment

This judgment was handed down at 10.00am on 7 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

1. On 3 March 2025, the Claimant filed an application to re-amend the Amended Reply. I heard the application yesterday, on the first day of the Liability Trial in respect of this defamation and data protection claim.

The applicable principles

2. The general principles which apply on an application for permission to amend are summarised in the White Book Vol.1 at 17.3.5-8. In exercising the discretion under CPR 17.3, the overriding objective is of central importance. In *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), Carr J observed at [38(a)] that:

> "Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted."

3. The timing of the application should be considered and weighed in the balance. In *Quah Su-Ling*, Carr J observed at [38]:

> "(b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
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> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
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> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
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> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
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> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay; …" (Emphasis added)

4. An important factor in the necessary balancing exercise is the applicant's explanation for the lateness of the application: there must be a good reason for the delay.

5. The Court will consider the prejudice to the resisting party if the amendments are allowed, as well as prejudice to the amending party if the amendments are not allowed. However, if prejudice to the amending party has come about by the amending party's own conduct, then it will be a less weighty factor.

6. In *CNM Estates* Males LJ observed at [77]:

> "The general rule is that, except in the case of 'very late' amendments, unless it can be seen that a claim has no real prospect of succeeding, its merits should be determined at a full trial. The warnings against mini-trials apply with just as much force to applications to amend as they do to summary judgment or jurisdiction disputes. The CPR do not bar litigants from pursuing claims that might at an interlocutory stage be considered weak. In our view, HH Judge Eyre QC (as he then was) correctly summarised the principles applicable to amend in *Scott v Singh* [2020] EWHC 1714 (Comm) at [19]:
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> > 'The new case set out in the proposed pleading must have a real prospect of success… The approach to be taken is to consider those prospects in the same way as for summary judgment namely whether there is a real as opposed to a fanciful prospect of the claim or defence being raised succeeding. It would clearly be pointless to allow an amendment if the claim or defence being raised would be defeated by a summary judgment application. However, at the stage of considering a proposed amendment that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success. The court is not to engage in a mini-trial when considering a summary judgment application and even less is it to do so when considering whether or not to permit an amendment.'"

7. A proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation: see White Book 17.3.6, citing *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33, at [18]. The focus must be on the pleaded case.

8. CPR 16.5(2) provides:

> "Where the defendant denies an allegation—
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> (a) they must state their reasons for doing so; and
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> (b) if they intend to put forward a different version of events from that given by the claimant, they must state their own version."

9. Practice Direction 53B – Media and Communications Claims, provides:

> "4.7 Where a defendant relies on a defence under section 2 (truth), section 3 (honest opinion), or section 4 (publication on a matter of public interest) of the Defamation Act 2013, the claimant must serve a reply specifically admitting, not admitting, or denying that defence and setting out the claimant's case in response to each fact alleged by the defendant in respect of it.
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> …
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> 4.8 (2)If the defendant relies on any other defence [i.e. other than honest opinion or publication on a privileged occasion: para 4.8(1)], and the claimant intends to allege that the defence is not available because of the defendant's state of mind, the claimant must serve a reply giving details of the facts or matters relied on. This includes—
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> (a) where a defendant relies on the defence under section 4 of the Defamation Act 2013 and the claimant intends to allege that the defendant did not reasonably believe that the publication was in the public interest; …"

10. Particular considerations arise where allegations of bad faith, conspiracy, dishonesty or malice are sought to be placed on the record: see *Henderson v London Borough of Hackney* [2010] EWHC 1651 (QB), Eady, [33]-[35] and *MBR Acres v Free the MBR Beagles* [2022] EWHC 1677 (QB), Nicklin J, [26]-[31]. As Eady J observed in *Henderson v LB of Hackney* at [35]: "It is not appropriate merely to plead (say) absence of honest belief, recklessness or a dominant motive on the defendant's part to injure the claimant. Unsupported by relevant factual averments, those are merely formulaic assertions." Mere assertion will not do.

11. Allegations of conspiracy are serious and must be pleaded to a high standard, particularly where the allegations include dishonesty. The more serious the allegations made, the more important it is for the case to be set out clearly and with adequate particularity. See *MBR Acres* at [30], citing *Ivy Technology v Martin* [2019] EWHC 2510 (Comm), [12].

The background to this application

12. On 26 August 2022, the claim form and Particulars of Claim were served on the Defendant. Following a meaning trial, on 15 November 2023, the Claimant served Amended Particulars of Claim. The Defence and Reply were served, respectively, on 10 January 2024 and 3 April 2024. The Amended Defence and Amended Reply were served, respectively, on 3 and 17 May 2024.

13. On 11 June 2024, the trial was listed to begin on 3 March 2025, with a time estimate of six weeks.

14. The Claimant's solicitors wrote to the Defendant's solicitors on 24 September 2024:

> "The Claimant now has strong reason and grounds to believe that these individuals engaged, inter alia, in an unlawful means conspiracy, in circulating these allegations with an intention to cause significant harm to the Claimant. This information is crucial to these proceedings, in that it goes directly to the Defendant's defence of public interest, and notably the depth of the Defendant's investigations, and sources of allegations, which would have affected the basis on which the Defendant had, at the time, reasonable grounds to believe that these allegations are true." (Emphasis added)

15. The parties exchanged simultaneous disclosure and inspection on 3 October 2024. Standard disclosure was given on 3 October 2024. Witness statements were exchanged on 5 December 2024.

16. On 8 January 2025, the Claimant filed and served on the Defendant (but not the proposed new defendants) an application to join six proposed new defendants and to re-amend the Particulars of Claim to add a new cause of action in unlawful means conspiracy, as well as amending the damages claim ('the Amendment and Joinder Application'). At the pre-trial review on 20 January 2025, I adjourned the Amendment and Joinder Application until after the trial of liability on the pleaded claims in defamation and data protection brought against the Defendant. In making that determination I took into account the lateness of the application ([2025] EWHC 142 (KB), [16]) and Mr Millar's submission, on behalf of the Defendant that ([19]):

> "the claimant would be able to put to the defendant's witnesses the allegation that documents are fabricated and the allegation that they are part of a conspiracy could be made in support of his response to the defendant's defence of truth and also in respect of the public interest defence."

17. Dismissing an appeal against that order ([2025] EWCA Civ 164), Warby LJ stated:

> "41 … The claimant's central complaint is that he will be unfairly muzzled at the Liability Trial because the scope for cross-examination will be unduly restricted, compared with what would be possible at a full trial of all the issues which the claimant wants to pursue. Mr Williams invited us to conclude that the publisher and the judge were both too generous to his client on that question. He submitted, by reference to authority, that he would only be entitled to cross-examine at the Liability Trial on matters strictly relating to the pleadings as they stand. I think Mr Williams is being unduly pessimistic.
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> 42. There are of course restrictions on what may legitimately be asked in cross-examination. This must depend on the issues raised by the statements of case. But the range of matters that can bear on a given issue can be quite wide. In addition, questions going to the witness's general credit are permissible. The limits of what is permissible in any given case are best set out by the trial judge in the course of the trial. Here, the issues between the

> parties include the truth of what was said, and whether those responsible for the offending publications honestly and reasonably believed it was in the public interest to publish it. Mr Millar made a persuasive case that it is in principle open to the claimant to put it to the 22 women to be called in support of the defence of truth, that they are telling lies and that the reason is that they were parties to a conspiracy or arrangement to tell lies to injure the claimant. The claimant does not require the 'whole edifice' of the conspiracy case for that purpose. Mr Millar also argued powerfully that the claimant can put to the witnesses to be called in support of the public interest defence that they are lying about their state of mind, and the reasons for that can be put. It is obviously relevant in this context that the proposed amendments are based on documents which the publisher has disclosed on the basis that they are relevant to the existing issues."

18. Although the formal start date of this trial remained 3 March 2025, the first two days were reading days, and so the first hearing day was 5 March 2025. As I say, the application to re-amend the Amended Reply was filed on 3 March.

The proposed amendments

19. The proposed amendments are all made in the context of the Claimant's reply to the Defendant's reliance on the public interest defence provided by s.4 of the Defamation Act 2013.

20. The first proposed amendment appears in paragraph 93. For context, I set out the whole paragraph (showing additions bold and underlined, and deletions struck out):

> "As to Paragraph 107 to 111, these matters relating to 'initial information' are **denied** ~~not admitted because they are outside of the Claimant's knowledge~~. Whilst Sirin Kale and Lucy Osborne might have had experience working on investigations involving sexual misconduct, it is denied that they had the requisite expertise, training or powers to conduct a proper investigation into the guilt or probable guilt of the Claimant. For instance, it is not pleaded that they had any training on how to conduct a de facto criminal investigation or to interview witnesses. They had no means to ensure that witnesses provided uncontaminated accounts. They had no powers to call for evidence or to compel documents."

21. The adequacy of the proposed denial has to be considered by reference to the paragraphs that are denied. Paragraphs 107-111 of the Amended Defence state:

> "107. On or around 1 April 2021 the Defendant received information from two sources, Sally El Hossaini and James Krishna Floyd ("the initial sources"). Ms El Hossaini is a multi-award-winning film director and Mr Krishna Floyd a 2013 "BAFTA Breakthrough Brit and star of ITV's The Good Karma

> Hospital. Both were BAFTA members. They explained that they were aware of and/or in touch with a number of women connected with the Claimant's work who alleged wrongdoing by him, including sexual harassment, assault and bullying. It appeared that the decision by BAFTA to grant him an award had caused anger and concern.
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> 108. These initial sources said that they knew of a number of people in the British film and TV industry who were aware of, or were themselves alleged victims of, misconduct by the Claimant. The misconduct in question had been ongoing for about 10-15 years, and they had been aware of concerns around the Claimant's behaviour for about 4 to 5 years. The initial sources gave some details of some of the incidents of misconduct alleged.
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> 109. The initial sources informed the Defendant that they, along with a third individual, had written to Krishnendu Majumdar, the chair of BAFTA, disclosing the allegations about the Claimant. A second group of people in the industry had also written to BAFTA alleging such misconduct by the Claimant. Both letters received a similar response asserting that BAFTA knew nothing about the allegations and asking the writers to use a personal email address belonging to Mr Majumdar when writing about these matters.
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> 110. The journalist at the Defendant who received and initially considered this information from the initial sources was Paul Lewis, the Defendant's Head of Investigations. He approached the information from the initial sources with caution, aware that the initial sources and/or the people with whom they were in contact could be acting in bad faith and that much work would need to be done to investigate the allegations with a view to verifying them. However, he considered that the information was at least indicative of potential evidence of serious misconduct by the Claimant and the existence of a potential public interest story.
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> 111. Paul Lewis discussed the matter with the Deputy Editor, Owen Gibson, and the Executive Editor for Features, Kira Cochrane. Following these discussions, on 6 April 2021 the Defendant, by Mr Lewis, Mr Gibson and Ms Cochrane, decided to commission two experienced female journalists, Sirin Kale and Lucy Osborne, to investigate the potential story. Both Ms Kale and Ms Osborne had experience working on investigations involving sexual misconduct."

22. The second proposed amendment appears in paragraph 94, which provides:

> "As to paragraphs 112 to 114, these matters are **denied** ~~not admitted because they are outside of the Claimant's knowledge. At this stage, he is unable to address the adequacy and fairness~~

> ~~of the investigation including what questions were posed to the alleged victims, whether the journalists provided information received from some to others and how they generally approached their task.~~ **The investigation was inadequate and unfair, especially given the complete lack of critical scrutiny on evidently hostile sources and obvious inconsistencies with the allegations**. The secondary sources are also not named and the entirety of the documentary sources of evidence has not yet been disclosed. Consequently, it is unclear, for instance, that if the women gave similar accounts, as pleaded in paragraph 114, they did so because of the way and generally the manner in which the investigation was conducted."

23. Again, the adequacy of the proposed denial in the first sentence has to be considered by reference to the paragraphs that are denied. Paragraphs 112-114 of the Amended Defence state:

> "112. Ms Kale and Ms Osborne ("the journalists") investigated the allegations between 7 and 29 April 2021. Their investigations were overseen by Mr Lewis who had regular, almost daily, meetings with them to discuss progress and to guide them. Mr Lewis in turn reported upwards on the investigation during this period to Mr Gibson and Ms Cochrane, as well as the Managing Editor, Jan Thompson, and the Editor-in-Chief, Katharine Viner. The journalists spoke directly to the Claimant's alleged victims, whilst retaining an open mind. By 26 April 2021 they had spoken to 22 women who said that they were variously sexually assaulted and/or harassed and/or bullied and/or subjected to some other form of mistreatment by the Claimant. Many of these individuals asked for their information to be anonymised. Many said they were fearful of retribution by the Claimant.
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> 113. Wherever possible, the journalists sought corroborative evidence of the information they had been given by the women. They spoke to secondary sources to attempt to verify (or alternatively disprove) the allegations made by these primary sources. They also made efforts to find documentary sources of evidence, such as contemporaneous notes, text messages, social media posts, bank statements and so on that could substantiate parts of the sources' accounts of events or provide an indication as to the overall reliability of the sources.
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> 114. As a result of these careful investigations, the journalists and Mr Lewis were confident that 22 of the women spoken to had given them credible accounts which would warrant inviting the Claimant's comments. They noted that the women, many of whom did not know each other, had given very similar accounts of the Claimant's behaviour."

24. The third and final proposed amendment appears in paragraph 103:

> "In the premises, paragraphs 128 and 129 are denied. **In particular, it is denied firstly that the Defendant held the subjective belief in the veracity of the allegations, or the fact that the publication of the Articles is in the public interest. This is because its journalists (inter alia Paul Lewis, Lucy Osborne and Sirin Kale) were aware that many of its sources were engaged in a conspiracy against the Claimant, and consequently deleted cogent evidence. They were in fact active participants in that conspiracy and operated in bad faith. Furthermore, even if the Defendant's journalists did hold such beliefs (which is denied) the reasonableness of such beliefs is denied for the same reasons.** Journalistic investigations which can, as here, lead to the cancellation of an individual and the destruction of his entire career and ability to earn a living must be undertaken with particular care, if undertaken at all. They are no substitute for a proper police investigation where the officers investigating are trained to weigh evidence objectively, who take care to ensure that evidence is not contaminated, who have proper powers to obtain evidence and who are not looking for front page stories. There is no or no proper public interest in a situation as here where the Defendant has caused the downfall of the Claimant in circumstances where the police declined to even investigate."

25. In paragraph 128 of the Amended Defence, the Defendant pleaded its belief that the decision to publish was in the public interest (particularising its reasons for that belief), and in paragraph 129 the Defendant pleaded that its belief was reasonable (again, giving particulars in support of that assertion). The words "in the premises" in paragraph 103 of the Amended Reply refer back to the Claimant's' pleading that (a) the initial information should have been treated with caution (paras 93 and 94), (b) the Defendant failed to afford the Claimant a proper opportunity to comment (paragraphs 95-101), and (c) that the Defendant's journalists made basic avoidable errors (paragraph 102, which gives particulars at (a)-(d)).

Decision

26. In my judgment, the application to amend has been filed very late. In *CNM Estates (Tolworth Tower) Limited v Carvill-Biggs* [2023] EWCA Civ 480, Males LJ observed at [67], citing the passage from *Quah Su-Ling* to which I have referred, that "*the courts have distinguished between 'late' and 'very late' amendments, a 'very late' amendment being one which would cause the trial date to be lost*". In this case, although the Defendant contends it is impossible to be sure of the consequences of granting the application, there has been no suggestion by either party that the result of doing so would be that the trial would have to be adjourned.

27. Nevertheless, it seems to me that while the authorities make clear that an amendment may be regarded as 'very late' if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start, it does not follow that an application which is served on the eve of trial, such that it falls to be determined during the trial, can only be regarded as 'very late' if granting it would result in adjournment of the trial. An application which is obviously, on any view, very late may

be so regarded, even if the court does not consider that the trial would have to be adjourned if it were granted. Even if I am wrong on that, the application is plainly late.

28. The application does not contain, and is not supported by, any explanation of the reasons for the lateness of the application to re-amend. The Claimant has evidently considered that the alleged conspiracy "*goes directly to the Defendant's defence of public interest*" since at least 24 September 2024. The Claimant chose to pursue his amendment only by means of a new cause of action. He has not explained why he did so, given his view that it was "*crucial*" to the existing claim. Nor has he given any reason for delaying bringing this application after the PTR. I appreciate that he was seeking to appeal, but given the proximity of the trial he obviously had to proceed on the footing that his appeal might not succeed and the trial would begin on 5 March. The lateness of the application weighs against the grant of permission, albeit not as heavily as would be the case if the result of granting the amendment would lead to the adjournment of the trial.

29. The first proposed amendment would introduce a bare denial of the detailed facts pleaded at paragraphs 107-111. The proposed amendment does not set out the Claimant's case in response to any of the facts alleged by the Defendant in those paragraphs. Mr Williams sought to rely on the remainder of the existing pleading in paragraph 93 as providing the requisite particulars. What is pleaded in paragraph 93 could be seen as particularising a denial that the two journalists who were commissioned were "experienced", but it plainly provides no particulars of the denial of any other fact stated in paragraphs 107-111. The first proposed amendment is so deficient it ought not to be allowed, particularly at such a late stage when there is no time for the Defendant to file a request for further particulars.

30. The proposed amendment of the first sentence of paragraph 94 introduces a denial of all the detailed facts pleaded in paragraphs 112-114 without setting out the Claimant's case in response to those facts. The proposed new particulars might be seen as addressing the contention in paragraph 114 of the Amended Defence that the investigation was "careful", but they do not otherwise engage with the stated facts in those three paragraphs. The assertion that there are "*obvious inconsistencies with the allegations*" is also unparticularised: none are identified. In my judgment, these parts of the second proposed amendment are so deficient that they, too, ought not to be allowed at this late stage.

31. However, I am prepared to allow the amendment to the extent that the Claimant can plead: "The investigation was inadequate and unfair, especially given the complete lack of critical scrutiny on evidently hostile sources". I do not accept, as Mr Millar contended, that this is an allegation of malice. The allegation that lack of critical scrutiny of hostile sources rendered the investigation inadequate and unfair is sufficiently clear. It is true that the Claimant does not identify what is meant by "*hostile*", but it is fairly plain the contention is that the sources had 'an axe to grind' and ulterior motives which the journalists negligently failed to spot or scrutinise. I bear in mind the lateness of the application, but there is no real prejudice to the Defendant in allowing this amendment, not least given that the Defendant's public interest statements already address the consideration that the journalists and editors gave to the sources' potential motivations.

32. As regards the third proposed amendment, there is an existing denial that the Defendant believed publication was in the public interest and that such belief was reasonable. The allegations of bad faith and engagement in a conspiracy do not come anywhere close to the high standard of pleading that is required to make such grave allegations. First, the allegations are made against the Defendant's journalists, identifying three by name, but making clear that the allegation extends beyond them to other unidentified journalists. Second, the journalists are alleged to have knowledge of the alleged conspiracy, yet no particulars of knowledge are pleaded. Third, the evidence that they are alleged to have deleted is not particularised, nor is any basis for the allegation such evidence was "cogent" given. Bare, unparticularised allegations are made that they were active participants in the conspiracy and operated in bad faith, without providing any particulars of what steps any individual is said to have taken as an active participant or in bad faith, or the basis for these grave allegations.

33. In my judgment, the third proposed amendment falls so far below the requirements of a pleading of allegations of this nature that it should not be allowed. Added to that factor, I bear in mind the lateness of the application, and the fact that the Defendant had no opportunity to address these allegations of bad faith and engagement in a conspiracy in the trial witness statements it has adduced in support of the public interest defence. The Court of Appeal rejected the Claimant's contention that he would be unfairly muzzled at the Liability Trial if he had to proceed on the existing state of the pleadings. Bearing in mind the nature of the cross-examination which the Court of Appeal (and the Defendant) has acknowledged the Claimant can pursue on the current pleadings, any prejudice to the Claimant consequent on refusing permission to make this amendment is limited. Such prejudice is, in any event, far outweighed by the combination of the inadequacy of the pleading, the prejudice to the Defendant and the lateness of the application.

Conclusion

34. For the reasons I have given, I refuse the Claimant's application save to the extent that the Claimant is given permission to re-amend paragraph 94 of the Amended Reply to add the words: "The investigation was inadequate and unfair, especially given the complete lack of critical scrutiny on evidently hostile sources."