EASTERN CARIBBEAN SUPREME COURT
ST CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHCV 2009/0180

BETWEEN:

DWIGHT C.COZIER

Claimant

and

MARK BRANTLEY

1st Defendant

GAWAIN FRAITES

2nd Defendant

Before:
Ms. Agnes Actie Master [Ag.]

Appearances:
Ms. Angela Cozier of counsel for the Claimant
Ms. Dia Forrester of counsel for the 1st Defendant

2014: May 14.
September 26

JUDGMENT

[1] ACTIE, M. [AG.]: The matter before the court is an application to amend a defence and for stay of proceedings. The matter is of some vintage with several interlocutory applications since the filing of the claim in 2009. The chronology of events below outlines the matters giving rise to the extant application.

Background

[2] By a claim form issued on 8th December 2009 the claimant, a Government Minister in the Nevis Island Administration, claims against the defendants for libel contained in an article written and published by the defendants. The claimant

alleges that the articles published were defamatory of him and claims damages including aggravated damages.

[3] The claimant alleges that the words complained of were first written on the 12th June 2009 from an email address ubrian@live.com under the name of "Brian Newman" and was on 13th day of June 2009 reposted by the 1st named defendant and republished by the 2nd named defendant as follows:

> " RE: MEXICAN WORKERS IN NEVIS STAYING AT MINISTER DWIGHT COZIER'S HOTEL
> Now now my fellow listeners, here in Nevis at this time we are speaking of a Commission of Inquiry and about transparency and good governance but yet here we have some serious INSIDER TRADING that sent Martha Stewart straight to jail. Just for those who does not know this, we have Mexican workers here who is assisting in the rebuilding of Four Seasons Resort and guess where they staying?. PINNEYS BEACH HOTEL. Who now owns PINNEYS BEACH HOTEL? Hon. Dwight Cozier and who is Dwight Cozier? A minister of Government who sits in cabinet meetings and makes decisions. Nevis has so many guest houses and hotels hungry for a penny in these challenging times even some of NRP supporters have guest houses and villas but Dwight Cozier, a minister of Government in the Nevis Island Assembly and owner of Pinneys Beach Hotel won the contract. This is RAPE but have no fear Nevisians and even Kittitians, CCM will conduct its own inquiry and it will be free of cost over everybody else and now making thousands from the Nevis treasury."

[4] The claimant states that the first defendant reposted the defamatory words in his own name from his email address mbrantley@sisterisles.kn.. The alleged defamatory words were stated as follows:

> " Re: Mexican workers in Nevis staying at Minister Dwight Coziers's hotel

You say Mr Cozier "has a right to compete". But were other hotel and guest house owners given the same right to compete for the business? I am always troubled by information like this. When all of Government printing goes to a printing company owned by Government Ministers it's a little hard to accept that others can compete. When all of Land and Housing legal work goes to a firm own by Government officials, it's hard to accept that others can compete. So when the person posting this talks of all the workers being accommodated at one hotel/guest house in which a minister is involved, it looks very much like more of the same. It's obvious that the Cabinet and therefore the Ministers of Government will know what business is coming to Nevis before the other business people in Nevis. They will know who is coming, what their needs are and who to contact. They know this because those coming in must interact with Government for approvals, permits etc. If Government Ministers are intent on benefiting themselves, then they do their deals even before other legitimate business people in Nevis know what's happening. This is wrong and would be unacceptable in most places. These NRP Ministers look out for themselves first and everybody else comes after. Some may say that's ok. I find it reprehensible.

Regards

Sent from my BlackBerry@wireless device from Cable Wireless'

[5] The first defendant filed a defence on 13th January 2010 admitting the publication of the alleged defamatory words but avers that he did not make any false allegations and pleaded fair comment as a defence. The first defendant states that all comments made addressed matters of public interest in relation to Government ministers. The claimant filed a reply to the defence on 8th February 2010.

[6] The matter was scheduled for case management conference on 22nd February 2010 where the first defendant raised a preliminary issue on the authorship of the

words complained. Master Lanns gave directions for filing of submissions in support of the application.

[7] On 22nd December 2011, Master Lanns delivered a written decision in relation to the preliminary issue.

[8] The court on 6th February 2012 gave case management directions with a pre-trial review window set for May 2012.

[9] On 19th March 2012 the first defendant filed a notice of application to strike out the claim against him.

[10] On 9th November 2012 Master Lanns delivered a written decision allowing the striking out application in part and made an order for a stay of execution of the proceedings.

[11] On 26th November 2012 the claimant applied, and on 22nd January 2013 was granted leave to appeal the master's decision.

[12] On 17th October 2013 the Court of Appeal set aside the master's order for the stay of execution but dismissed the other grounds of appeal. The Court in setting aside the stay was of the view that the master's order was made in breach of CPR 26.2 as it was an order made on the master's own initiative which the parties ought to have been given an opportunity to be heard.

[13] On 7th March 2014 the first defendant filed a notice of application seeking permission to amend his defence filed in 2010 and for a stay of the claim pending the determination of the appeal in Ramsbury Properties Limited v Ocean View Construction Limited[1]. The application sets out the following grounds namely:

[1] No. 20 of 2011

(a) Subsequent to the filing the defence Redhead J delivered a decision on October 3, 2011 in Ramsbury Properties Limited v Ocean View Construction Limited which decisions contains finding of fact that impact the case at bar and on which the defendant wishes to rely.

(b) Rule 10.7 of the Civil Procedures Rules 2000 (CPR 2000) provides that the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the Court gives permission or the parties agree.

(c) Rule 20.2 CPR 2000 provides that " the Court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings."

(d) The factual findings of Redhead J in Ramsbury Properties Limited v Ocean View Construction Limited decision makes a new defence of justification available to the defendant on which the defendant wishes to rely.

(e) It is in the interest of justice that the claimant be granted permission to rely on the facts set out in the decision of Redhead J and amend his defence accordingly.

(f) The decision of the of Redhead J is currently under appeal in the High Court Civil Appeal No 20 of 2011 Ramsbury Properties Limited v Ocean View Construction

Limited and in previous proceedings the respondent asserted that in light of the pending appeal the applicant cannot rely on the facts in the court below.

(g) In the interest of Justice the claimant seeks that the claim herein be stayed pending the determination of the appeal in High Court Civil Appeal No 20 of 2011 Ramsbury Properties Limited v Ocean View Construction Limited.

(h) Rule 26.1 (q) CPR 2000 provides that the Court may " stay the whole or part of any proceedings generally or until a specified date or event

The Law on changes to statement of case

[14] CPR 2000 Rule 20 provides for changes to a statement of case. Rule 20.1 states as follows;

(1)……..

(2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.

[15] The granting of permission to amend is circumscribed by the provisions of CPR 20.1 (3) which outlines the factors to which the court must have regard when considering such an application namely –

(a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make;

(b) the prejudice to the applicant if the application were refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice.

The promptitude of the application

[16] The first defendant filed his defence on 13th January 2010. He now seeks to amend his defence by application filed on 7th March 2014, some 4 years after filing the defence. The first defendant seeks to buttress his defence with statements made by the claimant in a civil suit in Ramsbury Properties Limited v Ocean View Construction Limited, a decision of Redhead J delivered in 2011. The first defendant in his affidavit in support states "*that the decision came to his attention sometime after it was delivered but I do not recall the precise date*" (my emphasis) However the court notes paragraph 11 of the witness statement of the first defendant states "I*n late 2011 a decision of Mr Justice Redhead dated October 3, 2011 in claim NEVHC2009/0111 Ramsbury Properties Limited v Ocean View Construction Limited came to my attention*". Clearly the first defendant is being evasive as to when he became aware of the decision of Redhead J.

[17] The decision of Redhead J in Ramsbury Properties Limited v Ocean View Construction was delivered in 2011. The first defendant by his own admission states that the statements made by the claimant in Ramsbury's case, which he now seeks to rely on, were available to him 8 months after he filed his defence. He did not then seek to amend his defence. He now seeks to do so some 3 years after the delivery of the judgment. The first defendant has not acted with the necessary alacrity to satisfy the first requirement of CPR 20.3(a). Accordingly, the first defendant has failed to satisfy the court that the application was made with promptitude.

The prejudice to the parties

[18] The first defendant contends that he would be prejudiced if he is not allowed to amend his defence to plead the defence of justification. The first defendant avers that CPR 2000 Part 10. 7 precludes a defendant from relying on any allegation or factual argument which is not set out in the defence but which could have been set out, unless the court gives permission or the parties agree. The first defendant

submits that it would be just to permit the amendment as to deny such an amendment would have the effect of shutting him out from relying on facts that provide a complete defence to the claim. The first defendant avers that the application to amend does not cause any prejudice to the claimant as a trial date has not been set for the hearing of the said claim.

[19] The claimant in response states that severe injustice would be caused if the amendment is allowed. The claimant alleges that any amendment to the pleadings would further protract the claim as it may necessitate the filing of further pleadings in response to the amended statement of case which would now raise a completely different defence if the application is allowed. .

Analysis

[20] The Court has a general discretion to permit amendments where it is just and proportionate[2]. In making an order for the amendment of a defence the court is to have regard to the public interest in enabling the defendant to deploy the defences it wished to use, while fulfilling the overriding objective. The Civil Procedure Rules impose an obligation on parties to specifically plead their cases. CPR 10.7 provides the consequences for not setting out a defence and states:

> "the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission or the parties agree"

It follows that a defendant has the obligation to plead the entire factual matrix of his defence in an effort to be able to rely on it at trial. The Civil Procedure Rules also mandate strict compliance for pleadings in defamation cases.

[21] In Roosevelt Skerrit v Thomas Fontaine etal[3] Master Taylor-Alexander stated;

[2] Blackstone Civil Practice Page 437 Para 31.4
[3] DOMHCV2011/0368 Delivered on 28th March 2013

> "Pleadings are of critical importance to the articulation of any party's case. In defamation actions, rule 69.2 and 69.3 of CPR 2000 contain very stringent requirements drafted in mandatory language such that a party's pleadings must be precisely framed to enable the court to determine whether the matter complained of is defamatory and the circumstances of the defamatory words".

CPR 69.3 requires a defendant to plead the statement of facts in support of the allegation.

[22] The defendant contends that it is necessary to amend his defence to plead justification having regard to the evidence led by the claimant in the Ramburys Properties case. The court notes that the claimant's statements of facts which the first defendant's now seeks to rely on to change his defence to justification came to his attention subsequent to the publication of the alleged defamatory statements. The alleged defamatory words were published in June 2009. The Judgment of Redhead J was delivered in 2011. Facts which came into existence after the publication of the alleged defamatory statements cannot be relied on, though they may be relevant to a plea of justification. The first defendant must prove to the court that the plea of justification was available to him at the time of publication. It is not now open to the first defendant to go behind his statements made and then contend that the comments made were based on other facts that came to his attention subsequent to his publication.

[22] In Chase v Newsgroup Newspaper Ltd[4] Brooke LJ at paragraph 30 states:

> " when deciding whether he should strike out para 12 of the defence the judge said that he should take into account three principles of English law which had only been articulated in the last ten years, although they each carried the genetic traces of much older case law. He set them out on these terms:

[4] [2002] EWCA Civ 1772

> "(1) A defence of justification based upon "reasonable grounds for suspicion" most focus upon some conduct of the individual claimant that in itself gives rise to the suspicion: *Shah v Standard Chartered Bank* Ltd (1999) QB 241, {1998] All ER 155,261 (Sir Brian Neill)
>
> (ii) In such a case it is not permitted to rely upon hearsay;…..
>
> (iii) nor may a defendant plead as supposed "grounds" matters postdating publication. Bennett (p 877) see also Evan v Granada Television Ltd [1996] EMLR 427"

[23] The first defendant has pleaded fair comment in his defence filed in 2010 in answer to the specific alleged defamatory statements made in regard to the claimant's ownership of the property. This puts in issue much of the factual narrative in the defence. The plea of fair comment is a complete defence, if accepted by the court at trial. Gately on Libel and Slander states:

> " It is a defence to an action of libel or slander that the words complained of are fair comment on a matter of public interest." …… There are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able freely, and even harshly, so long as they do so honestly and without "malice"[5] ,

{24} The facts which the first defendant now seeks to rely on came to his notice after the alleged defamatory words were published. The defence had to be considered at the time of the publication. It does not operate in the future.

[25] The court in such applications to amend a defence needs to have regard to the public interest in enabling the defendant to deploy the defences it wished to use, while fulfilling the overriding objective. The court needs to be astute to avoid

[5] Gately on Libel and Slander 10th Edition para 12.1

granting permission which will affect the administration of justice. I am of the view that the claimant would be severely prejudiced if an amendment to the defence was allowed at this late stage. To allow the amendment to plead a defence of justification will definitely require the claimant to file a reply to the new defence. This will further protract the hearing of this beleaguered claim which was filed since 2009. The court notes the inordinate delay in making the application to amend the defence and the myriad of interlocutory applications at the high court and leading to the court of appeal since the filing of this claim in 2009. The period of delay has to be viewed in the context of the effective administration of justice and in keeping with the overriding objective of the court to deal with matters expeditiously. For all the reasons given above the application by the first defendant to amend his defence is refused.

Stay of Proceedings

{26] The claimant seeks a stay of execution of the proceedings pending the decision of the court of appeal in the Ramsbury Properties case. The first defendant states that to allow this matter to proceed without a final determination of the appeal would threaten the integrity of the court as certain facts revealed in the decision of Ramsbury Properties case make the complete defence of justification available to him.

[27] I am of the view that the refusal to grant the application to amend the defence in the circumstances renders the application for a stay of proceedings otiose. However for finality I wish to state that it has already been determined that reliance cannot be placed on facts that came to the first defendant's knowledge subsequent to the publication of the alleged defamatory publication. The first defendant avers that both parties have an equal chance of benefiting from the outcome of the appeal in the Ramsbury Properties case. The first defendant states that the present facts stand in his favour to bolster a defence of justification if the decision of Redhead J is confirmed by the Court of Appeal and if overturned, would enure to the benefit the claimant. This speculative approach cannot sustain

the first defendant's application. This speculation is a violation of the overriding objective of the CPR 2000 as further amendments would be required to the pleadings based on the outcome of the appeal. We are all mindful of the delay in the preparation of transcripts of proceedings to prosecute an appeal. An appeal can take as long as 5 years to get to the Court of Appeal. This matter has been in the system since 2009 and it would be unfair to stay the proceedings for the determination of an appeal which bears no relevance to the issue in the claim. As indicated the defence of fair comment is a complete defence in a claim for defamation. The claim is to be determined on its own particular facts. It should not be further plagued with delays on suppositions. The matter needs to progress in a more efficient manner in keeping with the overriding objective of the rules. Accordingly the application for a stay of execution is refused.

[29] The Master had by order dated 6th February 2012 given case management directions which some dates may have been superseded by the myriad of interlocutory applications. It is directed that the matter be referred back to the master for further case management directions to get the matter back on track for trial.

[30] In summary I make the following orders:

(1) The application of the first defendant to amend the defence is refused.

(2) The application for a stay of execution of proceedings pending the appeal in the Ramsbury Properties case is refused.

(3) Costs in the sum of $750.00 to the claimant to be paid by first defendant.

(4) The matter shall be listed before the master for further case management directions to get the matter back on track for trial.

[31] I wish to express my gratitude to the parties for their valuable submissions.

Agnes Actie
Master [Ag.]