THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHCV2009/0180

BETWEEN:

DWIGHT COZIER

Claimant

and

[1] MARK BRANTLEY
[2] GARWAIN FRAITES

Defendants

Appearances:-

Mrs. Angela Cozier with Ms. E. Prentice for the Claimant
Ms. Dia Forrester and Mr. Gyan Robinson for the 1st Defendant

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2018: May 23rd
October 8th

JUDGMENT

[1] CHARLES-CLARKE, J.: These are preliminary applications to strike out certain documents and parts of each other's witness statements by the Claimant, Dwight Cozier and the Defendant, Mark Brantley in a defamation case. The oral applications were made when the trial in this matter was sheduled to commence on 23rd May 2018. Written submissions were subsequently filed by the parties. At the time of hearing of this matter default judgement had already been entered against the Second Defendant who had failed to enter an appearance or a defence. Therefore for the purpose of these applications there is only one Defendant, Mark Brantley.

Background

[2] On December 8th 2009 the Claimant filed a claim form and statement of claim claiming:

i) damages for libel including aggravated damages against the Defendant for and in relation to words written or repeated or which he on or about the 12th day of June 2009 posted or reposted, published or republished in the form of an email on the sknlist.com/skn@yahoogroups.com website used primarily by citizens of the Federation throughout the world and which is accessible by any user of the worldwide web.

ii) that the offending words were first written from the email address nbrian@live.com under the name 'Brian Newman' on the 12th June 2009 as follows:

> **'RE: MEXICAN WORKERS IN NEVIS STAYING AT** MINISTER DWIGHT **COZIER'S HOTEL**
>
> Now my fellow listeners, here in Nevis at this time we are speaking of a Commission of Inquiry and about good governance but yet 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 who is assisting in the rebuilding of Four Seasons and guess where they staying? PINNEYS BEACH HOTEL. Who 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 villas 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 over everybody else and now making thousands from the Nevis treasury. This is RAPE but have no fear Nevisians even Kittitians, CCM will conduct its own enquiry and it will be **free of cost'.**

iii) that some hours later or on the 13th day of June 2009 the first Defendant reposted those words in his own name and from email address mbrantley@sisterisles.kn and in the process commented on the email of Brian Newman and expanded upon them as follows:

> **'Re: Mexican workers in Nevis staying at Minister Dwight Cozier's hot**el
>
> 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 Governments printing goes to a printing company owned by Government Ministers **it's a little hard to accept that others can compete. When all land and** housing legal work goes to a Firm owned by Governm**ent 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 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 benefitting 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 but I find it reprehensible.**

Regards'

Sent from my blackberry®device from Cable and Wireless

[3] The Defendant contended that:

i. he commented on a post made by one Denny and did not post, repost, publish or republish the statement made by Brian Newman and that he did not intend to do the same when commenting on the post by Denny.

ii. the statement posted by him was fair comment on matters of public interest and were not specific to the Claimant. He states that the Claimant was a Minister of Government and his actions would be matters of public interest.

iii. in any event the statement posted by Brian Newman is true based on the factual findings of Justice Redhead in Ramsbury Properties Ltd v Ocean View Construction Ltd[1] dated October 2011 (The Ramsbury Property Case) that the Claimant whilst a minister of government and member of cabinet of the Nevis Island Administration benefitted from a contract to provide housing for Mexican workers at a property owned by a

[1] NEVHCV 2009/0111

company Ramsbury Properties Limited of which the Claimant is the majority shareholder.

iv. he relies on the defence of justification and asked that the claim should be dismissed.

[4] There were several case management hearings, interlocutory applications as well as two appeals, from the time of issuance of the claim in 2009, to the present. This matter came up for trial for the second time on 23rd May 2017.

Application to Strike Out By the Defendant

[5] The Defendant applied to strike out the Claimant's documents at Tabs A and G at Trial Bundle 3 namely: i) a Certificate of Incorporation No.004835 for Pinney's Hotel Development, ii) Articles of Association of Pinney's Hotel Development Ltd and iii) the Annual Returns of Pinneys Hotel Development. The application was made on the ground that these documents were not disclosed pursuant to the case management order of 11th January 2016 by the Master and so contravened CPR Parts 8 and 8.7A.

[6] The Defendant also applied to strike out paragraph 41 of the Claimant's witness statement on the ground that it constitutes hearsay and contravenes section 97 of the Evidence Act of Saint Christopher and Nevis No. 30 of 2011 (The Evidence Act). Paragraph 41 of the Claimant witness statement is as follows:

> '[41]It has been brought to my attention by my wife's international clients that these articles are all over the internet, as well as responses and commentaries upon them, and this has caused them to look at me in a different light which causes me great distress.'

[7] Additionally the Defendant applied to strike out paragraphs 44-49 of the Claimant's witness statement on the ground that they are inadmissible under CPR Part 8.7A and Part 29.5.2. Paragraphs 44-49 of the Claimant's witness statement are as follows:

'[44] The 1st Defendant has been for a number of years, and still is, the host of a talk show on Wednesday nights at the Voice of Nevis by the name *"On The Mark"* which is by his own admission, broadcast and listened to around the world.'

'[45] On that programme in 2011 the 1st Defendant spent the majority of his two hour allotted time lambasting me afresh in connection with a judgement given by His Lordship Justice Albert Redhead, who dismissed a claim brought by Ramsbury Properties Limited the company of which I am a shareholder, which judgement the company has since appealed.'

'[46] Among other things the 1st Defendant stated that I was 'lambasted' by the judge and made to 'pay back monies to the Mexicans' and that I had used 'my position to enrich myself'.'

'[47] On that broadcast the 1st Defendant allowed his co-host and political leader Vance Amory, then also in opposition, to make numerous libellous remarks of his own against me, to the effect that he, Mr Amory, had seen those premises, and that I had 'knocked up a warehouse to put the Mexicans in'.

'[48] Perhaps the lowest point of the night came when the 1st Defendant allowed his listeners to call in and libel me further, and even abuse me which seemed to afford the 1st Defendant a great deal of pleasure.'

'[49] What is so malicious about all of this is that the 1st Defendant made this broadcast while a judgement in this case is still outstanding on an application made by the 1st Defendant himself to strike out my claim, and I believe in a clear attempt to influence the decision of the court. I intend to rely on the transcript of this broadcast at the trial of this matter.'

Application to strike out by the Claimant

[8] The Claimant applied to strike out the Defendant's documents namely the judgement in The Ramsbury Property Case and the Notice of Appeal filed in the said case on the grounds that these documents are not relevant to this trial and that the findings of facts by the trial judge in that case cannot be relied upon because it is extant and sub judice.

[9] The Claimant also applied to strike out paragraphs 10 – 20 of the Defendant's witness statement on the same grounds.

[10] Paragraphs 10 – 20 of the Defendant's witness statement are as follows:

> '[10]. In late 2011, a decision of Mr Justice Redhead dated the 3rd of October, 2011 Ramsbury Properties Limited v Ocean View Construction Limited[2] ("Ramsbury Properties Case") came to my attention. I realized from the decision that the facts of that case were relevant to issues to be determined in the case at bar. The learned judge pointed out that Mr. Cozier in his witness statement in the Ramsbury Properties Case stated that he was the majority shareholder in the claimant company Ramsbury Properties Limited. In that case, Ramsbury Properties Limited sought a declaration that its lease agreement entered into with Ocean View Construction Limited was valid, specific performance of the lease agreement, damages in lieu of specific performance and damages for breach of contract in addition to specific performance, inter alia. The Statement of Claim in the Ramsbury Properties Case outlines that the lease agreement in question was for Ocean View Construction Limited to lease premises belonging to Ramsbury Properties Limited in Pinneys Industrial

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Site for 7 months commencing 20th June 2009 at the rate of US$56,000.00 per month to house Mexican workers.'

'[11] Justice Redhead found as a fact that Mr. Dwight Cozier negotiated on behalf of Pinneys Beach Hotel to provide accommodation for the Mexican workers in the Ramsbury Properties Case. The learned judge also found as a fact that Mr. Cozier offered premises owned by his company Ramsbury Properties Limited as an alternative and that Mr. Cozier did negotiate a lease for the accommodation of the Mexican workers at a building owned by his company Ramsbury Properties Limited. In fact, in the Ramsbury Properties Case, the contract for Mr. Cozier's company to provide accommodation for the Mexican workers was the basis upon which Ramsbury Properties Limited initiated its claim against Ocean View Construction Limited.'

'[12]. I note that part of the Ramsbury Properties Case judgment is being appealed via Civil Appeal[3] between Ramsbury Properties Limited and Ocean View Construction Limited filed on the 14th of November, 2011. Notably, the findings of fact made by Justice Redhead are not the subject matter of the Ramsbury Properties Case appeal. Therefore, I highlight the following paragraphs in the said decision of Justice Redhead in the Ramsbury Properties Case which confirms Mr. Cozier's involvement with securing accommodation for the Mexican workers at the material time:

i) ' Paragraph 26- Mr. Dwight Cozier in his witness statement says that he is a Minister of Government of the Nevis Island Administration and the majority shareholder in the claimant company. He says that Mr.

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Andrew Carter is employed as a Manager and Financial Controller of the claimant company…'

ii) 'Paragraph 44- From these two e-mails I come to the conclusion that there was a strong connection between the plaintiff company and Pinneys Beach Hotel. The Managing Director of Pinneys Beach Hotel at the time was Mr. Carter, who was also the manager of the claimant company.'

iii) 'Paragraph 45- Mr. Cozier denied in cross-examination that he was negotiating on behalf of Pinneys Beach Hotel with the Defendant company. I come to the conclusion that, having regard to the tone of the e-mail referred to above, he was negotiating on behalf of Pinneys Beach Hotel.'

> "With regards to food, he [Andrew Carter, Managing Director of Pinneys Beach Hotel] has tried as much as possible to work with you on the $4.00 budget… For accommodation he has reduced the cost per person per day by 50% from $30.00 to $15.00…"'

iv) 'Paragraph 68- When Mr. Dwight Cozier was negotiating on behalf of Pinneys Beach, he wrote to Mr. Hinojosa as follows:

> "After speaking with Andrew Carter, the Managing Director at Pinneys, has formulated the most economic scenario possible…"'

v) 'Paragraph 69- I accept Mr. Hinojosa's evidence when he said:

> "Mr. Cozier took us to Pinney's Beach Hotel as one option and presented us with a proposal for housing and food per person. Mr. Cozier and I entered into

> negotiations for the rental of the premises [Pinney's Beach Hotel]. However, negotiations fell through because Pinney's Beach Hotel was not available for monthly rental. Mr. Cozier said rental had to be on a daily basis, which was too expensive for the defendant company. Mr. Cozier then informed me that he had a separate property that he could modify and make available as a rental property suitable for a work camp site.'"

vi) Paragraph 70- 'As I have said, I accepted Mr. Hinojosa's evidence in this regard. Having done so, I am propelled also to accept that Mr. Cozier was negotiating on behalf of Pinney's Beach Hotel. In that negotiation, he was putting forward a proposal on behalf of Pinney's Beach Hotel that food would be brought to the living site for the workers.'

'[13]. In the circumstances, Mr. Cozier cannot now deny that he benefited from his company Ramsbury Properties Limited entering into a contract for the accommodation of Mexican workers. Mr. Cozier's contention at paragraph 11 of his claim is that he "did not win a contract or any contract as owner of Pinneys Beach Hotel". Further, at paragraph 17 of his claim, Mr. Cozier claims that I knew or ought to have known that he did not own Pinneys Beach Hotel. I reviewed the Claim filed herein and it is evident that in each instance Mr. Cozier specified that he did not win any contract "as owner of Pinneys Beach Hotel." It is apparent that Mr. Cozier took care not to deny that he benefited from any contract to provide

accommodation to the Mexican workers, period, and thereby sought to mislead this Honourable Court'.

'[14]. The issue central to the words complained of is whether Mr. Cozier, a Government Minister, benefited by entering into a contract to provide accommodation to the Mexican workers. Whether Mr. Cozier is the owner of Pinneys Beach Hotel or not or entered into the contract to provide accommodation to the Mexican workers "as owner of Pinneys Hotel" does not add to the sting of the charge in the words complained of authored by Brian Newman. Mr. Cozier's claim does not and cannot turn on the true ownership of Pinneys Beach Hotel. Mr. Cozier, by causing his company to bring the claim in the Ramsbury Properties Case, by his own admission benefited from his company entering into a contract to provide accommodation to the Mexican workers. Consequently, the main charge or the gist of the words complained of in the post of Brian Newman is true, by Mr. Cozier's own admission'.

'[15]. In the post that I authored I made no statement on whether Mr. Cozier owned Pinneys Beach Hotel or not. I commented strictly on the issue of a government Minister benefiting from a contract ahead of other Nevisians, which based on Mr. Cozier's majority shareholding in Ramsbury Properties Limited is entirely true'.

'[16]. In light of the Ramsbury Properties Case and Mr. Cozier's admission in that case that he is a majority shareholder of Ramsbury Properties Limited, it is clear that the claim herein is a blatant misuse of the process of the Court and ought not to succeed. Mr. Cozier has brought a claim in defamation against me based on the

accusations of Brian Newman that Mr. Cozier benefited from a contract to provide accommodation to the Mexican workers while he was a Minister of Government, which in fact Mr. Cozier did by his own admission. Whether he benefited through Pinneys Hotel or through Ramsbury Properties Limited, what is relevant is that he, by his own admission, benefited from housing the Mexicans whilst he was at one and the same time a sitting Minister of Government.'

'[17]. By letter dated 1st February 2012, I invited Mr. Cozier to withdraw his claim against me in light of the facts that were revealed by the decision in the Ramsbury Properties Case to save the parties from incurring further costs. I received no response from Mr. Cozier.'

'[18]. I deny that I have in any way defamed Mr. Cozier. My comments were general comments on matter of public importance. They are protected as fair comment but in any event, as I now know from the findings of Mister Justice Redhead in the Ramsbury Properties Case, my comments were entirely true and Mr. Cozier as a Minister of Government did in fact benefit from a contract to house Mexican workers which said contract he sued on in the name of Ramsbury Properties Limited, a company in which he is the majority owner.'

'[19]. Additionally, my comments in response to Denny's posting were justified. The alleged defamatory words were essentially and substantially true as Mr. Cozier, as the majority shareholder of Ramsbury Properties Ltd, did benefit from the arrangement to house Mexican workers. I deny that the Claimant has or is likely to have suffered any or any serious harm to his reputation from the alleged

defamatory statement and or that my comments were maliciously published or meant to cause damage to the Claimant.

'[20].Mr. Cozier cannot be permitted to maintain one positon before this Court and an entirely different position before the Court in the Ramsbury Properties Case. His claim herein is an abuse of the process of the Court calculated only to harass me for political reasons. It is instructive that several other bloggers commented on the same comments of Brian Newman but Mr. Cozier has singled me out for legal action notwithstanding that he at all times knew that the content of my comments were entirely true. This has forced me to spend time and resources defending a claim which is abusive of the process of this Honorable Court.

The issues

[11] The issues which the court has to decide are:

I) Whether the Claimant has breached CPR Part 8.7(3) in that there was no disclosure of the documents, namely the Certificate of Incorporation, Articles of Association and Annual Returns of Pinney's Hotel Limited.

II) Whether paragraph 41 of the Claimant's witness statement should be struck out because it constitutes hearsay.

III) Whether paragraphs 44 – 49 of the Claimant's witness statement should be struck out because they contravene CPR Parts 8.7A and 29.5(2).

IV) Whether the judgement of Redhead J in the Ramsbury Property Case relied upon by the defendant is sub judice as a result of the

Notice of Appeal and whether these documents are relevant to the claim?

V) Whether paras 10 – 20 of the first Defendant's witness statement should be struck out on the ground that their contents are sub judice and not relevant to the claim at bar.

The issue of disclosure

[12] Learned counsel for the Defendant, Ms Dia Forrester submitted that the documents at Tab A and G of Bundle 3 were not previously disclosed contrary to the requirements of CPR 8.7 which places a duty on the Claimant to set out its case and specifically states that the claim form or the statement of claim must identify any document which the Claimant considers necessary to his case. She further argued that in the instant case there is no reference in the claim form or statement of claim to the said documents.

[13] CPR 8.7 states:

1) The claimant must include in the claim form or in the statement of case all the facts on which the claimant relies.
2) The statement must be as short as possible.
3) The claim form or statement of claim must identify any document which the claimant considers to be necessary to his or her case.

[14] Learned counsel for the Claimant Mrs Angela Cozier responded that these documents were disclosed since 4th May 2012 some six years ago and are properly included in Trial Bundle 3. She referred the court to a List of Documents filed on March 3, 2012 and a supplemental list filed on 4th May 2012 in which the documents are listed in Schedule 1 Part 1 of the supplemental bundle. She relied on CPR 28.1(3) which states:

> "A party **'discloses'** a document by revealing that the document exists or has existed."

[15] Reliance was also placed on CPR 28.12(1) which states that:

> "The duty of disclosure in accordance with any order for standard or specific disclosure continues until the proceedings are concluded".

Discussion and Analysis

[16] I find the rules relied upon by the Claimant are applicable in these circumstances. In addition CPR 28.4 states:

> "If a party is required by any direction of the court to give standard disclosure, that party must disclose all documents which are directly relevant to the matters in question in the proceedings."

[17] The Claimant filed the supplemental list of documents on 4th May 2012 which contains the said documents. The Defendant would have been made aware of the existence of these documents from that date onwards and it cannot be said that he was taken by surprise. The fact that the documents were not included on the List of Documents filed on 5th February 2016 by the Claimant does not mean that he cannot rely on them as notice had already been given to the Defendant of the Claimant's intention to rely on these documents from the time the supplemental list of documents was filed in May 2012. The Defendant was entitled to request specific disclosure of these documents and it cannot be said that he was unaware of the existence of these documents or the intention of the Claimant to rely on them in support of the claim.

[18] I am of the view that there was disclosure of the documents by the Claimant in that they were available for inspection by the Defendant from May 2012 and this satisfied the requirements of CPR 28.1(3). Moreover under CPR 28.12 disclosure continues until the conclusion of the matter. Therefore the fact that the documents formed part of Trial Bundle 3 which was filed on 16 May 2018 at least three days before the trial was scheduled to commence also amounts to disclosure. Accordingly the application to exclude these documents from Trial Bundle 3 is refused.

The Hearsay Issue

[19] Ms Forrester objected to paragraph 41 of the Claimant's witness statement on the ground that it constitutes hearsay. She indicated that the statement is being relied upon for the truth of its contents but that the individuals who made the statement have not been identified and are not here to give evidence. Accordingly she argued this contravenes Section 67 of the Evidence Act of Saint Christopher and Nevis[4] (The Evidence Act).

[20] Section 67 states:

> (1) Subject to subsection (3) evidence of a previous representation is not admissible to prove the existence of a fact that the person who made the representation intended to assert by the representation.
>
> (2) Where the evidence of a previous representation is relevant otherwise than as mentioned in subsection (1) that subsection does not prevent the use of the evidence to prove the existence of an asserted fact.

Discussion and Analysis

[21] Section 67 of The Evidence Act provides an exception to the hearsay rule in that it allows a previous representation to be admissible, not to prove the truth of the asserted fact but to prove that it was made. This fundamental rule about the admissibility of hearsay evidence which was established in the seminal case of Subramainiam son of Munasamy v Director of Public Prosecutions[5] has in my view been incorporated into the Evidence Act of Saint Christopher and Nevis. In Subramainiam the law Lords of the Judicial Committee of the Privy Council had this to say about hearsay evidence at page 4:

[4] No 30 of 2011

[5] Privy Council Appeal No.2 of 1956

> "In ruling out peremptorily the evidence of the conversation between the terrorist and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what was contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that the statement was made quite apart from its truth is frequently relevant in considering the mental state and conduct thereafter of the witness or some other person in whose presence it was made".

[22] Applying the principle in Subramainiam, I accept Mrs Cozier's argument that para 41 is seeking to establish that a conversation took place between the Claimant and some of his wife's clients about what was on the internet which caused the Claimant to *"feel a certain way".* That evidence is admissible not to establish the truth of what was said on the internet but that such a conversation took place between the Claimant and other persons and the effect this had upon the Claimant. That is one of the issues the court will have to resolve as it relates to damages if the claim is successful. Accordingly I find that paragraph 41 falls within the exception to the hearsay rule under Section 67 of The Evidence Act and the application to strike it out is refused.

The Issue of Relevance

[23] Ms Forester also objects to paragraphs 44-49 of the Claimant's witness statement which refers to the Defendant's participation in a talk show radio programme some two years after the alleged defamatory act. She argues that there is nothing in the claim form or statement of claim which pleads any aspect of this radio talk show programme and as this did not form part of the pleadings they are allegations of factual arguments and not part of the claim as mandated by CPR 8.7A and CPR 29.5(2).

[24] CPR 8.7A states:

> 'The claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree.'

[25] CPR Rule 29.5(2) *states:*

> '2. The court may order that any inadmissible, scandalous, irrelevant, or otherwise oppressive matter may be struck out of any witness statement.'

[26] According to Ms Forrester the Claimant pleaded its case and particular facts to support his allegations of malice. However paragraphs 44 to 49 of the Claimant's witness statement of March 11, 2016 are fresh allegations not contained in the claim form, statement of claim or reply. She referred to the case of Simeon Albert v Michael Coipel and others[6] where Thomas J. referring to CPR 8.7A held that it was inadmissible for a litigant to include matters in a witness statement that ought to have been pleaded in the claim form or statement of claim.

[27] In response Mrs Cozier submitted that the court is governed by the laws of the Federation of St. Christopher and Nevis and that CPR 2000 comprise subsidiary legislation made under the West Indies Associated States Supreme Court Act[7] and is therefore subject to primary legislation such as The Evidence Act. She referred to Sections 6, 63 and 64 of The Evidence Act which she argued allows for the admissibility of evidence that is relevant.

[28] Section 6 of The Evidence Act states:

> 'The provisions of this Act shall apply in relation to all proceedings in a court of St. Christopher and Nevis, unless the contrary is in any case expressly provided'

Section 63(1) states:

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[6] [2015] ECSCJ No.86
[7] Court Order No. 17 of 1975

> 'The evidence that is relevant in proceedings is evidence that, if it were accepted, would rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings.'

Section 64 states:

> 'Evidence that is relevant to proceedings is admissible and shall be admitted in the proceedings.'

[29] Mrs Cozier therefore submitted that paragraphs 44 – 49 of the Claimant's witness statement are relevant to these proceedings as the claim before the court is one of defamation of a public figure and the paragraphs in question go to the issue of malice based on the actions of the Defendant. Accordingly once the evidence is relevant it should be admitted and the court can then allow cross examination.

Discussion and Analysis

[30] The new approach to pleadings in civil proceedings was discussed by Lord Wolf MR in Mc Philemy v Times Newspaper Ltd[8] wherein he gave guidance on the functions of statements of case under the new regime and indicated the reduced need for extensive pleadings now that witness statements are to be exchanged. In that case it was recognised that in the majority of proceedings, identification of documents upon which a party relied, together with copies of that party's witness statement made the detail of the nature of a party's case obvious to the other side.

[31] This was reiterated by Barrow JA in the case of Flours Ltd v Ormiston Ken Boyea[9] where he gave an exposition of the law on the requirements of pleadings and the use of witness statements as stated by lord Wolf MR in Mcphilemy v Times Newspaper (op cit) and Lord Hope in Three Rivers District Council v Bank of England (No.3)[10] UKHL. I find the learning in Flours Limited extremely

[8] [1999] 3 AER 775 CA
[9] SVGHCV No. 12 OF 2006
[10] [2001] UKHL 16

useful to the issues raised in the case at bar and I will therefore reproduce the relevant parts.

[32] At paragraph 43 Barrow JA stated inter alia:

> "But there is no longer a need for extensive pleadings, which I understand to mean pleadings with an extensive amount of particulars because the witness statements are intended to serve the requirement of providing details of the particulars of the pleader's case."

[33] At paragraph 44 His Lordship stated:

> "It is settled law that witness statements may now be used to supply details or particulars that, under the former practice were required to be contained in pleadings. The issue in the Three Rivers case was the need to give adequate particulars. Not the form or document in which they must be given. In deciding that it was only the pleadings she should look at to decide what were the issues between the parties the judge erred in my respectful view. If particulars were given for instance, in other witness statements the judge was obliged to look at these witness statements to see what the issues were between the parties. It follows, in my view that once the material in Mr Mc Cauley's witness statement and the report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and therefore, admissible. This proposition applies equally to the contents of the documents identified at Tabs 31 and 33 (My emphasis)."

[34] With regards to the issue whether the challenged material were particulars of existing allegations or were new allegations Barrow JA, after explaining that permission had to be obtained in order for a change to be made to the statement of case stated that CPR 20.1 (3) provides that 'the court may not give permission unless the court is satisfied that the change is necessary because of a change in circumstances which became known after the date of the first case management conference'. He further stated "I am firmly of the view that additional instances of a sufficiently made allegation do not constitute a change in circumstances."

[35] At Paragraph 46 Barrow JA gave an example of such a situation where new particulars became known of additional misconduct and stated:

> "If a party alleges misconduct of a certain nature, say misappropriating funds making false entries in an accounting record, and gives five instances of false entries, and a closer look at documents reveals a sixth entry I see no reason why the party should be prevented from giving particulars of it in his witness statement, provided the requirements of fairness have been satisfied and there has been no abuse of process or disentitling conduct. I emphasize the distinction between changing a statement of case and supplying particulars to say I expect the court will be keen to ensure that the one does not masquerade as the other. Decisions will be made on a case by case basis' (my emphasis)."

[36] At paragraph 47 His Lordship also dealt with the delay in making the objection and stated:

> "In this case the fact that as long as 3 years before the objection was taken the defendant provided the claimant with the material it seeks to adduce as further instances or particulars of the alleged conduct satisfies me, if the material is really particulars and not new allegations or a change of case that there would be no unfairness in permitting this evidence to be admitted. Such evidence would be relevant to misconduct alleged in the defence and counterclaim. It is therefore necessary to examine the excluded material to see if it truly consist of particulars of allegations already made or is in reality new allegations…"

[37] Applying the principles enunciated above by Lord Wolf MR and the reasoning of Barrow JA regarding pleadings and witness statements to the case at bar, I do not accept Ms Forrester's arguments that because these allegations were not contained in the claim form or statement of claim they should be struck out or that they constitute new allegations which were not pleaded. The Claimant had pleaded malice in his statement of claim with particulars filed in 2009. These allegations were also contained in his witness statement filed in March 2016 after an appeal by the Defendant in which the Court allowed him to amend his defence to raise the defence of justification and directed that the case be further case managed. Following which witness statements were filed by both parties. The

Defendant must have been aware of the allegations from that time and it cannot be said that there is a change of case or new allegations.

[38] Moreover it is well settled law that the particulars of malice must be pleaded where a defence of fair comment is raised by the Defendant in a defamation case. In Deldridge Falvius and Dr Ernest Hilaire[11] Periera CJ spoke of the necessity or insufficiency of a plea of malice in a defamation case and made the point that *'a plea of express malice is relevant to the defence of fair comment and the Claimant must 'sufficiently particularise his averment of malice'.*

At paragraph 10 she stated inter alia:

> "CPR 69.2(c) states, in effect, that the statement of claim in a defamation claim must, if the Claimant alleges that the Defendant maliciously published the words or matters, give particulars in support of the allegation. In short the Claimant does not wait until a defence of fair comment is made to then plead malice by way of reply. Our CPR does not so require. However it would no doubt behove a claimant who did aver malice in the statement of claim to aver malice by way of reply if the defendant raises the defence of fair comment in the defence, if the claimant wishes to defeat the defence. As to the sufficiency of the particulars of malice pleaded by the respondent, it is not the function of the court at the stage of a strike application to determine the strength of the averment of malice contained in the statement of the case (My emphasis). As the learned Master opined at para 21 "a trial judge is able to consider pleadings in the round to determine the case of each party"'.

[39] In accordance with the dicta of Periera CJ, I am of the respectful view that what is contained in the paragraphs 44-49 of the Claimant's witness statement can be considered as particulars of malice which the Claimant is seeking to rely on to counter the defence of fair comment raised by the Defendant and the trial judge is entitled to have regard to these particulars when considering the issue of malice and fair comment. According to Barrow JA in Flours Limited it is left entirely to the trial judge to determine whether the allegations constitute new acts or whether

[11] SLUHCVAP2015/0003

they are further instances or particulars of the alleged misconduct or malice which the Claimant can rely on in support of his claim for defamation.

[40] With respect to the Defendant's reliance on CPR 29.5 (2), this matter is settled by the dicta of Blenman JA in Joseph w. Horsford vs Geoffrey Croft[12] where she emphasized the relevance of the evidence as the determining factor. At para 43 she stated:

> "Allegations or evidence are held to be scandalous if they state matters which are indecent or offensive or are made for the mere purpose of abusing or prejudicing the other party. Moreover any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party or make any charge of misconduct. However an allegation which is scandalous for example by making charges of dishonesty, immorality or outrageous conduct cannot be struck out if it is necessary or relevant to any issue in the action" (My emphasis).

[41] At para 50 Blenman JA further stated:

> "In relation to the contention that the paragraphs were scandalous, it is the law that it is open to a court to strike out matters that are irrelevant and scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action, but such orders are not to be lightly made. One party cannot dictate how the other should provide the relevant evidence. The primary test of whether material is scandalous is whether the matter is relevant to an issue raised by the pleading…. (My emphasis)."

[42] In light of the principles of law enunciated by Blenman J A., I do not agree with learned counsel Ms Forrester that para 44-49 are scandalous, irrelevant or oppressive and in breach of CPR 29.5(2) and therefore should be struck out but instead as already stated I find they are relevant to the Claimant's case and his need to show malice.

[12] ANUHCV AO 2014/0006

The issue of subjudice and relevance of the Ramsbury judgement and the Notice of Appeal filed by the Claimants

[43] The Claimant objected to the judgement at first instance and Notice of Appeal in the Ramsbury Property Case on the ground that these documents are not relevant to this trial. Mrs Cozier also submitted that as the judgement of Redhead J. in The Ramsbury Property Case is under appeal the findings of facts by the learned trial judge cannot be relied upon because it is extant and sub judice as indicated by the Notice of Appeal. Mrs Cozier also applies to strike out paragraphs 10 – 20 of the first Defendant's witness statement on the same grounds. I will deal with the two issues together.

[44] In relation to the issue of sub judice the Claimant referred to Section 90 of the Evidence Act which states:

> 'Subject to subsection (2) and sections 91 and 92, evidence of a decision in legal or administrative proceedings is not admissible to prove the existence of a fact in issue in the legal or administrative proceedings'.

[44] Counsel for the Claimant referred to the common law principle of sub judice and relied on the case of Mark Brantley et al v Curtis Martin et al[13] in which the court considered whether Parliament could deal with an issue which was before the court but did not find this was sub judice. Also in and Bernard Nicholas and Kertist Augustus[14] where Singh JA thought the disclosure of a letter to an organisation other than the one which had jurisdiction to deal with the matter could be considered sub judice.

[45] She further submitted that The Ramsbury Property Case is not relevant to these proceedings because the claim before the court is for defamation arising from an article posted on the sknlist.com/skn@yahoogroups.com in 2009 under the

[13] SKBHCVAP 2104/0027
[14] Civil Appeal No. 3 of 1994, Commonwealth of Dominica.

caption '**Mexican Workers Staying at Minister Dwight Cozier Hotel'**. Therefore, the impugned documents and paras 10-20 of the Defendant's witness statement have no relevance to the claim at bar. Mrs Cozier contended that in the case of Mark Brantley v Dwight Cozier[15] (The Mark Brantley Appeal) the Court of Appeal dealt with amending the defence statement and not the issue of sub judice. She further argued that none of these facts speak to Pinney's Hotel Development and further the decision in The Ramsbury Property Case came in 2011, two years after the claim was brought against the first Defendant for defamation. Therefore the facts in that case cannot be relevant to the matter before this court which was filed in 2009.

[46] In response Ms Forester relied on Sections 2 and 90 of the Evidence Act and argued that the principle of sub judice does not prevent the Defendant from relying on the facts of the Ramsbury Property Case.

[47] Section 2 of the Evidence Act states:

> "facts in issue" means …all facts which, by form of the pleadings in any action or other civil proceedings, are affirmed on one side and denied on the other".

[48] Ms Forrester submitted that any decision taken by the Court of Appeal will not overturn the findings of facts by Justice Redhead in his judgement of 3rd October 2011 and thereby renders this point moot. She referred to the case of Borowoski v Canada[16] in support of her contention that there is no live issue before the court as it relates to the facts pleaded. As such reference to the facts of The Ramsbury Property Case in the case at bar cannot be considered sub judice. Moreover she argued that as the judgement has not yet been set aside by the Court of Appeal the findings of facts by the lower court remains in effect until it is set aside. She further relied on CPR 42.8 which states:

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[15] SKBHCVA 2014/0027
[16] [1981] 1 SCR 342

"The judgement or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date".

[49] In relation to the principle of sub judice she refers to the cases of The Queen v Payne and Cooper[17] and Attorney General v Times Newspapers Ltd[18] which dealt with a breach of the sub judice principle at common law and the resultant prejudice as it relates to a fair trial.

[50] Ms Forrester also submitted that the issue of relevance of these paragraphs is for the court to decide in the course of the trial. She referred to the case of Mark Brantley v Dwight Cozier[19] (The Mark Brantley Appeal) and the dicta of Blenman JA at paras 53,67, 78 and 79 which she says dealt with the issue of relevance of the judgement of The Ramsbury Property Case to the case at bar. She argued that the said judgement is relevant to the defence of fair comment and particularly the defence of justification raised by the Defendant. Therefore the Defendant is relying on aspects of The Ramsbury Property Case to establish that there was a lease in existence between Ramsbury Property Limited and Ocean View Construction Company. According to her this was not in dispute at the trial in The Ramsbury Property Case, or The Mark Brantley Appeal where the Defendant sought to amend his defence. She submitted that the Defendant has advanced in support of his plea of justification that the sting of the charge is that the Claimant, a Minister of Government benefitted from a contract to house Mexican workers. It therefore would be inappropriate at this stage to go further into the law on the matter and an analysis of the facts thus far as that is what the court is required to do at trial. She referred to the case of Moorjani Caribbean Ltd v Ross University School of Medicine and Others[20] at paras 16-21 pg. 122-123B.

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[17] [1896] 1 QB 577
[18] [1973] 3 AER 54
[19] Op. cit.
[20] 2014 ECSCJ No. 229

Discussion and Anaylsis

[51] The sub judice principle prevents a matter which is before the court from being litigated, discussed or dealt with in a manner that would prejudice the outcome of the case before the court such that the litigant(s) would not receive a fair trial. This would amount to contempt of court.[21] It applies both in cases involving trial by jury or otherwise.

[52] I do not find the cases relied upon by Mrs Cozier support her submission that the sub judice principle applies to the case at bar. In the instant case it cannot be said that the use being made of the facts in The Ramsbury Property Case will result in prejudice to the appellant such that his case will not receive a fair hearing at the appeal stage. Moreover the Claimant has pleaded some of the facts relied upon by the Defendant in the instant case. I am of the view that the sub judice principle does not prevent reference to The Ramsbury Porperty Case nor reliance on the facts stated in that case. It should also be noted here that in the Mark Branltey Appeal the Court of Appeal was aware that an appeal had been filed in The Ramsbury Property Case but found that the Defendant could rely on the facts in support of his defence of justification in the instant case.

[54] Both counsel referred to Section 90 of the Evidence Act which prevents reliance on a judgement where the facts are in issue. Section 90 (2) prohibits such use even if the facts in issue are relevant. I am of the view that Section 90 does not preclude reliance on the facts in The Ramsbury Property Case where these facts are not in issue. However, it will be a matter for the trial judge to determine whether the facts relied upon by the Defendant are in issue and whether or not the Defendant can rely upon them at the trial.

[55[Further, the issue of relevance of the Ramsbury Property Case to the case at bar was dealt with extensively by Blenman JA in The Mark Brantley Appeal and I

[21] See Halsbury Laws of England Vol. 22 (2012) para 29.

am enjoined by her findings specifically at paras 53, 67, 78 and 79 where Her Ladyship stated:

> '53. ..Also I am satisfied that the findings of facts that were made in the Ramsbury Properties Ltd case and the matters which Mr Cozier admitted in his witness statement that was filed in that matter are very pertinent to a defence of justification'.
>
> '67. It seems clear to me that in so far as Mr Cozier in his witness statement that was filed on 2nd April 2012 in the Dwight Cozier v Mark Brantley case admitted he was a shareholder in the Ramsbury Properties Ltd., which is a family company that owned the building in which the Mexican workers were accommodated, the defence of justification may well arise in consideration; this may be so independent of the further findings that were made by the judge in the Ramsbury Properties Ltd., case. It would be unjust not to permit Mr Brantley to amend his defence in order to plead justification'.
>
> '78. In any event, some of the important facts found by the judge and initially matters which Mr Cozier had stated in his witness statement that was filed in the Ramsbury Properties Limited claim are clearly relevant to the defence of justification'.
>
> '79. Indeed apart from the findings of fact by the judge, it is indisputable that in his witness statement that was filed in the Ramsbury Properties Ltd case. Mr Cozier admitted that he was a Minister of Government and a shareholder in Ramsbury Properties Limited, which is a family company. It is not in dispute that Ramsbury Properties Limited benefitted from the agreement between Ocean View Construction Limited and itself to house the Mexican construction workers who went to Nevis to reconstruct the Four Seasons Hotel. Even if it is accepted that the initial negotiations were in relation to Pinneys Hotel which is not owned by Mr Cozier as was stated in the original publication, the issue of justification may well be a live one based on Mr Cozier's witness statement that he is a shareholder in Ramsbury Properties Limited, bearing in mind that the Mexican workers were housed at the (hotel) building that is owned by Ramsbury Properties Limited. It is also of note that the Managing Director of Ramsbury Properties was a Mr Carter who was also the Managing Director of Pinneys Beach Hotel.'

[56] I reiterate Blenman JA's finding that reference to The Ramsbury Property Case is indeed '*very pertinent to this claim and to exclude it at this stage would be to*

prevent the first Defendant from properly putting forward his defence'. I also accept the pronouncement that it would be unfair at this stage to prevent the Defendant from referring to the evidence he is seeking to rely upon in support of his defence of justification. What facts the Defendant can rely on and the extent to which he can rely on them in support of his defence of justification will be a matter for the trial judge to determine upon hearing all the evidence and upon application of the law.

[57] With respect to the Notice of Appeal I believe it would be equally useful in assisting the trial judge in determining which facts from The Ramsbury Property Case the first Defendant can rely upon as it highlights the facts and legal issues which the Claimant is challenging in the judgement of Redhead J. However even if the facts are in contention it is open to the trial judge to decide whether the Defendant can rely upon them. According to Periera JA in Paul S. Webster v Lois Dunbar[22] **"**it is well established law that the appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in very limited circumstances, such as where a judge misdirects himself or herself and draws erroneous inferences from the facts'.

[58] In light of the above I find that The Ramsbury Property Case is relevant to the Defendant's defence of justification and the fact that it is being appealed does not render it sub judice. The notice of appeal is also relevant because in my humble view it will assist the trial judge in deciding what facts are being appealed and therefore in dispute. Similarly paras 10-20 are relevant in that they specifically refer to the parts of The Ramsbury Property Case the Defendant is seeking to rely upon in support of his defence of justification.

[59] Finally in exercising my discretion whether to grant the applications to strike out by both the Claimant and the Defendant I am guided by the statement of the

[22] HCVAP2011/004

Honourable Chief Justice Periera in Deldridge Flavius V Ernest Hilaire at para 3 where she stated:

> "Rule 26.3 permits the striking out of a statement of case (or parts thereof) where it appears it discloses no reasonable ground for bringing or defending a claim. It may now be taken as trite law that the power to strike out in the context of the plenitude of case management powers contained under part 36 may only be ordinarily utilised as a last resort given its draconian nature.[23] "

[60] Accordingly I hereby order as follows:

i) The application by the Defendant to strike out the Claimant's documents at Tab A and G at Trial Bundle 3 is refused on the ground that there was disclosure of these documents and they are relevant to the Claimant's case. – CPR 28.1 (3), 28.4 and 28.12 applied;

ii) The application to strike out paras 44 -49 is refused on the ground that they are relevant to the issue of malice which must be pleaded; - CPR 69.2(c) applied;

iii) The application to strike out paragraph 41 is refused on the ground that it is admissible under Section 67 of The Evidence Act as an exception to the hearsay rule;

iv) The application to strike out the Defendant's documents at Tabs K and L of Trial Bundle 3 is refused on the ground that the issue of sub judice does not act as a bar in this case and the documents are relevant to the Defendant's case;

v) The application to strike out paragraphs 10 – 20 of the Defendant's case is refused on the ground that these paragraphs

[23] Real Times System Limited v Renraw InvestmentsLimited [2014] UKPC6.

are relevant and go to the issue of justification raised by the Defendant as part of his defence.

vi) Both parties having been unsuccessful with their applications there shall be no order as to costs;

[61] It would be remiss of me if I did not comment on the delay in the trial of this matter which commenced in 2009 but has been plagued by numerous interlocutory applications including two appeals from both sides. On two occasions the trial dates have had to be vacated. Both sides could have prevented this last adjournment by filing their application during the case management stage and way in advance of the date fixed for trial of this matter. This practice is contrary to the objectives of the CPR 2000 to ensure the speedy and just disposition of cases and this Court frowns upon it. Accordingly the Registrar shall fix a final date for the speedy trial of this case.

Victoria Charles-Clarke
High Court Judge

By the Court

Registrar