EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2014/0027

BETWEEN:

MARK BRANTLEY

Appellant

and

DWIGHT C. COZIER

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise Esther Blenman — Justice of Appeal

On written submissions:

Ms. Dia Forrester for the Appellant
Ms. M. Angela Cozier for the Respondent

2015: August 27.
Re-Issued 2019: March 11.

Interlocutory appeal – Defamation – Libel – Words complained of by respondent republished and reposted on internet by appellant – Whether learned master erred in exercise of her discretion – Whether court should exercise its discretion afresh – Amendment to statement of case after filing – Rule 20.1 of Civil Procedure Rules 2000 – Factors to be taken into account in deciding whether or not to allow amendment to statement of case after date fixed by court for first case management conference – Whether appellant should be granted leave to amend his defence to include additional defence of justification on basis of factual findings made in relation to respondent in separate proceedings – Whether underlying claim should be stayed pending hearing and determination of appeal arising from separate proceedings

On 8th December 2009, Mr. Dwight Cozier brought a libel action against Mr. Mark Brantley and one other party, alleging that Mr. Brantley had republished defamatory words about him (Mr. Cozier) on the internet. The words complained of were authored by another person (who was not a party to the claim) and were allegedly repeated and expounded on

by Mr. Brantley. On 13th January 2010, Mr. Brantley filed a defence to the claim in which he admitted to having made some comment on the material which was originally published and also to having reposted the words complained of; additionally, he pleaded the defence of fair comment.

In a separate set of proceedings in the High Court between the parties Ramsbury Properties Limited and Ocean View Construction Limited, a trial judge had made findings of fact in relation to Mr. Cozier which Mr. Brantley wished to rely on in the underlying claim, for the purpose of pleading the defence of justification (in addition to the defence of fair comment). These factual findings had not been available at the time when Mr. Brantley had filed his defence, since the judgment in the Ramsbury Properties Limited case had not been rendered as yet. An appeal has since been filed against the Ramsbury Properties Limited judgment and has not yet been determined. On 7th March 2014, Mr. Brantley filed an application seeking permission to amend his defence to plead justification and to stay the claim in the present proceedings pending determination of the appeal in the Ramsbury Properties Limited case. Mr. Cozier opposed this application.

The application came before the learned master, who, after considering the submissions of the parties, refused it. Her decision was based on several factors, which included: the 4 year delay in the filing of the application to amend the defence; the prejudice that granting Mr. Brantley's application would cause to Mr. Cozier; and the fact that Mr. Brantley had already pleaded fair comment, which is a complete defence to a defamation claim. Additionally, the learned master examined the principles and merits of the defence of justification and made the finding that facts which come into existence after the publication of alleged defamatory statements cannot not be relied on, though they may be relevant to a plea of justification.

Mr. Brantley appealed the decision of the learned master, contending that she made numerous errors in the exercise of her discretion. He argued that, in coming to a decision on his application, she had taken into account irrelevant factors and had failed to take into account relevant ones. In particular, instead of taking into account all of the factors listed in rule 20.1(3) of the Civil Procedure Rules 2000 (which rule deals with amendments to statements of case) she placed too much weight on only two of them, namely, the promptitude of Mr. Brantley's application, and the prejudice that would be caused to Mr. Cozier if the application was granted. Accordingly, Mr. Brantley sought, on appeal, to have this Court exercise its discretion afresh and grant him: (1) leave to amend his defence so as to include the additional defence of justification; and (2) a stay of the underlying claim in the present proceedings, pending the outcome of the Ramsbury Properties Limited appeal. As at the date of the filing of Mr. Brantley's appeal, no date had been set as yet for the trial of the underlying claim.

Held: allowing the appeal and: granting the appellant 14 days leave from the date of this judgment to file and serve an amended defence so as to plead the defence of justification; granting the respondent 21 days thereafter, if necessary, to file and serve an amended reply; refusing the appellant's application for the stay of the underlying claim; and remitting the case to the High Court to be dealt with in accordance with the rules of procedure and awarding costs to the respondent in the sum of $2000.00, that:

1. Rule 20.1(3) of the Civil Procedure Rules 2000 sets out the factors to which the court must have regard when considering a party's application to amend a statement of case. They are: (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. In the present case, the learned master quite rightly took into account the likely prejudice that would be occasioned to Mr. Cozier if leave were granted to Mr. Brantley to amend his defence 4 years after it was filed. However, she failed to give any consideration to the likely prejudice that would be occasioned to Mr. Brantley if he was refused leave to amend his defence in order to plead justification. She also failed to consider whether an award of costs to Mr. Cozier would suffice for any prejudice he may suffer as a result of allowing the appellant's defence to be amended. Furthermore, the learned master placed significant emphasis on the issue of whether Mr. Brantley's defence of justification could be based on facts which came into existence subsequent to the publication of the alleged defamatory statements and ultimately came to the conclusion that it could not be. This, however, was a matter for the trial and the learned master ought not to have taken it into account in deciding whether to exercise her discretion in the appellant's favour. This failure to take into account relevant factors and the taking into account of irrelevant ones led the master to commit errors of principle in exercising her discretion.

   Rule 20.1(3) of the Civil Procedure Rules 2000 applied.

2. The decision which the learned master arrived at in relation to the appellant's application to amend his defence was not within the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly wrong. Accordingly, this puts the Court of Appeal in a position to exercise its discretion afresh.

Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 applied.

3. In exercising its discretion with regard to the appellant's application to amend his defence, the Court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice to the other party and can be compensated in costs. The amendment should be allowed regardless of how negligent or careless the omission from the statement of case may have been, and no matter how late the proposed amendment is. Insofar as the respondent made certain admissions in his witness statement that was filed in the separate proceedings in the court below, the defence of justification may arise for consideration. Furthermore, in the present case, an award of costs would be adequate compensation for any likely prejudice that Mr. Cozier would suffer as a result of the grant of Mr. Brantley's application. Accordingly, it would be unjust not to permit the appellant to amend his defence in order to plead justification.

   Charlesworth v Relay Roads Ltd. and Others [2000] 1 WLR 230 applied; Clarapede & Co. v Commercial Union Association (1883) 32 WR 262 applied; George Allert (Administrator of the Estate of George Gordon Matheson, deceased) et al v Joshua Matheson et al GDAHCVAP2014/0007 (delivered 24th November 2014, unreported) applied.

4. A defence of justification is separate and distinct from that of fair comment. Therefore, the fact that a defendant has already pleaded fair comment in his defence is no bar to an application for leave to amend the defence to plead the additional defence of justification.

5. With regard to the appellant's application for a stay of the underlying claim in the present proceedings pending determination of the appeal in the separate proceedings, there is no basis for the Court to conclude that to allow the underlying claim to proceed would threaten the court's integrity. Refusing to grant the stay will not bring the administration of justice into disrepute. On the contrary, to stay the matter could well result in the underlying claim being unduly protracted and this would offend the spirit of the law which requires justice to be administered timely and fairly and effectively.

JUDGMENT

Introduction

[1] BLENMAN JA: This is an appeal by Mr. Mark Brantley against the refusal of the learned master, to grant him leave to amend his defence; refusal to stay the proceedings pending the determination of the appeal in the Ramsbury Properties Limited case[1] and awarding costs against him. In effect, it is an appeal against the exercise of the learned master's discretion. The appeal is vigorously opposed by Mr. Dwight Cozier who maintains that the learned master did not err in the exercise of her discretion and therefore the Court should dismiss Mr. Brantley's appeal.

Grounds of Appeal

[2] Mr. Brantley has filed 10 grounds of appeal, several of which have sub-grounds. The grounds of appeal are as follows:

> "1. The Learned Master erred in that in the exercise of her discretion, the Learned Master took into account the following irrelevant factors:
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> i. The Appellant must prove to the court that the plea of justification was available to him at the time of publication (paragraph 22);
>
> ii. It is not open to the Appellant to go behind his statements and contend that the comments were based on other facts that came to his attention subsequent to the publication (paragraph 22);
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> iii. The Appellant has already pleaded the defence of fair comment which is a complete defence to defamation (paragraphs 23 and 28);
>
> iv. The facts on which the Appellant seeks to rely came to his attention after the alleged defamatory words were published (paragraph 24);
>
> v. The defence of justification has to be considered at the time of the publication. It does not operate in the future (paragraph 24);
>
> vi. To allow the Appellant to amend his defence would definitely require the claimant to file a reply to the new defence (paragraph 25);
>
> vii. To allow the Appellant to amend his defence to plead justification would further protract the hearing of the claim which was filed in 2009 (paragraph 25);
>
> viii. The Appellant's assertion that the present facts of the Ramsbury Properties case stands in his favour to bolster a defence of

[1] Ramsbury Properties Limited v Ocean View Construction Limited (SKBHCVAP2011/0020).

justification but if the decision of Redhead J is overturned it would enure to the benefit of the Respondent is speculative (paragraph 27);

ix. An appeal [SKBHCVAP 2011/20 Ramsbury Properties Limited v Ocean View Construction Limited] can take as long as 5 years to get to the Court of Appeal to be prosecuted (paragraph 28);

x. It would be unfair to stay the proceedings for the determination of an appeal which bears no relevance to the issue in the claim (paragraph 28);

xi. To stay the proceedings pending the determination of the appeal in the Ramsbury Properties case would be to "*further plague*" the action "*with delays on suppositions*" (paragraph 28).

2. The Learned Master failed to take into account the following relevant factors:

i. The facts of the Ramsbury Properties case are directly relevant to the case at bar as it counters the very basis on which the Respondent seeks to assert that the words complained of published by Brian Newman are defamatory;

ii. The delay in the matter proceeding to trial was not due to the actions of the Appellant; at no stage of the case did the Appellant request an adjournment of a hearing or an extension of time for the filing of any document or took any steps that led to a delay in the progress of the matter;

iii. There were two interlocutory matters in the case – one on a preliminary issue raised by the Appellant as to authorship, which, had it been determined in favour of the Appellant, would have saved time at trial. The other interlocutory matter was an application by the Appellant to strike out the claim which application went to the Court of Appeal which made its determination on October 17, 2013. There were [sic] no "*myriad of interlocutory applications*" as asserted at paragraph 25 of the Learned Master's decision;

iv. In response to the Ramsbury Properties decision the Appellant wrote to opposing Counsel seeking a withdrawal of the claim and subsequently brought an application to strike out the claim which application went to the Court of Appeal; the Appellant did not remain inactive for 3 years before filing his application for permission to amend his Defence as suggested by the Learned Master at paragraph 17 of her decision.

3. The Learned Master misapprehended the facts of the case in that:

i. The Learned Master failed to make the distinction between the publication made in the name of "Brian Newman" which the Appellant denies to have republished and the publication made in the Appellant's own name as at paragraph 5 of her decision, as the Learned Master inaccurately states that "*the first defendant*

filed a defence … admitting to publication of the alleged defamatory words" with no regard for the distinction between the two publications;

ii. The Learned Master found that the Appellant sought to rely on "*facts which came into existence after the publication of the alleged defamatory statements*" (paragraph 22) which is inaccurate;

iii. The Learned Master failed to appreciate the facts of the Ramsbury Properties case and the case at bar in holding that [the] appeal in the Ramsbury Properties case "*bears no relevance to the issue in the claim*" (paragraph 28).

4. The Learned Master erred in failing to consider all the factors to be considered by the Court on an application for permission to amend a statement of case as set out at Rule 20.1(3) of the CPR 2000 as amended.

5. The Learned Master erred in according undue weight to the fact that the Claim was filed in 2009 without according due consideration to the progress of the case, despite a chronology of the case having been provided in the submissions in Reply filed on behalf of the Appellant. The elements constituting the overriding objective were not properly balanced as too much weight was placed on the element of dealing with cases expeditiously.

6. The Learned Master erred in failing to consider that any prejudice sustained by the Respondent from the Appellant being allowed to amend its Defence and the substantive claim being stayed until conclusion of the [appeal] SKBHCVAP 2011/20 Ramsbury Properties Limited v Ocean View Construction Limited can be adequately compensated for in costs.

7. The Learned Master erred in arriving at the following conclusions of fact which were not supported by the evidence:

i. The Appellant was being "*evasive*" as to when he became aware of the decision of Redhead J as in one document the Appellant indicated that the decision came to his attention in "*late 2011*" and in his Affidavit in support of the application before the Learned Master, the Appellant indicated that he did not recall the precise date on which the decision came to his attention after it was delivered, the Ramsbury Properties case having been delivered on October 3, 2011.

ii. By concluding that the appeal in the Ramsbury Properties case "*bears no relevance to the issue in the claim.*"

8. The Learned Master erred in considering the Witness Statement of Mark Brantley to arrive at the conclusion that Mr. Brantley was being

evasive (see paragraph 16 of the decision[2]) but failed to consider the Witness Statement of the Respondent which is relevant to the case at bar. At paragraph 6 of his Witness Statement the Respondent stated as follows: "*I am a shareholder of Ramsbury Properties Ltd, a family company which owns real estate in the island of Nevis.*" [see page 236 of the Appeal Bundle]. This statement is directly relevant to the case at bar as it provides an undisputed connection between the Ramsbury Properties case and the Respondent.

9. The Learned Master erred in failing to recognize that the Appellant on his application to amend his defence sought to add the defence of justification rather than change his defence as the Learned Master suggests at paragraph 22 of her decision.

10. The Learned Master erred in law and acted beyond her jurisdiction by making a finding of fact with respect to the defence of justification which was an issue she was not invited to adjudicate upon as it is a triable issue to be decided by a trial judge."

I propose to crystallise the grounds of appeal.

Grounds of appeal

[3] The grounds of appeal can helpfully be categorised as follows:

(a) Whether the learned master erred in the exercise of her discretion, and if so, whether this Court should exercise its discretion afresh;

(b) Whether Mr. Brantley should be granted leave to amend his defence;

(c) Whether this Court should stay the claim pending the hearing and determination of the Ramsbury Properties Limited appeal?

[4] I will now address the factual background.

Background

[5] On 8th December 2009, Mr. Cozier filed a claim against Mr. Brantley and another in which he alleged that Mr. Brantley had libelled him by republishing and reposting defamatory words about him (Mr. Cozier) on the internet. The alleged defamatory words were authored by another person and were allegedly repeated and expanded by Mr. Brantley through his email address. Mr. Brantley filed a

[2] At p. 7 of the Appeal Bundle.

defence to the claim in which he admitted to having made some comment on the original email and reposting the words but pleaded fair comment. There were several applications in relation to the claim that were dealt with at case management conferences and which do not concern the present appeal. Some of the rulings on the applications were disposed of by the Court of Appeal and the matter was remitted to the High Court for it to be proceeded with in accordance with the rules. It is noteworthy that a trial date which was set for June 2012 had to be vacated as a consequence of the applications that were engaging the attention of the court. There is at present no pre-trial review hearing or trial date set in relation to the underlying claim namely: Dwight Cozier v Mark Brantley et al.[3]

[6] In another High Court claim between the companies Ramsbury Properties Limited and Ocean View Construction Limited,[4] the trial judge made certain findings of fact allegedly about Mr. Cozier, which facts Mr. Brantley wished to rely on in the claim in the present proceedings for the purpose of pleading the additional defence of justification. In the Ramsbury Properties Limited claim, judgment had been rendered in favour of Ramsbury Properties Limited and an appeal against that judgment has been filed.

[7] On 7th March 2014, Mr. Brantley filed an application seeking permission to amend his defence to plead justification and to stay the claim pending the determination of the Ramsbury Properties Limited appeal.[5] He indicated that he wished to rely on the facts that were found by the judge. Mr. Cozier filed an affidavit in opposition to this application. Submissions were made to the learned master who gave a written judgment in which she refused to grant Mr. Brantley permission to amend his defence or to stay the underlying claim. Indeed, the learned master gave a full written judgment with which Mr. Brantley is dissatisfied. As alluded to earlier, he has appealed against the judgment and contends that the learned master made numerous errors in the exercise of her discretion by refusing to grant

[3] NEVHCV2009/0180.
[4] Ramsbury Properties Limited v Ocean View Construction Limited (NEVHCV2009/0111).
[5] NEVHCVAP2011/0020.

him leave to amend the defence and to stay the claim. He therefore seeks to have this Court exercise its discretion afresh and grant him leave to amend his defence so as to include justification; he also seeks a stay of the claim pending the outcome of the Ramsbury Properties Limited appeal.

[8] I propose now to address each ground of appeal seriatim:

Ground 1

Whether the learned master erred in the exercise of her discretion in refusing to grant Mr. Brantley leave to amend his defence and if so, whether this Court should exercise its discretion afresh

[9] Learned counsel Ms. Dia Forrester accepted that the appellate court will set aside the exercise of the discretion of a learned master and exercise its own discretion only if:

> "… the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and many therefore be said to be clearly or blatantly wrong."[6]

[10] In her written submission Learned counsel Ms. Forrester stated that the master, in dealing with Mr. Brantley's application to amend his defence and for a stay of proceedings, made several errors, including the following: (a) she gave too little weight to the relevant factors that govern the exercise of her discretion as stated in rule 20.1(3) of the Civil Procedure Rules 2000 (as amended) ("CPR 2000"), and instead gave too much weight to irrelevant factors and considerations and exceeded her jurisdiction; (b) gave too much weight to the provision of the overriding objective for matters to be dealt with expeditiously and failed to balance that provision against the other factors of the overriding objective; (c) made

[6] Sir Vincent Floissac CJ in Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 at 190-191.

several findings of fact which were not within her jurisdiction to make but were properly to be decided by the trial judge; (d) erred in relation to the legal principles applicable to several aspects of the application before her. Ms. Forrester submitted that as a result of the various errors and the degree of those errors made by the learned master, all of which are discussed below, the decision of the learned master exceeded the generous ambit within which reasonable disagreement is possible and is therefore clearly and blatantly wrong. Consequently, this Court ought to exercise its discretion afresh.

[11] Ms. Forrester reminded the Court that rule 20.1 of CPR 2000 sets out the circumstances in which the court may permit a change to be made to a statement of case, likewise, the factors that the court must take into consideration on an application for a change to be made to a statement of case. She indicated that the rule provides as follows:

> "20.1 – (1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.
>
> (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.
>
> (3) When considering an application to amend a statement of case pursuant to Rule 20.1(2), the factors to which the court must have regard are –
>
> (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."

[12] Next, Ms. Forrester stated that at common law, reflected in Steward v North Metropolitan Tramways Company,[7] the general principles with respect to amending a statement of case are stated by Lord Esher MR to be as follows:

> "The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made."[8]

[13] Learned counsel Ms. Forrester said that at paragraph 20 of the judgment, the learned master started her analysis of Mr. Brantley's request to amend his defence on an incorrect premise, as it is there stated that:

> "The Court has a general discretion to permit amendments where it is just and proportionate[2] [*Blackstone Civil Practice Page 437 Para 31.4*]. In making an order for the amendment of a defence the court need [sic] to have regard to the public interest in enabling the defendant to deploy the defences it wished to use, while fulfilling the overriding objective …"

None the factors provided for in rule 20.1(3) of CPR 2000, nor the overriding objective of CPR 2000 asserts what the learned master stated as the scope for the exercise of her discretion. CPR 2000 sets out the factors the court is to consider when determining whether to grant permission to amend a statement of case (rule 20.1(3)). She submitted that CPR 2000 requires an examination of the circumstances that relate to the claim that was before the learned master and not a consideration of how the general public will be affected by either granting or refusing Mr. Brantley's application to amend his defence.

[14] Ms. Forrester stated that the principles imported by the learned master into her consideration of Mr. Brantley's application went beyond the provisions of the law. The general principles at common law and rule 20.1(3) of CPR 2000 are similar in that both require the court to consider the prejudice to the parties, that is, whether there is any injustice that arises from permitting the amendment and likewise,

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[7] (1886) 16 QBD 556.
[8] At p. 558.

whether or not such injustice and or prejudice can be compensated for in costs. The learned master, in the exercise of her discretion, failed to consider the issue of whether or not any alleged prejudice that can arise to Mr. Cozier may be compensated adequately in costs. The failure of the learned master to examine compensation as distinct from the prejudice led to an erroneous exercise of discretion exceeding the generous ambit of reasonable disagreement and is clearly wrong. Accordingly, this Court must now exercise its discretion afresh. Ms. Forrester argued that an award in costs will be sufficient to compensate Mr. Cozier for any prejudice that may be caused by permitting Mr. Brantley to amend his defence.

[15] Arguing that the master should have granted Mr. Brantley leave to amend his defence, Ms. Forrester said that whether the amendment proposed to be made by Mr. Brantley to his defence stems from findings of fact that came to light some eight (8) months after the appellant filed his defence and after case management was completed in the claim herein, the facts on which he seeks to rely provide a complete defence to the cause of action alleged by Mr. Cozier and causes no injustice and or injury to the respondent; it permits the court to dispose of all true issues arising between the parties. She stated that in relation to the amendment of pleadings, the dicta in Worldwide Corporation Limited v GPT Limited, GPT (Middle East) Limited[9] is instructive:

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided."[10]

[9] 1998 WL 1120764.
[10] At p. 10.

[16] Ms. Forrester said that at paragraph 22 of the judgment, the learned master incorrectly stated that Mr. Brantley is seeking to change his defence to justification. At no stage in the application and or submissions before the learned master did he assert that he wished to abandon his defence of fair comment (as already pleaded in his defence) in order to plead justification. Also, the learned master gave too much weight to irrelevant factors which included that Mr. Brantley has pleaded fair comment which is also a complete defence to a defamation claim. Neither rule 20.1(3) of the CPR nor the general principles at common law indicates that having already pleaded a defence is a basis on which he may be precluded from seeking to amend his defence at a subsequent date to include an additional defence. Notably, the learned master did not consider how the absence of a plea of justification in the defence would be prejudicial to him in light of the provisions of rule 10.3 of CPR 2000 and the need for the true issues between the parties to be determined. It must be borne in mind that Mr. Brantley submitted a draft of the proposed amended defence for consideration. The draft amended defence clearly shows that there was no abandoning of the plea of fair comment but only the adding of a plea of justification. Additionally, the proposed draft defence satisfied the conditions of pleadings as required in Part 10 of CPR 2000, being fully particularised, illustrating it is a significant inclusion to his case.

[17] Further, in considering Mr. Brantley's request to plead and amend his defence in order to include justification, the learned master examined the defence of justification, its principles and the merits of the defence of justification with respect to the case at bar. In considering the principles of justification, the learned master acted beyond her jurisdiction by making findings of fact and law with respect to the defence of justification when she concluded that the defence of justification was not available to Mr. Brantley on the basis that the facts he wished to rely on came to his attention subsequent to the alleged defamatory words being published. Those findings of fact are triable issues and ought properly to have been left for determination at trial. Also, it was not within the jurisdiction of the learned master to conclude that the defence of justification would not be available to Mr. Brantley

as that is a matter for the trial judge. Further, the conclusion of law of the learned master was based on an incorrect statement of how the defence of justification is to be applied. The learned master incorrectly stated that '[f]acts 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'[11]. Mr. Brantley in his application to amend his defence (to include justification) has put forward evidence in support of that plea which came to his attention after the alleged defamatory remarks were published. The position adopted by the learned master runs contrary to the established principle that where evidence to support a plea of justification arises subsequent to the alleged defamatory event, it is still possible to rely on the defence. Lord Justice Brooke states the following in Chase v Newsgroup Newspapers Ltd[12]:

> "[53] There has for a long time been a rule that if a publication contains general aspersions on a claimant's character, a plea of justification may include reliance on subsequent events if they happen within a reasonable time from the date of publication (see *Maisel v Financial Times Ltd* [1915] 3 KB 336), [1914-15] All ER Rep 671. This rule was vividly restated by Lord Denning MR in *Cohen v Daily Telegraph Ltd* [1968] 2 All ER 407, [1968] 1 WLR 916, at p 919F-G of the latter report:
>
> > '... if a libel accuses a man of being a "scoundrel", the particulars of justification can include facts which show him to be a scoundrel, whether they occurred before or after the publication.'
>
> [54] As Pickford LJ observed in *Maisel* at p340, however, the question whether it is admissible to rely on subsequent events in support of a plea of justification must depend on the nature of the libel and also on the nature of the subsequent acts." (Emphasis added).

[18] Next, Ms. Forrester turned her attention to the master's treatment of delay. She submitted that in considering delay in the context of the administration of justice and in keeping with the overriding objective of the court to deal with matters expeditiously (at paragraph 25 of the judgment), the learned master erred in the exercise of her discretion in deciding whether or not to grant Mr. Brantley

[11] para. 22 of learned master's judgment.
[12] [2002] EWCA Civ 1772.

permission to amend his defence. As is evident from the chronology and case history above, he has not engaged in any delay by seeking adjournments or requesting any extension of time to comply with any rule or order of the court. In the circumstances of this case, the learned master did not give ample weight to the history of the case and how that affected Mr. Brantley's ability to pursue an application to amend his defence – most circumstances of which were entirely outside of the control. It is grossly unfair for the learned master to have ignored such facts and in turn penalise him for the matter not having proceeded expeditiously by denying his application to amend his defence. There has been neither a lack of vigour nor a relaxed and complacent attitude by him in defending the claim brought against him. That error of the learned master exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong, argued Ms. Forrester.

[19] Ms. Forrester emphasised that this request for an amendment is extremely important in light of the provisions of rule 10.7 of CPR 2000 which precludes him from relying 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. If the Court of Appeal confirms the findings of fact made by the judge in the Ramsbury Properties Limited case, Mr. Brantley can only rely on those facts if those facts are pleaded in his defence. She reminded this Court that the learned judge in the Ramsbury Properties Limited case makes several findings of fact directly related to the alleged defamatory publication wherein Mr. Cozier admitted to being the owner of the company as stated in the alleged defamatory publication. The learned master erred in stating, at paragraph 28, that the Ramsbury Properties Limited appeal, 'bears no relevance to the issue in the claim.' Ms. Forrester therefore contended that she exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. The connection between the two matters is obvious. Further, Ms. Forrester maintained that any decision of the Court in the Ramsbury Properties Limited appeal can be of

benefit to Mr. Cozier since allowing that appeal will strengthen his claim whilst dismissing that appeal will strengthen Mr. Brantley's defence. Specific facts were found in the Ramsbury Properties Limited case which makes the complete defence of justification available to Mr. Brantley. The Ramsbury Properties Limited case is under appeal and learned counsel Ms. Cozier's argument is that by virtue of that appeal, Mr. Brantley ought not to be permitted to rely on those facts of the Ramsbury Properties Limited case and that a stay of proceedings ought not to be granted pending the outcome of the appeal in the Ramsbury Properties Limited case. Ms. Forrester said that for the Court to accept that submission would require the Court to turn a blind eye to the facts revealed by a decision of this very Court that are material to and directly impact the case at bar. To do so, Ms. Forrester submitted, would be a serious threat to the integrity of the Court.

[20] Turning to the issue of promptitude and considering whether or not Mr. Brantley was prompt in applying to amend his defence, the learned master, in exercising her discretion, gave too little weight to the history of the case. Mr. Brantley filed his defence on 13th January 2010 however, he sought to amend it in March 2014. That may at first appear to be an inordinate length of time and contrary to what is to be considered prompt. However, as the chronology and case history of this matter indicate, between 2010 to 2014 there have been several applications all within the letter of the law and none of which was deemed frivolous. Mr. Cozier's appeal of the strike out decision of Master Lanns took approximately 11 months to be completed. The subject matter of those applications and the appeal warranted that the appellant refrain from seeking to amend his defence since it may not have been necessary to do so, if the words were found not to be defamatory and or the claim was struck out in full and or the portion of the claim which was struck out was reinstated on appeal. By raising the preliminary issue of authorship and filing the strike out application, he sought to pursue avenues available to him to establish his legal rights. These steps were bona fide and cannot be considered as delay tactics for which he should be penalised. The Court took 20 months after

the hearing on the preliminary issue of authorship before delivering its decision. Further, a decision was delivered on his application to strike out the claim just over 7 months after the application was filed. The history of this case is very important in any consideration of the timing of the appellant's request to amend his defence.

[21] Ms. Forrester submitted that the decision of the learned master denies Mr. Brantley of not only the opportunity of putting forward the defence of justification which can be a complete defence to the claim, but if not found to be a complete defence, there may be sufficient partial justification to reduce any award of damages against the appellant significantly – all done by the learned master applying incorrect principles of law. The learning in Gatley on Libel and Slander[13] is particularly instructive on how the Court is to treat substantial justification. Paragraph 11.9 states as follows:

> "Some leeway for exaggeration and error is given by the defences of fair comment and qualified privilege. However, for the purposes of justification, if the defendant proves that 'the main charge, or gist, of the libel' is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable. 'It is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified.'" (Emphasis added)

[22] Ms. Forrester sought to highlight the connection between the Ramsbury Properties Limited case and the claim, since the findings of fact in the former case is forming the basis for the plea of justification. The connection between the two cases is set out at paragraphs 7 and 8 of Mr. Brantley's affidavit filed 7th March 2014. Mr. Brantley maintains that the conduct of Mr. Cozier and the ruling of the learned judge in the Ramsbury Properties Limited case is evidence that substantiates that the alleged defamatory remarks were based on truth. Mr. Cozier goes to pains to say that the Ramsbury Properties Limited case has no bearing on the case at bar because it involved two different companies that are not

[13] Patrick Milmo, QC and W. V. H. Rogers: Gatley on Libel and Slander (10th edn., Sweet & Maxwell 2004) para. 11.9.

parties to this matter. While that may be so, the Rambsury Properties Limited case involved Mr. Cozier and he filed a witness statement in that case in which he indicated that he is a shareholder in Ramsbury Properties Limited. Also, there were certain findings of fact in relation to Mr. Cozier which directly impact the issues in the case at bar, particularly as it relates to the Brian Newman posting which it is alleged that Mr. Brantley reposted. For example, whether Mr. Cozier benefited as owner of Pinney's Beach Hotel (as alleged by "Brian Newman") or as owner of Ramsbury Properties Limited does not add to the sting of the charge in any way. Therefore, the charge in the post under the name "Brian Newman" which it is alleged Mr. Brantley republished (which is denied) is true. Further, the statement of Brian Newman that Mr. Cozier is making 'thousands from the Nevis treasury' does not add to the sting of the charge and in its context, it would be clear to any reasonable reader that it did not affect the gist of Brian Newman's statement. It is an undisputed fact that the workers stayed at the building that was owned by Ramsbury Properties Limited. What the appellant is asking the Court to do is to permit him to amend his defence so that he can rely on the facts revealed by the Ramsbury Properties Limited case and have that triable issue determined by pleading justification.

[23] It may be at trial that the trial judge has a view different to the appellant as to the impact of the facts in the Ramsbury Properties Limited case on the case at bar but that is a matter for the trial judge who will be responsible for assessing all the facts, applying the relevant law and arriving at a decision in the case at bar. It would be grossly unfair to him if at this preliminary stage he is denied the opportunity to put facts that he says is critical to his case before the trial judge simply because the evidence to substantiate those facts became known to him after the filing of his defence, which is a matter that only the trial judge can decide. Ms. Forrester implored the Court to permit Mr. Brantley to include in his defence all the matters that the appellant believes are relevant to his case and the trial judge will determine the weight and value of the evidence.

[24] Prince Radu of Hohenzollern v Houston and Another[14] is authority for the proposition that a plea of justification should only be made if one has evidence to substantiate that plea. Mr. Brantley asserts that he has evidence to substantiate a plea of justification in light of the Ramsbury Properties Limited case and wishes to now include that in his defence to Mr. Cozier's claim. Additionally, as indicated in Chase v Newsgroup Newspapers Ltd, a trial judge must consider the nature of the defamatory statement and the nature of the subsequent acts and whether or not the defence of justification will be accepted – the learned master was not requested to determine the triable issue of whether Mr. Brantley could rely on evidence arising subsequent to the alleged defamatory event to support a plea of justification but nevertheless did so.

[25] Ms. Forrester further submitted that there is no complete bar to the plea of justification where a defendant seeks to rely on subsequent acts. In any event, the applicability of the evidence in support of a plea of justification which arises subsequent to the alleged defamatory event is an issue to be determined by a trial judge and it was beyond the jurisdiction of the learned master to adjudicate on that issue at the stage of an interlocutory application. None of the factors to be considered by the learned master in an application to amend a defence required the determination of triable issues and or the merits of the defence to the extent where the learned master conducts a mini-trial and adjudicates on triable issues. Rule 20.1(3) of CPR 2000 does not stipulate that Mr. Brantley needs to have a realistic prospect of success in order to be granted leave to amend his defence to include an additional element to his defence. As a result of that error or the degree of those errors, the learned master's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. Mr. Brantley ought to be permitted to amend his defence to include the plea of justification for determination by the trial judge which will permit him the opportunity to rely on all the defences available to him at trial and which amendment will cause no injustice or injury to Mr. Cozier.

[14] [2009] EWHC 398 (QB).

[26] Ms. Forrester also said that the learned master again erred in the exercise of her discretion in applying the overriding objective of CPR 2000, which objective requires that parties are to be kept on an equal footing, so far as is practicable. The learned master gave too much weight to the need for matters to be dealt with expeditiously without more. The other elements of the overriding objective were not considered and having failed to consider those elements and therefore, the overall administration of justice, the decision of the learned master exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. Though the overriding objective of CPR 2000 requires that cases be dealt expeditiously, it also, in that same breath, says "fairly". Fairness requires that the court to conducts a balancing exercise and weighs the consequences of any decision it may make. The provisions of overriding objective, just like rule 20.1(3) of CPR 2000, ought to be evenly balanced as no one factor, as was done by the learned master in this case with respect to promptitude or expeditiousness, should be given greater weight than the others. The provisions of CPR 2000 are meant to ensure that no party obtains an unfair advantage over the other and any attempt to put parties on an equal footing must involve a consideration of what are the true issues for determination between them. Justification is a live issue in the defence of the alleged the defamatory remarks and Mr. Brantley ought to be permitted to plead it in his defence in the circumstances of this case.

[27] Learned counsel Ms. Angela Cozier accepted the pronouncements made by Sir Vincent Floissac CJ in Dufour v Helenair Corporation Ltd[15] when he stated that the Court of Appeal will set aside the discretion of a judge and exercise its own discretion only if:

> "… the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the

[15] (1996) 52 WIR 188 at 190-191.

generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[28] She also referenced the case of The Attorney General et al v Geraldine Cabey,[16] in which Gordon JA referred to the dicta of Viscount Simon LC in Charles Osenton & Co. v Johnston,[17] where the Lord Chancellor said:

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."[18] (Emphasis added).

Further, and in the same case, Gordon JA endorsed the dicta of Asquith LJ in Bellenden (formerly Satterthwaite) v Satterthwaite,[19] which was approved and adopted by the House of Lords in G v G,[20] as follows:

> "We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

[29] Ms. Cozier stated that it is worthy of note that in the case of The Attorney General et al v Geraldine Cabey, Gordon JA concluded that:

> "I am not satisfied that either condition 1 or 2, as articulated by Sir Vincent, has been met in this case. I would dismiss the appeal with costs in the sum of $2500.00 to the respondent."[21]

[30] Learned counsel Ms. Cozier agreed with Ms. Forrester that the Court of Appeal will only set aside the discretion of the trial judge if the two conditions above are

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[16] MNIHCVAP2008/0008 (delivered 12th January 2009, unreported).
[17] [1941] 2 All ER 245.
[18] At p. 250.
[19] [1948] 1 All ER 343 at 345.
[20] [1985] 2 All ER 225 at 228.
[21] At. para. 17.

cumulatively fulfilled. She posited that Mr. Brantley therefore faces an uphill battle in this appeal from the start, as Sir Vincent Floissac CJ's dicta in the case of Dufour v Helenair Corporation Ltd[22] does very little to assist the appeal in any way, as it provides compelling authority why the Court of Appeal will not easily interfere with the discretion of the court at first instance.

[31] Mr. Cozier took issue with Mr. Brantley's submissions that the learned master took into account irrelevant matters. Mr. Brantley listed ten factors which he says are irrelevant factors which the learned master took into account in the exercise of her discretion to refuse to grant him leave to amend his defence. Ms. Cozier submitted that the matters that were taken into consideration are very relevant in coming to her decision to refuse to grant the appellant permission to amend his defence to include a plea of justification. In this regard the case of Chase v Newsgroup Newspapers Ltd is particularly instructive and the learned master was well within the ambit of her discretion when she indicated the defence of justification was not available to Mr. Brantley because he would have to prove to the court that the statements in the Ramsbury Properties Limited case that he alleged availed him of a plea in justification were available to him at the time of publication of the words complained of. This is not the case and he cannot, therefore, rely on Chase v Newsgroup Newspapers Ltd in support of his appeal, as he appears to be doing because any application to amend a defence to include a plea of justification made 4 years after a defence of fair comment was made, cannot in any way be considered to have been made 'within a reasonable time from the date of publication' within the meaning of the dicta of Lord Brooke in that case.

[32] Indeed, in her analysis of the pleadings before her, the learned master found that 5 years after the publication of the words complained of, and 4 years after the filing of the defence, was not a reasonable time, and that Mr. Brantley lacked promptitude, before concluding that to allow the appellant to amend his defence at

[22] At. pp. 190-191 (set out above at para. 27 of this judgment).

such a late stage in the proceedings would severely prejudice Mr. Cozier. Such an exercise of discretion should not be interfered with by this Court and Mr. Brantley's appeal against the learned master's decision should be therefore refused.

[33] Learned counsel Ms. Cozier stated that indeed, the factors which must be considered by learned master in exercising her discretion, are clearly set out in rule 20.1(3) of CPR 2000, namely:

1. promptitude;
2. prejudice to the applicant if the application is refused;
3. prejudice to the other parties if the changes were permitted;
4. whether any prejudice to any of the parties can be compensated by costs and or interest;
5. whether the trial date or any likely trial date can still be met if the application is granted; and
6. the administration of justice.

[34] Ms. Cozier stated that it is the lack of promptitude displayed by Mr. Brantley, which, in the learned master's opinion, represented severe prejudice to Mr. Cozier herein and which was a reason why the learned master consequently refused to grant permission to amend his defence. The discretion was correctly and properly exercised by the learned master in accordance with the guidelines proposed in rule 20.1(3) of CPR 2000, and should not be interfered with by the this Court. Indeed, the learned master dedicated a substantial portion of her judgment to any possible prejudice a refusal of permission to amend the defence would have on the appellant himself and balanced her analysis at paragraph 25 of her judgment where she held that '[t]he 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.' In this regard, the learned master's exercise of her discretion cannot be said to be plainly wrong.

[35] Moreover, in the exercise of her discretion the learned master was bound to give effect to overriding objective of the Rules as set out in rule 1.1 of CPR 2000 when exercising any discretion or interpreting any rule.

[36] In this regard, rule 1.1 of CPR 2000 provides that:

> "(1) The overriding objective of these Rules is to enable the court to deal with cases justly.
> (2) Dealing justly with the case includes –
> (a) ensuring, so far as is practicable, that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with cases in ways which are proportionate to the –
> (i) amount of money involved;
> (ii) importance of the case;
> (iii) complexity of the issues; and
> (iv) financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[37] Accordingly, maintained Ms. Cozier, it cannot be said that the learned master took into account irrelevant factors as posited by Ms. Forrester. Learned counsel Ms. Cozier said that Ms. Forrester indicated a number of purported relevant facts which she asserts that the learned master failed to take into account in her decision not to grant him leave to amend his defence at this stage, however, for the avoidance of doubt, the relevant factors which the learned master was required to take into consideration, and which she examined and analysed in paragraphs 16-24 of her judgment are those set out in rule 20.1(3), rule 10.7 and rule 69.3 of CPR 2000. The appeal cannot succeed on this ground.

Discussion and Analysis

[38] It is common ground that this is an appeal against the learned master's exercise of discretion. I now propose to deal with the first ground of appeal.

[39] I agree with both learned counsel that in order for this Court to be able to interfere with the exercise of discretion by the lower court it must be satisfied that not only the judicial officer in the exercise of his or her discretion committed an error of principle and that as a result of that error or degree of error of principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. It is the law that the applicant must satisfy the Court of Appeal of both conditions in order for the Court of Appeal to be able to interfere with the exercise of the judge's discretion. Nothing less will suffice. It is not open to an appellate court to set aside a decision which is based on the exercise of discretion by a court of first instance on the mere basis that the appellate court may have exercised that discretion differently.[23]

[40] In relation to the reference to the overriding objective, there is no doubt that it was clearly within the remit of the learned master to take into consideration the overriding objective of CPR 2000 in the seeking to determine whether to grant leave to amend the defence. It seems to be a fair criticism, given all of the circumstances, to assert that the elements which constitute the overriding objective were not all addressed. The master intended to utilise the overriding objective as one matter in coming to her decision.

[41] It does appear however that the learned master paid quite a lot of regard to the need to deal with the case expeditiously.

[42] It does not appear that the learned master paid regard to the other relevant factors of the overriding objective. For example, there was no explicit reference to the need to put the parties on equal footing.

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[23] See: Charles Osenton & Co. v Johnston [1941] 2 All ER 245; Bellenden (formerly Satterthwaite) v Satterthwaite [1948] 1 All ER 343; Tanfern Ltd. v Cameron-Macdonald and Another Practice Note [2000] 1 WLR 1311; The Attorney General et al v Geraldine Cabey (MNIHCVAP2008/0008 (delivered 12th January 2009, unreported)).

[43] The court needs to deal with cases proportionately, taking into consideration the amount of money involved; the complexity of the issues and the financial position of the parties.

[44] However, it is noteworthy that, the rule does not indicate how the factors should be weighted. Factors listed at (a) to (f) must all be taken into consideration in addressing the overriding objective. The reason for the master's omission to do so is in large part based on the fact that the evidential basis for making those determinations was not provided to her. It is not fair to criticise her approach.

[45] I will now take a look at the factors and the master's observations in relation to them to determine whether there is any merit in the complaints.

[46] However, in order to be able to determine whether the learned master can be faulted for the manner in which she exercised her discretion it is important to briefly advert to the relevant factors which are connected to the amendment of a statement of case or defence. There is no disputation in relation to the pre-requisites of rule 20.1(3) of CPR 2000 and as a consequence there is no need to repeat them.

Promptitude

[47] I commence by examining promptitude as stated in rule 20.1(3)(a) – how soon after Mr. Brantley applied, after becoming aware that the change was one he wished to make, is a material factor which the learned master quite properly took into account. The High Court judgment in the Ramsbury Properties Limited case was rendered in 2011 and Mr. Brantley applied in 2014 to amend his defence. He stated that he was aware that the judgment was rendered in 2011 and the master said that he was being evasive. It seems to me that it was clearly open to the learned master to find that his disclosure of the date on which he became aware ought to have been more fulsome. The master was correct in holding that three years after becoming aware of the facts upon which he intends to rely was not prompt. I am of the considered view that the learned master

cannot be faulted for her observation in relation to the ruling of the application to amend after the judgment in the Ramsbury Properties Limited case. A party who wishes the court to exercise its discretion in its favour must provide the court with the relevant information in order for the court to be able to determine the issue. It is not sufficient for Mr. Brantley to have simply said that sometime in October 2011 the judgment was rendered. It was open to the learned master to observe that he was being evasive.

Prejudice to the respondent

[48] The learned master was quite within her discretion to take into account the likely prejudice to Mr. Cozier, if leave were to be granted to Mr. Brantley to amend the defence several years after the filing of the defence. It is likely that as stated, since learned counsel Ms. Cozier said that if leave to amend were to be granted to Mr. Brantley it may well result in Mr. Cozier having to amend his pleadings. It was clearly within the master's discretion to assess this matter in the exercise of her discretion and she cannot be faulted for her inclusion in this regard.

Prejudice to applicant

[49] From the judgment it does not appear that the learned master gave any consideration to the likely prejudice that would be occasioned to Mr. Brantley if leave to amend the defence so as to plead justification were to be refused. Mr. Brantley's complaint in this regard is well founded. The reason for the learned master's failure in this regard could well have been because the master concluded that the defence of justification was not available to Mr. Brantley since the matters on which he sought to rely post-dated the alleged defamatory words. One of the major foci of the learned master's exercise of discretion was that the defence of justification had to be considered at the time of the publication and cannot be based on subsequent facts. In so far as the learned master placed great emphasis on that view of the law, Mr. Brantley is correct in asserting that this is a matter for the trial and the master ought not to have taken this matter into account in deciding whether to exercise her discretion in his favour. It is important to

recognise that I have refrained from commenting on whether or not the view the master took of the law represents a correct statement of the law. The criticism that the learned master, in the exercise of her discretion, did not take into account the prejudice to the applicant if the application were refused has merit.[24] The learned master clearly took into account an irrelevant factor and this led her into committing an error of principle.

I turn now to the requirement of costs.

Whether any prejudice which Mr. Cozier may suffer if Mr. Brantley is allowed to amend his defence may be compensated in costs

[50] The learned master did not consider whether an award of costs to Mr. Cozier would suffice for any prejudice. Indeed rule 20.1(3)(c) requires consideration to be given to whether any prejudice to any other party can be compensated by the payment of costs. Even though an award of costs can be made, the question remains as to whether this is an appropriate case in which costs would be adequate given the totality of circumstances including the date of the filing of the claim, the date on which the new information became available, the date on which the judgment was rendered, and taking into account that it was three years after. The current jurisprudence indicates that a defendant will not be prejudiced if he can be adequately compensated in costs. It must be remembered that there is no date set for trial or pre-trial. The general rule is that in these circumstances where any potential prejudice can be compensated by an award of costs, the court should lean in favour of granting the amendment. In relation to the sub-issue of an award of costs, it is self-evident that the learned master omitted to take into account a relevant factor and therefore committed an error of principle in the exercise of her discretion.

I now turn to the other pre-requisite, namely the trial date.

[24] See CPR 20.1(3)(b).

Whether the trial date or any likely trial date can still be met

[51] It does not appear that there was any submission before the learned master on this limb and quite appropriately it was not considered by the learned master. There was no evidence of a likely trial date or eminent trial date before the learned master. Accordingly, the learned master cannot properly be faulted for not having considered this aspect of the rule. In any event there is no evidence before this Court which indicated that there is an eminent trial date.

The Administration of Justice

[52] There is no merit in the complaint that the administration of justice was required to be considered by the master and not just simply the interests of justice. In my view, this is all a question of semantics.

[53] Much of the other criticisms of the learned master's exercise of discretion are not well founded, in that regard I do not propose to deal with all of them in detail. It is important to note that the learned master's exercise of discretion in large part seemed to turn on the view that she took in relation to the plea of justification. Importantly, the master formed the view that Mr. Brantley could not seek to rely on facts which came to his knowledge subsequent to the publication of the alleged defamatory words in order to avail himself of the defence of justification. Without expressing any view on this aspect of the law, I agree with the complaint of learned counsel Ms. Forrester that this was clearly not a matter within the remit of the learned master. Also, I am satisfied that the findings of fact that were made in the Ramsbury Properties Limited 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.

Master's exercise of discretion

[54] It is clear that the learned master erred by taking into account irrelevant factors and failing to take into account relevant factors. Also, the decision that the learned master arrived at was not within the generous ambit within which reasonable

disagreement is possible and may therefore be said to be clearly wrong. It therefore falls to this court to exercise its discretion afresh.

Exercise of discretion afresh

[55] Bearing in mind all that I have stated above and taking into account the prerequisites of CPR 20.1(3), there is no denying that in determining whether to exercise its discretion so as to enable an amendment to be made, there are several factors that the Court must take into consideration. These include the justice to the parties; the legitimate expectation that the basis of a claim will not be fundamentally challenged at the last minute; the adverse effect on other litigants of lost judicial time; the stage reached in the proceedings; whether the other side can be adequately compensated in costs.[25] There is public interest in allowing a party to deploy its real case, provided it is not irrelevant and has a real prospect of success.[26] In Easton v Ford Motor Co. Ltd.,[27] the defendant, having defended the claim for five years, then applied to amend its defence. Although the claim was pending for a long time, it was nowhere near ready for trial. The Court of Appeal applied the rule in Clarapede & Co. v Commercial Union Association[28] and since the amendments did not cause injustice, as it did not raise any new evidence, it allowed the amendment. In exercising its discretion, the court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice to the other party and can be compensated in costs.

[56] In Clarapede & Co. Brett MR said: 'however negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment

[25] See George Allert (Administrator of the Estate of George Gordon Matheson, deceased) et al v Joshua Matheson et al (GDAHCVAP2014/0007 (delivered 24th November 2014, unreported)).
[26] Young (t/a Michael Graham Chartered Surveyors) v JR Smart (Builders) Ltd. (No. 1) (2000) LTL 7/2/00.
[27] [1993] 1 WLR 1511. See also Practice Direction 20(4) No. 5 of 2011 now contained in CPR 20.1(3) as amended by S.R.O. 14.
[28] (1883) 32 WR 262.

should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs …'

[57] In Charlesworth v Relay Roads Ltd. and Others[29] Neuberger J approved the above principle and held that it had a universal and timeless validity. In applying all of the above principles to this appeal I have no doubt that the justice of the case required that leave be granted to Mr. Brantley to amend his defence.

[58] For the sake of completeness, I must state that I agree with learned counsel Ms. Forrester that it was not open to the master to determine whether the defence of justification was available to Mr. Brantley. This is a matter that falls exclusively within the purview of the trial judge. At that stage, the only issue that fell to be determined by the master was whether leave should have been granted to amend the defence so as to plead justification.

Even though grounds 1 and 2 are interrelated, I will now address ground 2.

Ground 2

Whether Mr. Brantley should be granted leave to amend his defence

Appellant's Submissions

[59] It is clear that on an application to amend a defence the court seeks to do justice to the parties. Ms. Forrester submitted that in the circumstances of this case, it would be just to permit the amendment of the defence as sought by Mr. Brantley as to deny such an amendment would have the effect of shutting out the appellant from relying on facts that provide a complete defence to the claim. Further, to grant his application for leave to amend his defence does not cause any prejudice to Mr. Cozier. The matter has not been fixed for a pre-trial review and no trial date has been set. The trial window previously set at the case management conference stage for May 2012 was overtaken by events which included an appeal prosecuted by Mr. Cozier himself. The filing of an amended defence will not delay

[29] [2000] 1 WLR 230 at 235.

the trial in any way but will permit all issues for determination to be submitted to the court. Instead, allowing the amendment is in keeping with the overriding objective and the administration of justice.

[60] Moreover, Mr. Cozier suffers no prejudice if Mr. Brantley is allowed to amend his defence. At the very least he will not suffer any prejudice that warrants Mr. Brantley being denied permission to amend his defence. Definitely no prejudice that a cost award, as discussed previously, cannot compensate for. Additionally, the respondent is fully aware of the Ramsbury Properties Limited case and Ramsbury Properties Limited appeal and the progress being made to bring that appeal to completion. The respondent, as the majority shareholder of Ramsbury Properties Limited, is in a position to advise the court on the progress of the company's appeal.[30]

Respondent's Submissions

[61] Learned counsel Ms. Cozier stated that in the exercise of her discretion to refuse permission to the appellant to amend his defence, the learned master took into consideration rule 10.7 of CPR 2000 in paragraph 13(b) of her judgment. Rule 10.7 of CPR 2000 provides that a '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.' Learned counsel Ms. Cozier submitted that in the exercise of her discretion to refuse permission to the appellant to amend his defence, the learned master also took into consideration rule 20.2 of CPR 2000 which provides that '[t]he court may allow an amendment … 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.' (Emphasis added). Ms. Cozier complained that in the appeal at bar, Mr. Brantley is attempting to rely on purported findings made in a different

[30] See para. 6 of the respondent's witness statement dated 2nd April 2012, at p. 236 of the Appeal Bundle.

case for which different remedies were claimed between different parties, namely Ramsbury Properties Limited and Ocean View Construction Limited.

[62] Ms. Cozier submitted that the learned master clearly and correctly considered the law as it relates to changing statements of case, and so was well within the ambit of her discretion, and cannot be said to be plainly wrong, when she refused to grant permission for the appellant to amend his defence. For example, in paragraphs 16 and 17 of her judgment, the learned master considered the appellant's statement in his affidavit in support filed on 7th March 2014, to the effect that he did not remember when the judgment in the Ramsbury Properties Limited case that constitutes the basis for the proposed amendment to his defence was brought to his attention, but that he knew the judgment was issued on 3rd October 2011, and found the appellant to be 'evasive'. It is therefore submitted that the learned master cannot be said to be plainly wrong in then concluding reasonably that the appellant's attention was drawn to the judgment shortly after its issue date on 3rd October 2011, even though the appellant did not make his application to amend his defence until 7th March 2014, some 2 years and 6 months after, and over 2 years after the end of case management in the matter in March of 2012.

[63] Ms. Cozier therefore argued that the learned master in her judgment gave careful consideration to the law as it relates to changes to statements of case before she exercised her discretion in paragraph 25 of her judgment, to refuse permission to Mr. Brantley to amend his defence, and so cannot be viewed as exceeding the generous ambit within which reasonable disagreement is possible and cannot therefore be said to be clearly or blatantly wrong.[31]. Such an exercise of discretion lies within the boundaries referred to by Viscount Simon LC in Charles Osenton & Co. v Johnston above and should not be disturbed by the Court of Appeal.

[31] See judgment of learned master at pp. 1-12 of the Appeal Bundle.

[64] Learned counsel Ms. Cozier further submitted that the fact that the appellant's application to amend his defence came some 50 months after filing his defence is in and of itself sufficient ground for the refusal of permission by the court to allow Mr. Brantley to amend his defence at this stage, as this will clearly prejudice Mr. Cozier, and has already affected the trial dates of this matter, all of which were relevant considerations given appropriate weight by the learned master before exercising her discretion to refuse permission to the appellant to amend his defence.

[65] Ms. Cozier submitted that Mr. Cozier has already suffered delays for close to 5 years now as a result of consecutive applications made by Mr. Brantley, at significant costs to Mr. Cozier, and that the best compensation for such a delay is to have the matter put back for trial, as ordered by both the master and the Court of Appeal. Ms. Cozier said that the learned master properly exercised her discretion by finding that fair comment, which was already pleaded, provided a complete defence for the appellant for the reasons which she gave in paragraphs 22-24 of her judgment. Mr. Brantley should not be allowed to amend his defence so as to plead justification.

Analysis and Discussion

[66] It is apparent that in addressing ground 1 of necessity, ground 2 was also dealt with. However for the sake of completeness it is apposite to state that it is clear from everything that I have said in relation to the first ground that I have no doubt that Mr. Brantley should be granted leave to amend his defence in order to plead justification. The only question that leaves to be determined are upon what terms and conditions this Court should grant him leave to file an amended defence.

[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 Ramsbury Properties Limited case admitted that he was a shareholder in Ramsbury Properties Limited, which is a family company that owned the building in which the Mexican workers were accommodated, the

defence of justification may well arise for consideration; this may be so independent of the further findings of fact that were made by the judge in the Ramsbury Properties Limited case. It would be unjust not to permit Mr. Brantley to amend his defence in order to plead justification.

[68] A defence of justification is separate and distinct from that of fair comment. It is therefore no bar to an application for leave to amend in order to plead justification to deny the application on the basis that the defendant has already pleaded fair comment. The learned master erred in so doing. Based on the circumstances it is just that leave be granted to Mr. Brantley to amend his defence so as to plead justification. Accordingly, I will grant Mr. Brantley 14 days leave from the date of this judgment within which to file and serve his amended defence so as to plead the defence of justification.

I turn now to address the final ground of appeal.

[69] Ground 3

Whether this court should stay the claim pending the hearing and determination of the Ramsbury Properties Limited appeal
Appellant**'s** Submissions

Ms. Forrester indicated to the Court that Mr. Brantley seeks a stay of proceedings on the basis that it is in the interests of justice that a stay be granted. As matters currently stand, he cannot rely on the facts in the Ramsbury Properties Limited case as evidence since the judgment in the case was delivered after the defence was filed so that the facts of the case are not included in the defence.

[70] Firstly, it is noted the court's general powers of case management as stated in rule 26.1 of CPR 2000 include the power to 'stay the whole or part of any proceedings generally or until a specified date or event.'[32] Additionally, rule 26.2 of CPR 2000 indicates that '… the court may exercise its powers on an application or of its own initiative.' She reminded the Court that the stay sought by Mr. Brantley is not an

[32] CPR 26.1(2)(q).

indefinite stay. It is a stay pending the determination of the Ramsbury Properties Limited appeal. Therefore, it is entirely within the proper exercise of the powers of the Court to grant a stay of proceedings pending the conclusion of the Ramsbury Properties Limited appeal. At the last hearing of the Ramsbury Properties Limited appeal in June 2013, the transcript for that appeal was not yet available.[33] The respondent may contend that the Ramsbury Properties Limited case may proceed to the Privy Council but that cannot be a bar to granting the stay sought by Mr. Brantley. If the case proceeds to the Privy Council, the appellant may file an application to extend the stay pending the outcome of the Privy Council decision. It is clearly within the power of the Court to grant a stay until a specified event.

[71] Ms. Forrester submitted that the learned master erred in principle in not dealing with those important matters as raised and consequently failed to exercise a proper judicial discretion. Consequently, this Court should find it sufficient to exercise its own discretion on this appeal and to favourably consider Mr. Brantley's application to amend his defence and for a stay of proceedings. Consequently, Ms. Forrester argued that the case at bar is one where, in light of the dicta in the case of Re Barings plc and Others (No.2),[34] the court should grant a stay of proceedings as to allow the case to proceed without a final determination of the Ramsbury Properties Limited appeal would threaten the integrity of the Court. In the circumstances, it is in the interests of justice that the Court exercises its discretion afresh and stays the current proceedings pending the outcome of the Ramsbury Properties Limited appeal. The effect of granting a stay as sought by Mr. Brantley is that the status quo would be preserved in the interests of justice until the Ramsbury Properties Limited appeal is determined.

[72] In further support of her contention, Ms. Forrester said that the learned master erred in the exercise of her discretion in refusing to grant the stay as requested by

[33] See pp. 225-226 of the Appeal Bundle.
[34] [1999] 1 All ER 311.

Mr. Brantley. The learned master gave no consideration to the fact that a stay of proceedings was previously granted by the learned Master Lanns, which stay was set aside by the Court of Appeal as the appellate court found that learned Master Lanns erred as she did not permit the litigants to make representations with respect to whether or not a stay should have been granted. Consequently, the appellant was required to make a formal application for a stay, subsequent to the decision of the Court of Appeal to set aside the stay granted by learned Master Lanns. That fact must be considered when deciding whether or not there has been a delay in the appellant seeking a stay and the proper exercise of the learned master's discretion in the circumstances of this case. The case of Re Barings plc is instructive on the principles to be applied by the Court on an application for a stay of proceedings. At pages 335-336 of Re Barings plc the following is asserted in relation to a court deciding to stay proceedings and its inherent jurisdiction to protect the administration of justice:

> "The basis upon which the court can interfere, by granting a stay of proceedings, is to protect its own process from abuse. …
>
> "The overriding consideration … is the need to preserve public confidence in the administration of justice. The court is entitled – indeed bound – to stay the proceedings where to allow them to continue would threaten its own integrity. In the words of Lord Diplock, proceedings should be stayed where to allow them to continue would bring the administration of justice into disrepute among right thinking people.
>
> "Right-thinking people will not rush to a conclusion that – in refusing to stay the disqualification proceedings – the court is allowing its process to be used as an instrument of oppression, injustice or unfairness – in short, that the process of the court is being abused – without taking care to understand the nature of the SFA proceedings and of the present disqualification proceedings and the interrelation between them."

Respondent's Submissions

[73] Ms. Cozier reminded the court that Ms. Forrester contends that the learned master was wrong in refusing the application for stay of proceedings of the substantive claim herein on the ground (as stated in paragraph 27 of her judgment) that the

Ramsbury Properties Limited appeal 'bears no relevance to the issue in the claim'. Ms. Cozier asserted however that the learned master arrived at this conclusion after considering a number of factors. First of all, the learned master was of the view that since she had refused the application for leave to amend the defence, the accompanying application for stay of proceedings of the substantive claim, which was dependent on the court granting the application to amend the defence in line with the judgment in the Ramsbury Properties Limited case, would fall away and be rendered 'otiose'.

[74] Secondly, the learned master stressed that, in any case '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', and that accordingly, for that reason and the other reasons as set out in paragraph 27 of her judgment, it would be unfair to the respondent to stay the proceedings in the substantive claim pending the determination of the appeal in the Ramsbury Properties Limited case. Accordingly, it is clear that the learned master did not err in the exercise of her discretion in this respect and so her decision in this regard should not be disturbed by the Court of Appeal. In this regard, the case of Steward v North Metropolitan Tramways Company[35] does not assist Mr. Brantley in the appeal at bar, as it is clear from her careful analysis of the circumstances in this case that the learned master was correct in finding at paragraph 25 of her judgment that Mr. Cozier would be severely prejudiced if an amendment to the defence, to add a complete new defence, was allowed at this late stage.

[75] In the circumstances, Ms. Cozier advocated that the Court should, for the reasons above, dismiss the appeal brought by the appellant against the decision of the learned master dated the 9th October 2014, and for a stay of proceedings pending the outcome of the appeal in the Ramsbury Properties Limited case, and award costs against the appellant in favour of the respondent.

[35] (1886) 16 QBD 556.

Discussion and Analysis

[76] It is the law that the grant of a stay is discretionary. The learned master was of the view that the refusal to grant the application to amend the defence rendered the application for the stay of proceedings otiose. I have already concluded that the master erred in refusing to grant Mr. Brantley leave to amend his defence. However, the learned master correctly refused to grant a stay on other bases.

[77] Having concluded that the learned master erred in principle and exercised her discretion improperly, it therefore falls on this court to exercise its discretion and determine whether a stay of the underlying claim should be granted pending the determination of the appeal in the Ramsbury Properties Limited case.[36]

[78] It is common ground that an appeal has been filed in relation to the first instance decision in the Ramsbury Properties Limited case. There is no indication as to the status of that appeal or the likely date by which that appeal will be heard. In any event, it would yield injustice if this Court were to stay the underlying claim so as to await the determination of the Ramsbury Properties Limited appeal, the hearing date of which is uncertain. It is noteworthy that in considering whether to grant the stay, the learned master cannot be faulted for analysing the possibilities that are likely to occur if the Ramsbury Properties Limited case were to proceed on appeal. Indeed, the master was quite right in observing that the claim in this appeal has been in the system since 2009 and that appeals to the Court of Appeal are usually protracted due to administrative difficulties in preparing the transcripts in a timely manner bearing in mind that the Ramsbury Properties Limited decision has been appealed. It is also true that there is the likelihood of further appeals against any decision that the Court of Appeal may render in the Ramsbury Properties Limited case to stay the claim herein could well lead to a further protraction. 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

[36] See CPR 26.1(2)(q).

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 Limited 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 Beach 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 building that is owned by Ramsbury Properties Limited. It is also of note that the Managing Director of Ramsbury Properties Limited was a Mr. Carter who was also the Managing Director of Pinneys Beach Hotel.

[80] Even in the absence of the findings of fact, Mr. Brantley may well be in a position to plead justification based on Mr. Cozier's own evidence. Based on everything I have said, there is no doubt that Re Barings plc is very distinguishable from the underlying claim that forms the basis of this appeal.

[81] Equally, I am far from persuaded, as argued by Ms. Forrester, that the interests of justice require that a stay of the claim be granted pending the hearing and determination of the Ramsbury Properties Limited appeal. There is no basis for the Court to conclude that to allow the underlying claim to proceed would threaten the court's integrity. I am not of the view that in refusing to grant the stay would in effect bring the administration of justice into disrepute. To the contrary, to stay the matter could well result in the underlying claim being protracted unduly and this

would offend the spirit of the law which requires justice to be administered timely and fairly and effectively.[37]

[82] The justice of the claim cries out for it to be heard. It is clear that the learned master came to the correct conclusion in dismissing the application for the stay but did so for the wrong reasons. This ground of appeal fails.

I turn now to the issue of costs.

Costs

[83] Insofar as leave has been granted to Mr. Brantley to amend the defence, Mr. Cozier ought to be compensated in costs for the likely prejudice that would be occasioned to him, and the appropriate order is that he be granted costs of $2,000.00 to be paid by Mr. Brantley.

[84] In view of the totality of the circumstances, I would make the following orders:

(1) Mr. Brantley's appeal against the judgment of the learned master is allowed. He is granted 14 days leave from the date of this judgment to file and serve an amended defence so as to plead the defence of justification.

(2) Mr. Cozier is granted 21 days leave thereafter, if necessary, to file and serve an amended reply.

(3) Mr. Brantley's application for the stay of the claim NEVHCV2009/0180, is refused.

(4) The case is remitted to the High Court to be dealt with in accordance with the rules of procedure.

(5) Mr. Cozier shall be granted costs of $2,000.00 to be paid by Mr. Brantley.

[37] See the overriding objective of CPR 2000.

The Court gratefully acknowledges the assistance of learned counsel.

[Sgd.]
Louise Esther BIenman
Justice of Appeal

I concur.

[Sgd.]
Dame Janice M. Pereira, DBE
Chief Justice

I concur.

[Sgd.]
Davidson Kelvin Baptiste
Justice of Appeal