BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. CV 1563 of 2014

BETWEEN:

STEVE STRAUGHN **CLAIMANT**

AND

DAVID CORBIN **DEFENDANT**

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 20 June 2019

The Claimant in person.

Mr. Jared Richards in association with Ms. Gayl Scott for the Defendant.

DECISION

INTRODUCTION

[1] This is a defamation claim. Before me are two applications which were filed during the course of the proceedings. First, is an application filed by the defendant on 21 September 2016. He seeks leave pursuant to ***Rule 20.1(2) of the Supreme Court (Civil Procedure) Rules, 2008*** ("***CPR"***) to amend his

defence. He wishes to substitute the defence of absolute privilege with that of qualified privilege.

[2] On 26 October 2016, the claimant filed an application seeking dismissal of the defendant's application. His attack against it is three-pronged. He claims that it (i) is "out of time"; (ii) constitutes "an abuse of the process of the Court"; and (iii) discloses "no reasonable ground for amending the Defendant's Statement of Case".

[3] I heard the applications together. The claimant appeared in person and Mr. Jared Richards in association with Ms. Gayl Scott appeared for the defendant. The latter's application was supported by an affidavit filed on 21 September 2016. The claimant filed an affidavit on 26 October 2016. I had the benefit of written and oral submissions from the parties. Having considered the matter, I have determined to refuse the defendant's application and to allow the third ground of the claimant's. I set out my reasons for this decision below.

BACKGROUND

[4] Some background is required to provide context. The defamation proceedings arise out of a letter which was written by the defendant to the Solicitor General on 31 October 2011. It appears that it was copied to the Attorney General, the Deputy Solicitor General and an Acting Deputy Solicitor General. The claimant complains that some of its contents defamed him.

[5] It is common ground that at the time of the communication, the parties worked together in the Solicitor General's Chambers, the defendant as a Clerical Officer and the claimant as a Crown Counsel. The defendant avers that two police officers came to see him at work in response to a complaint made to them by the claimant. He asserts that the letter was written at the behest of the Solicitor General who requested him to explain why police officers had visited the Chambers.

[6] The claimant filed his claim form on 17 October 2014. The defendant filed a defence on 3 December 2014. In it, he averred that the letter was published on an occasion of qualified privilege. Additionally, he denied that the words complained of were defamatory of the claimant; that they bear any of the meanings asserted by the claimant; or that they were calculated to disparage him in his employment as a Crown Counsel or as an Attorney-at-Law.

THE GROUNDS OF THE DEFENDANT'S APPLICATION

[7] In the grounds set out on his application, the defendant asserts that when he filed his defence, he was represented by a different Attorney-at-Law and that the amendment should be allowed in the interest of justice. The record reflects that he was represented by Mr. Derrick Oderson when the defence was filed. He is now represented by the Solicitor General's Chambers.

[8] At paragraph 5 of the grounds, the defendant sets out the basis on which he considers the defence of qualified privilege to be relevant. It reads:

> The Defendant was acting in the course of his employment when he presented the report dated the 31st day of October 2016 to the head of Chambers, the Solicitor General and in the circumstances the defence of absolute privilege should apply in this instance.

THE ISSUES

[9] Five issues potentially arise. If either of those identified at (i) to (iii) is resolved in the claimant's favour, those at (iv) and (v) will fall away. They are:

i. is the defendant's application out of time?

ii. is the claimant's application an abuse of process; and, if so, should it be struck out on that account?

iii. should the claimant's application be dismissed on the ground that it discloses no reasonable ground for amending the defence?

iv. subject to the outcome of 5 below, ought the defendant to be granted leave?

v. does the prospective defence have a reasonable prospect of success?

THE PROCEDURAL RULES

[10] Three sets of procedural rules feature in the discussion that follows. The first is contained in ***CPR 20.1*** which regulates amendments to statements of case; the second in ***CPR 1*** which is concerned with the overriding objective of the ***CPR***; and the third in ***CPR 10*** which deals with defences.

(i) leave to amend

[11] ***CPR 20.1(1)*** provides that a statement of case may be amended at any time "prior to a case management conference and the filing of a defence without the court's permission". ***CPR 20.1(2)*** reads:

> The court may give permission to amend a statement of case at a case management conference or, at any time after a case management conference, upon an application being made to the court.

(ii) the overriding objective

[12] ***CPR 1*** provides:

> **1.1** (1) The overriding objective of the Rules is to enable the court to deal with cases justly.
>
> (2) Dealing justly with a case includes, so far as is practicable,
>
> *(a)* ensuring that the parties are on equal footing;
>
> *(b)* saving expense;
>
> *(c)* dealing with the case in ways which are proportionate to
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> (i) the amount of money involved;
>
> (ii) the importance of the case;
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> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> *(d)* ensuring that it is dealt with expeditiously and fairly; 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.

1.2 The court must seek to give effect to the overriding objective when interpreting these Rules or exercising any powers under these Rules.

1.3 The parties are required to help the court to further the overriding objective.

(iii) defences

[13] The relevant portions of ***CPR 10*** read:

10.1 The rules in this Part set out the procedure for disputing the whole or part of a claim.

10.2 (1) A defendant who wishes to defend all or part of a claim must file a defence in Form 5.

…

10.3 (1) The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form and statement of claim.

…

(5) The parties may agree, by one agreement or several successive agreements, to extend the time for filing a defence … up to a maximum total period of 56 days.

(6) …

(7) Any further extensions may only be made by court order.

(8) The general rule is subject to any express provision made elsewhere in these Rules, … .

IS THE DEFENDANT'S APPLICATION OUT OF TIME?

[14] I come now to the first issue- is the defendant's application out of time? A "defence" is one of a number of procedural documents expressed to fall within the definition of the term "statement of case" contained in ***CPR 2.3***. It is not disputed that the defence in this case is a statement of case for the purposes of ***CPR 20.1(2)***; nor that these proceedings reached case management some time ago.

[15] Mr. Richards relied on ***CPR 20.1(2)*** to answer the assertion that the defendant's application is out of time. Invoking the plain language of the sub-rule, he contended that it allows that at any time after proceedings have reached case management, a party may on an application seek the leave of the court to amend a statement of case. That is clear enough.

[16] But what did the claimant advance? He built his limitation argument on the timelines set out in ***CPR 10.3***. ***CPR 10.3(1)*** prescribes twenty-eight days from the date of service of the claim form to be the general period for filing a defence. The ensuing sub-rules provide for extensions to that period by the agreement of the parties or order of the court. The defendant has not sought to exploit any of those provisions. I do not suggest that he needed to do so. The claimant submitted that an amended defence which substitutes absolute privilege for qualified privilege would be a wholly new defence.

Consequently, he continued, the amended defence would be out of time given the timelines contained in ***CPR 10.3(1)***.

[17] The claimant cited no authority for this novel proposition. Mr. Richard's rebuttal answers it convincingly. The filing of a defence and amending a defence are distinctly different procedural steps which are regulated by different parts of the ***CPR***. ***CPR 10*** deals with the filing of a defence, and ***CPR 20.1*** with amendments to a defence. The fact that an amended defence advances a substantially different case to that contained in the defence it amends does not and cannot magically convert the former to the latter so as to render ***CPR 10*** applicable. Such procedural acrobatics are impossible.

[18] The process from the issuance of a claim form to judgment is a journey along a procedural highway that is carefully mapped out in the procedural rules. As with many journeys, sometimes there is a turning back. However, this occurs only as allowed by the rules of the road. After a defence has been filed, the case moves beyond the juncture sign-posted and directed by ***CPR 10.3***. To uphold the claimant's submission requires a reckless U-turn that would throw litigants into irremediable and catastrophic chaos. I must reject it.

IS THE DEFENDANT'S APPLICATION AN ABUSE OF PROCESS?

[19] I turn to the claimant's second ground. He contends that the defendant's application is an abuse of the Court's process and, for that reason, should be

struck out. No issue arises as to this Court's jurisdiction to strike out an application if it constitutes an abuse of process. However, the defendant disagrees that his application can be so characterised.

[20] The general complaint the claimant makes is that the defendant has acted wilfully to secure an unfair advantage for himself in the proceedings. He asserts that while failing to comply with case management orders for the filing of a pre-trial memorandum and skeleton arguments, the defendant had the benefit of seeing the corresponding documents filed by him. He states further that, having concluded that the defence of qualified privilege is bound to fail, the defendant decided to seek leave to amend his defence six weeks before the scheduled trial dates.

[21] In the grounds of his application, the claimant states that this conduct is an abuse of process in that it contravenes ***CPR 1.1(1)*** and ***1.1(2)(a)***. Reference to paragraph [12] above shows that those rules provide that the overriding objective of ***CPR*** is to enable the court to deal with cases justly; and that dealing with cases justly includes, so far as is practicable, ensuring that the parties are on equal footing. The grounds go on to detail the dates on which the claim form and defence were filed, and the case management orders made.

[22] It is a matter of record that those orders were made on 16 February 2016 and 25 May 2016, respectively. There is no dispute that the defendant did not

comply with them, nor that the claimant filed his documents before the defendant filed his application. The record also discloses that the claim was scheduled for trial on 7 and 8 November 2016. At paragraph 11 of his grounds, the claimant summarises his complaint in this way:

> Having received both the Claimant's memorandum of the facts relied on, the issues involved, the arguments to be advanced at the trial and the law in support of those arguments on 22nd July, 2016, the Defendant having had the benefit of analysing the Claimant's said pre-trial memorandum and skeleton arguments, while refusing to likewise file and serve his pre-trial memorandum and skeleton arguments in accordance with the Orders of the court … has decided to change his defence and statement of case from one of qualified privilege to one of absolute privilege six weeks before the dates slated for trial in the matter on 7th and 8th November, 2016.

[23] In his affidavit, the claimant introduced the additional assertion that the defendant acted wilfully to gain an unfair advantage. This new allegation is contained in paragraphs 13 and 14 which read:

> 13 … the Defendant wilfully refused to file or serve his pre-trial memorandum and skeleton arguments in accordance with the Orders of the Court in order that the Defendant would have the unfair advantage of analysing the Claimant's arguments without the Claimant likewise having the benefit of seeing the Defendant's arguments.
>
> 14. … in seeking leave of the Court to amend his defence from one of qualified privilege to one of absolute privilege, eight months after he was served with the Claimant's pre-trial memorandum; and five months after he was served with the Claimant's skeleton arguments, the Defendant is seeking to gain an unfair advantage over the Claimant with respect to the presentation of his defence.

[24] The defendant raised no objection to this approach. However, the Court deprecates it. ***CPR 11.6(1)(b)*** requires an applicant to state "briefly, the grounds on which the applicant is seeking the order". This requirement serves to define the parameters of the applicant's case on the application. The ***CPR*** does not anticipate that he can enlarge them in his supporting affidavit. The proper course must be to re-state the grounds in an amended application.

[25] The defendant adduced no evidence in rebuttal of the added assertions. Indeed, he offers no explanation in his affidavit for his decision to seek to amend his defence. However, the mere statement under oath by the claimant that the defendant acted wilfully to secure an unfair advantage, or is by an application seeking to do so, does not prove such damning allegations. There must be evidence from which the intention to secure an unfair advantage can be inferred.

[26] The claimant must prove the alleged state of mind on the balance of probabilities. As to what is required of him, I am guided by the following passage found at ***paragraph 9055*** of ***J D Heydon's Cross on Evidence 8th Australian ed***.:

> Where satisfaction of the civil standard of proof depends on inference, there must be something more than conjecture, guess work or surmise. That is, there must be more than "conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture" [*Nominal*

> *Defendant v Owens (1978) 22 ALR 128 at 132*]. If there is, the test is as follows: "the difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged [*Transport Industries Insurance Co. Ltd. v Longmuir [1997] 1 VR 125 at 141*].

[27] So, what are the material facts? I have the dates on which the claim form together with the statement of claim, and the defence were filed. When the defendant filed his defence and up to 7 June 2016, he was represented by other counsel. He failed to file his pre-trial memorandum and skeleton arguments as ordered by Worrell J. I have the dates of those orders. I also have the dates on which the claimant filed his documents. He did so more than two months before the defendant filed his application.

[28] So, what inferences may I draw? Undoubtedly, the defendant would have seen and had the opportunity to digest the claimant's documents when the claimant could not have enjoyed a reciprocal benefit. However, it is a matter for conjecture whether the defendant acted with the intent the claimant asserted, or whether his failure to comply with the case management orders were due to a less damning explanation such as inadvertence or negligence. Also, there is nothing from which I can infer that by filing an application for leave to defend in the circumstances, the defendant is seeking to gain an unfair advantage.

[29] I must add that I have great difficulty understanding how the defendant could secure an unfair advantage by the events the claimant underscores. Had the defendant filed his documents timeously, it would still have been open to him to file the application to amend. The position might have been entirely different were the claimant complaining that he had lost some opportunity as a result of the defendant's conduct. Equally, I cannot see how any unfair advantage accrues to the defendant by the filing of his application for leave.

[30] Neither side addressed the law relating to abuse of process. I turn to paragraph ***11.239*** of ***Zuckerman on Civil Procedure: Principles of Practice 13th ed.*** for general guidance. The author states:

> Abuse of process, Lord Bingham C.J. has explained, consists in "using that process for a purpose or in a way significantly different from its ordinary and proper use". [*A-G v Barker* [2000] 2 F.C.R 1, [2000] 1 F.L.R. 759]. The jurisdiction to prevent such misuse of procedure transcends the rules…. It provides the court with the power to prevent or disqualify procedural acts not because they are contrary to the rules, but because they amount to a misuse of process. This is, Lord Diplock said, an "inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of the procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people". [*Hunter v Chief Constable of West Midlands* [1982] AC 529, [1981] 3 All ER 727 at 729 HL.].

[31] In ***Broxton v McClelland and Another [1995] EMLR 485***, Simon Browne LJ noted at ***page 497*** that "an action is only [an abuse of process] if the Court's

processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings". However, in ***Dow Jones and Co Inc*** v ***Jameel [2005] EWCA Civ 75***, the court identified an expanded basis for concluding that an action amounts to an abuse of process. It stated at ***paragraph 54***:

> An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.

[32] In ***Jameel***, the court determined that the introduction of "the new Civil Procedure Rules and the pursuit of the overriding objective" necessitates a more flexible and pro-active approach to litigation. That statement applies with equal force in Barbados. ***CPR 1.2*** requires the Court to seek to give effect to the overriding objective of dealing justly with a case when exercising any power under ***CPR***. ***CPR 1.1(2)(c)*** and ***(e)*** incorporate proportionality and the efficient use of court resources into the notion of dealing justly with a case. These provisions enjoin our courts to be concerned with the very matters identified in ***Jameel***.

[33] There are two further points. The first is that the claimant bears the burden of satisfying the Court that the defendant's conduct is an abuse of process. Citing

Johnson v Gore Wood & Co [2000] UKHL 65, the Court of Appeal in ***Roseal Services Ltd. v Challis & Ors. (2011) 79 WIR 95***, at ***paragraph 45***, accepted that "the party who alleges abuse of process bears the onus of proving the abuse".

[34] The second point is that the exercise of the jurisdiction in respect of abuse of process ought not to be an act of first resort. Where abuse is found to be established, striking out is not always an appropriate sanction. At ***paragraph 11.244*** of his text, ***Zuckerman*** states that it is unnecessary to exercise this power where an alternative satisfactory solution is available. The case for restraint is well put by Laddie J in ***Reckitt Benkiser (UK) Ltd v Home Parifum Ltd & Ors [2004] EWHC 302***. He stated, at ***paragraph 29***:

> The court's powers under the CPR are wide. They should be tailored to meet the circumstances of the case. Although … the court has power to strike out even a prima facie valid claim where there is abuse of process, it does not follow that in all cases of abuse the correct response is to strike out the claim. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be.

[35] So, what do I make of this ground of the claimant's application? My finding that he has not established a wilful design on the defendant's part to secure an unfair advantage takes much of the sting from his attack. I have considered the other arguments he has made but taken individually or collectively, they do not persuade me that this ground should succeed.

[36] The claimant relies, in part, on the fact that the defendant filed his application mere weeks away from the scheduled trial dates. I accept that the Court must be concerned with the efficient use of its resources. However, it is a matter of record that on 21 September 2016, Worrell J extended the time for the filing of the defendant's outstanding documents and adjourned the matter to a date beyond the scheduled trial dates. There is no evidence that the late filing of the application caused those dates to be vacated.

[37] Much has been said by the claimant about unfairness to him and a loss of footing, as a consequence of the defendant's conduct. ***CPR 1.1(2)(a)***, ***1.1(2)(d)*** and ***1.2*** require me to ensure that the parties are on equal footing; and that cases are dealt with fairly. However, the claimant has not persuaded me that the defendant's conduct has caused him any irremediable prejudice or that he has so lost footing to now be unequally perched.

[38] ***CPR 20.1(2)*** permits a litigant to seek permission to amend a statement of case at any stage after the proceedings have reached case management, however late. This option would have been available to the defendant even if he had complied with the case management orders. The defendant has made an application for leave. The claimant has the right to contest it. Indeed, he has done so most vigorously. If the defendant's application succeeds, the

claimant will be permitted to reply to the amended defence and contest it at trial. Where, I ask, is the unfairness?

[39] The claimant also submitted that the defendant demonstrated a disregard for the court's orders and failed to comply with his ***CPR 1.3*** duty to assist the Court to further the overriding objective. ***CPR 1.1(2)(d)*** entrenches expedition as a component of dealing with a case justly. In appropriate cases, persistent and contumelious breaches of case management orders may constitute an abuse of process. However, the defendant's breaches were sanctioned previously by Worrell J. There is no complaint of any additional breaches.

[40] I am not persuaded that there has been an abuse of process and, therefore, this ground of the claimant's application must fail. In any event, in considering an application for leave to amend, the Court must seek to give effect to the overriding objective of ***CPR***. To do so and properly exercise its discretion, consideration must be given to all relevant factors. These must include the timing of the application and the circumstances leading up to it. The matters of which the claimant complains can be considered and weighed in determining a just result. Therefore, in any event, the striking out of the defendant's application would be unnecessary.

FAILURE TO DISCLOSE A REASONABLE GROUND FOR THE AMENDMENT

[41] The third basis on which the claimant seeks dismissal of the application for leave is that it discloses "no reasonable ground for amending the defendant's statement of case". I understood his argument to be that the proposed defence has no prospect of success and, therefore, the application ought to be dismissed.

[42] An application for leave to amend a defence will be refused if the proposed defence has no real prospect of success. The editors of ***Blackstone's Civil Practice 2011*** ("***Blackstone's***") state this tersely at ***paragraph 31.7***. This proposition is readily defensible by reference to ***CPR 1.1(2)(b), (d)*** and ***(e)***. They list saving expense, expedition and the efficient allocation of court resources as aspects of dealing justly with a case. To allow an amendment to include a defence which has no prospects of success is to commit the matter to a course of action that would be wasteful of time, money and court resources.

[43] Therefore, I must turn to the issue of the viability of the defence of absolute privilege. However, I will first consider whether the defendant should otherwise be granted leave.

SUBJECT TO THE VIABILITY OF THE PROPOSED DEFENCE, SHOULD LEAVE BE GRANTED?

[44] Mr. Richards' principal submission is that the defendant ought to be permitted to put his best defence before the Court. He cited a passage found in ***Gale v. Super Drug Stores PLC [1996] 1 WLR 1089, 1098*** in which Millet LJ stated that "justice requires that [a litigant] be allowed to put [a mistake] right even if this causes delay and expense, provided that it can be done without injustice to the other party". Counsel urged further that the proposed defence raises a question that would be of interest to public officers.

[45] In part, the claimant's submissions mirrored those advanced in respect of his assertion that the defendant's application is an abuse of process. Additionally, he submitted that were the amendment allowed it would cause him undue hardship and delay the proceedings. He submitted further that the defendant's application should be refused since he has provided no evidence as to why he failed to put forward absolute privilege in his defence. Citing ***Ladd v Marshall [1954] 3 All E.R. 745***, he contended that the defendant needed to demonstrate that he could not have put forward that defence originally.

[46] Mr. Richards countered that ***Ladd v Marshall*** is inapplicable. I agree with him. That case related to the admissibility of fresh evidence at the hearing of an appeal. That is not to say that a party who seeks an amendment when a case is ready for trial is not better served by providing some explanation for the

failure to put his case differently earlier. However, such an omission is no automatic bar to success.

[47] There is no axiomatic rule that absent some injustice to the other party, an amendment must be allowed. The non-exhaustive list of factors identified in ***CPR 1.1(2)*** as components of the notion of dealing justly with a case demonstrates that the Court's considerations are not so narrowly circumscribed. The objectives identified in ***CPR 1.1(2)*** apply "so far as is practicable."

[48] Mr. Richards' second submission raises the aspect of proportionality which is set out in ***CPR 1.1(2)(c)(ii)***. This provides that dealing with a case justly includes "dealing with [it] in ways which are proportionate to … [its] … importance …". Commenting on a similar rule in England and Wales, the editors of ***Blackstone's*** submit, at ***paragraph 1.28***, that "the importance which may be considered may be either an exceptional significance to one of the parties or an importance to the public or a section of the public".

[49] I accept that civil servants generally would have an interest in knowing if, or the extent to which, their work-related communications are protected by absolute privilege. This matter must also be important to the State and the wider public. This is a factor which weighs in favour of the grant of the defendant's application.

[50] The claimant's submissions bring the other aspects of ***CPR 1.1(2)*** into the frame. If the amendment were to be allowed, the parties' statements of case and pre-trial documents would have to be revised. Invariably, this will involve additional work and expense on the claimant's part. He contended that an individual claimant does not have the resources of the Solicitor General's Chambers.

[51] The proportionality rule also requires that a case must be dealt with in ways which are proportionate to the financial position of each party (***CPR 1.1(2)(c)(iv)***). Arguably, too, the parties would not be on an equal footing if, after any amendment, the defendant is unable to meet the expenses for the additional work that would inevitably be required. ***CPR 1.1(2)(a)*** has been identified already as including "ensuring the parties are on an equal footing" as a component of dealing justly with a case. There is also ***CPR 1.1(2)(b)*** which incorporates saving expense.

[52] However, the claimant's submissions in respect of added expenses do not militate against the grant of the defendant's application. He has adduced no evidence that he is financially unable to meet the costs associated with any additional work that may be necessitated by any amendment. He is an Attorney-at-Law and, but for his Claim Form, his "drawn and prepared stamp" appears on the documents which he has filed in the proceedings. Furthermore,

prejudice of this type can be mitigated by a costs order. This Court would, therefore, be disinclined to prohibit the defendant from advancing what he considers to be his best case, on this account.

[53] By his submissions, the claimant suggested that an observance of the objectives which are set out in ***CPR 1.1(2)(d)*** necessitates a refusal of the defendant's application. That sub-rule requires that the court ensures that cases are dealt with expeditiously and fairly. I think "fairly" in this context means in a manner that is procedurally fair. The sub-rule speaks to the need for a fair trial. Each party must be permitted to put his case but where an amendment is sought late in the proceedings, the Court must weigh up the competing factors and determine whether to allow it.

[54] I have considered the extent to which allowing the application could delay the progress of the proceedings. I have already determined that the loss of the trial dates is not attributable to the application for leave. However, it is likely that an amendment could result in some delay in the matter getting to trial. The potential for this may however be blunted by the setting of appropriate timelines for the filing of further documents. I am of the view that the importance of allowing the defendant to amend the defence outweighs this consideration.

[55] I have also reflected on whether to allow the amendment would be to allocate to the claim an inappropriate share of the court's resources, taking account of the need to allot resources to other cases. ***CPR 1.1(2)(e)*** imports that consideration. The determination that the application has not compromised trial dates is significant. It is true that if leave is granted, additional court resources would be required to further manage the case through stages that it has already passed. However, in my view, by itself, that does not outweigh the importance of allowing the defendant to put his case as he thinks best.

[56] The claimant also re-asserted that the defendant is seeking by his prior conduct and this application to secure an unfair advantage in the proceedings. If this were established, this might have been a good reason for refusing the application. I have concluded already that this allegation has not been proven. The Court has also noted also that the defendant has been sanctioned by Worrell J for the breach of the case management orders.

[57] Having considered the matter, thus far I am inclined to exercise my discretion in favour of the defendant's application. Whether or not this remains the case depends on my assessment of the viability of the proposed defence.

IS ABSOLUTE PRIVILEGE SUSTAINABLE?

[58] In carrying out this exercise, I must ask myself whether the defendant could rely on the defence of absolute privilege, assuming without so deciding, that

the asserted facts on which he bases his claim are true. Both parties submitted that ***Chatterton v Secretary of State for India [1895] 2 QB 189*** is helpful on this issue. Relying on that case, Mr. Richards submitted that the defence is open to his client. The claimant disagrees.

[59] I did not understand Mr. Richards to contend that there is a blanket immunity which protects all civil servants from liability for communications made in the course of their employment. He submitted, though, that the defence would apply to communications from the defendant to his head of department, the Solicitor General.

[60] Opposingly, the claimant submitted that ***Chatterton*** was concerned with communications between Ministers and the Crown or among Ministers. He urged that the defence applies at the executive level of Government but not below the rank of Minister. He relied on ***Szalatnay-Stacho v Fink [1946] 1 All E.R. 303***; and ***Gibbons v Duffell [1932] HCA 26***.

[61] These authorities must be set in their proper juridical context. Defamation is an ancient common law tort. It has long been subject to erasure on the basis that the words complained of were spoken or written on an occasion of privilege. Two types of privilege are known to the law of defamation: qualified and absolute. Proof that a defendant was actuated by malice defeats

a defence of qualified privilege; but as the epithet suggests, absolute privilege is indefeasible.

[62] Much of the law of defamation is now contained in the ***Defamation Act Cap. 199*** which refers to the defence of absolute privilege in ***sections 9*** and **10**. ***Section 9*** relates to reports of court proceedings and ***section 10*** to parliamentary proceedings and reports of such proceedings. However, the legislation does not purport to be a complete code. ***Section 35*** preserves any related common law rules subject to their modification by the statute. That provision reads:

> Subject to this Act, any enactment or rule of law or practice which immediately before the 15th August, 1997 applied to actions for libel or slander shall, in relation to actions for defamation brought after the 15th August, 1997 apply as varied, modified or otherwise affected by this Act.

[63] As both sides acknowledged, the common law recognises that the defence of absolute privilege applies in the realm of communications made between officers of the State in the course of official duty. The issue on which they differ is whether its cover is so limited as to exclude its application to this case. This brings me back to the authorities.

[64] In ***Chatterton***, the Court of Appeal of England and Wales comprising Lord Esher M.R. and Kay and Smith LJJ held that the privilege attached to communication from the Secretary of State for India in Council to the Under-

Secretary of State in order to enable the latter to answer a question asked in Parliament. At ***pages 190*** to ***191,*** Lord Esher M.R. commenced his judgment in this way**:**

> The plaintiff in this case has brought an action of libel against the Secretary of State for India in Council. … The substance of the case is that it is an action brought against him in respect of a communication in writing made by him as Secretary of State, and, therefore, a high official of the state, to an Under-Secretary of State in the course of the performance of his official duty. The master, the judge at chambers, and the Divisional Court have all come to the conclusion that the action is one which cannot by any possibility be maintained; that it is not competent to a civil Court to entertain a suit in respect of the action of an official of state in making such a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it. I think that conclusion was correct. The authorities which have been cited to us appear to shew that, as a matter of clear law, a judge at the trial would be bound to refuse to allow such an inquiry to proceed, whether any objection be taken by the parties concerned or not. It follows that such an action as this cannot possibly in point of law be maintained; and, that being so, to allow it to proceed would be merely vexatious and a waste of time and money.

[65] At ***page 191***, Lord Esher M.R. advanced the following rationale:

> The reason for the law on this subject … is that it would be injurious to the public interest that such an inquiry should be allowed, because it would tend to take from an officer of state his freedom of action in a matter concerning the public weal. If an officer of state were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence necessary for

> the performance of his functions as an official of state. Therefore the law confers upon him an absolute privilege in such a case.

[66] Turning to the applicable law, he continued:

> In all of [the cited authorities] the law seems to have been stated to the same effect, and it seems to me to be accurately summed up in Fraser on the Law of Libel and Slander, p. 95, where he says, after stating that no action lies in respect of a defamatory statement in a report made in the course of military or naval duty, "For reasons of public policy the same protection would, no doubt, be given to anything in the nature of an act of state, e.g., to every communication relating to state matters made by one minister to another, or to the Crown." I adopt that paragraph as stating the law correctly.

[67] Lord Esher M.R. concluded in this way, at ***pages 191*** to ***192***:

> In my opinion, the statement of which the plaintiff complains, being a communication relating to a state matter made by one official to another, was absolutely privileged.

[68] At ***page 194***, Kay LJ also accepted the passage from ***Fraser*** as an accurate statement of the law. He rested his decision "on the broad ground that what the defendant did was an act of state, and as such is absolutely privileged". Earlier, at ***page 192***, after outlining the circumstances leading to the communication, he stated:

> I cannot conceive of anything which would more clearly be an act of state than the making of such a statement. A question is raised before the House of Commons which the representative of a department of the Government in the House has to answer, and the head of the department communicates to his subordinate the answer which he wishes to be given. I cannot see how the business of government could be carried on if such a statement were the subject of an action for libel.

[69] At ***page 195***, Smith LJ considered that "under circumstances such as exist in this case, there is an absolute privilege". However, he thought it to be conclusive of the matter that the libel complained was "a document of state" and, therefore, could not be produced in evidence since it would be contrary to public interest. He so classified the document since it was "brought into existence by the defendant for a state purpose".

[70] In ***Gibbons***, the High Court of Australia determined that a report from an inspector of police to the Metropolitan Superintendent of Police which was defamatory of a junior officer was not the subject of absolute privilege. In their joint decision, Duffy CJ, Rich J and Dixon J stated as follows at ***page 525*** to ***526***:

> In the executive department of government, communications between Ministers and the Crown, or among Ministers themselves, clearly have complete immunity (*Chatterton v Secretary of State of India* [(1895) 2 Q.B. at pp. 191, 194]) The privilege extends to communications in the course of duty between high officers of State and Ministers [(1895) 2 Q.B. 189)]. It includes statements made by the High Commissioner to the Prime Minister (*Isaacs & Sons v. Cook* [(1925) 2 K.B. 391]). It has been considered too that an official statement to the Board of Trade prepared by one of its officers to enable it to make its annual general report to Parliament under the *Companies (Winding up) Act* 1890 was absolutely privileged (*Burr v Smith* [(1909) 2 K.B. 306 at p. 313, per *Fletcher Moulton* L. J.]). But it was not without the dissent of *Cockburn* C.J. that unqualified privilege was given to the report of a commanding officer of a regiment to the Adjutant-General upon a complaint made by an officer (*Dawkins v. Lord Paulet* (1869) L.R. 5 Q.B. 94).

[71] They then cited a passage from ***Hart v. Gumpach (1872) L.R. 4 P.C. 439*** in which *Sir* Montague Smith underscored the rationale for the defence. At ***page 464***, Sir Montague stated with reference to the protection accorded to persons engaged in the administration of justice and extended in ***Dawkins v Lord Paulet (1869) Law Rep. 5 Q.B. 94*** to reports made by a military officer to the Commander-in-Chief:

> The immunity in these cases rests upon grounds of public policy and convenience: the object being to secure the free and fearless discharge of high public duty in the administration of justice, and the maintenance of military discipline, on which the welfare and the safety of the State depend.

[72] The Chief Justice, Rich J and Dixon J went on to accept the limited applicability of the defence. They concluded at ***page 528*:**

> The truth is that an indefeasible immunity for defamation is given only where upon clear grounds of public policy a remedy must be denied to private injury because complete freedom from suit appears indispensable to the effective performance of judicial, legislative or official functions. The presumption is against such a privilege and its extension is not favoured. (*Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [(1892) 1 Q.B. 431]). Its application should end where its necessity ceases to be evident.
>
> The functions of an inspector of police are not, either in point of delicacy or consequence, so removed from the common round of official duty and his station is not so elevated, as to require for the satisfactory execution of his office the same freedom from apprehension of suits as a Cabinet Minister or a General Officer.

[73] Starke J reasoned similarly. At pages ***529*** to ***530***, he rejected the assertion that public policy requires the application of a blanket immunity to all civil service communications. He considered "[s]pecial immunities and privileges for State Servants [to be] "opposed to the rule of English law" and the argument for the broad-brush application of the defence "difficult to support … upon principle". At ***page 532***, he opined that ***Dawkins v. Lord Paulet*** was an exceptional case which ought not to be extended to police officers or other Crown servants.

[74] Earlier, at ***page 530***, having discussed ***Chatterton*** and the principle extracted from ***Fraser***, Starke J noted that there was in this context no definition of what is meant by an act of State or a State matter. He stated that the term "act of State" is normally connected with "actions of the Imperial or Dominion Governments towards foreigners outside British territory". He observed, though, that in ***Chatterton*** Lord Esher M.R. "does not so confine himself".

[75] Evatt and McTiernan JJ also agreed that the defence did not apply. At ***page 537***, the latter concluded that the respondent's position did not warrant the application of the principle in ***Chatterton***.

[76] In ***Szalatnay***, Henn Collins J opined that under English law the defence would not apply to a dossier sent by the Chief Military Prosecutor in the Czechoslovak army to the Military Office of the President of the

Czechoslovak Republic. At ***page 305***, ***letter D***, he expressed the view that "protection is afforded only to communications passing at a higher level". At ***page 305***, ***letter F***, he considered that there was "no authority ... which indicates that communications passing at a lower level than those between Ministers require this exceptional protection." On appeal, the Court of Appeal acknowledged that English law gives no general protection in civil suits to acts done by officials (***Szalatnay-Stacho v Fink [1947] K.B. 1*** at ***page 12***).

[77] Henn Collins J's statement in ***Szalatnay*** was cited without disapproval by Latham CJ, at ***page 306***, in ***Jackson v. Magrath (1947) 75 CLR 293***. In that case, at ***page 307***, the Chief Justice considered that absolute privilege did not apply to a report from the Commonwealth Commissioner of Taxation to the Treasurer of the Commonwealth. He was not satisfied that the defendant "was a high officer of State".

[78] At ***page 306***, Latham CJ commented as follows in respect of ***Chatterton***:

> It is true that in this case Lord *Esher* M.R. said that "it is not competent to a civil Court to entertain a suit in respect of the action of an official of state in making ... a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it"[(1895) 2 QB 189, 191]. This statement would appear to give absolute privilege to all communications between civil servants made in the course of their duty. But if this were the law the references to "high" officers of State in the authorities would be difficult to understand.

[79] The remainder of the court in ***Jackson*** subscribed to the notion that the defence is limited to communications between state officers of high rank.

[80] In ***Fayed v Al-Tajir [1988] QB 712***, at ***page 732***, ***letter A***, Mustill LJ referred to the "high officers of state contemplated by the ***Chatterton*** line of authority". Earlier, ***at page 724***, he suggested that there is a dual test for determining when the privilege applies. Having acknowledged that "the publication of certain categories of state documents does not found a cause of action in damages", he continued, at ***page 724, letter E***:

> Such publication has been referred to as an "act of state." That documents of this kind may be the subject of absolute privilege is undoubted, and it is clear that the court must take into account the position occupied by the sender and the recipient, and the nature and subject matter of the communication.

[81] The editors of ***Gatley on Libel and Slander 11th ed.*** acknowledge that the defence is limited in its application. At ***paragraph 13.25***, they state that "though the limits of the principle are difficult to define, absolute privilege attaches to certain communications made between officer of state acting in an official capacity ... ". The editors state "it seems plain that there is no blanket immunity" though "it is not clear how far the absolute privilege extends below minsterial level...".

[82] Regionally, ***Halliday v Baronville No. 25 of 1977*** (***decision of the High Court of the British Virgin Islands, dated 14 October 1977***) has been noted

by ***Gilbert Kodilyne*** in ***Commonwealth Caribbean Tort Law 4th ed***. as an authority that suggests there may be a general immunity. In that case, Hewlett J held that a report by a police constable to the Deputy Chief of Police that the plaintiff, a police sergeant, had assaulted her was absolutely privileged. The court stated at ***page 5*** that "[a]bsolute privilege also attaches to official communications" and expressed the view "that the matter falls within this general compass". Hewlett J offered no authority for this broad proposition which is out of step with the other authorities I have reviewed.

[83] Barring legislative intervention, the precise boundaries of the defence of absolute privilege as it applies to communications between officers of the state must be drawn as cases necessitate. However, six things are clear: (i) none of the authorities suggest that there is a blanket immunity across the panorama of civil service communications; (ii) the application of the defence is limited by reference to the nature of the communication and the rank of the officers involved; (iii) the authorities contemplate that protected communications are those passing at a very high executive level which are in the nature of an act of state i.e. relate to a "state matter"; (iv) the terms "act of state" and "state matter" are not defined in the authorities but are not confined to actions by a state towards foreigners outside its borders (v) the defence is limited to instances where it is necessary in the public interest to facilitate the

uninhibited execution of a high public duty; and (vi) in considering whether the defence ought to apply, one must be mindful of the right of individuals to bring proceedings to protect their reputations.

[84] With these limitations of principle and policy in mind, I come to the defendant's case. He is a clerical officer assigned to the Registry of the Solicitor General's Office. The communication complained of was written by him in compliance with a request from the Solicitor General for a report as to why police officers had visited the workplace. That visit, he says, followed discordant exchanges between himself and the claimant culminating in a complaint to the Police by the claimant against him.

[85] I will not reproduce the defendant's letter. A fair summary will serve to highlight its nature. It is captioned "Incident Involving Police Intervention on Thursday October 27, 2011". The first five paragraphs detail the defendant's version of the precursory events he alleges occurred between himself and the claimant. The narrative is supplemented with adjectives and adjectival phrases purporting to describe the claimant, conduct attributed to him, and a report said to have been written by him. At paragraphs 6 to 9, the letter reports on the visit by the Police, their conversation with the defendant, and his perception of their view of the claimant. The final paragraph is a plaintive cry

to the Solicitor General to rid the staff of the claimant who is again labelled, and whose conduct is described in unflattering terms.

[86] The defence of absolute privilege is not open to the defendant. There is nothing about the nature of the communication to justify its application. It does not relate to state matters in the sense that the term is used in the authorities. It has not passed at a high executive level. Indeed, it does not rise beyond the common round of official duty. As a clerical officer, the defendant operates at the lowest level of the public service. Absolute privilege is not necessary for the satisfactory execution of his duties generally nor was it required for the effective execution of the specific assignment he said was given to him by the Solicitor General. What pray tell is the public interest to be served that is so important as to override the claimant's right to pursue a defamation action, if he feels aggrieved? I can think of none. I hold, therefore, that the defence of absolute privilege has no real prospect of success.

DISPOSAL

[87] It follows that the defendant's application for leave to amend his defence must be refused; and the claimant's application succeeds to the extent that the defendant has shown no reasonable ground for amending his defence. I will

make the appropriate orders and hear the parties in respect of costs.

OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT