IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 185 OF 2018

BETWEEN:

(1) JOHN MURPHY
(2) JOEL SLUTSKY

Plaintiffs

AND

(1) ARA HACET
(2) MIKE MONTGOMERY

Defendants

Appearances:	Mr. Kyle Broadhurst and Ms. Laura Stone of Broadhurst LLC for the Plaintiffs Mr. Mark Goodman and Ms. Natasha Partos of Campbells for the Defendants
Before:	Hon. Justice Richard Williams
Heard:	27 August 2019
Draft Judgment circulated:	24 October 2019
Final Judgment delivered:	29 October 2019

HEADNOTE

Civil Procedure - pleading in defamation case - Striking out application by Plaintiff - Whether appropriate to strike out counterclaim and certain paragraphs of Defence - Whether affidavit evidence must be filed by a party seeking to strike out part of a pleading

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JUDGMENT

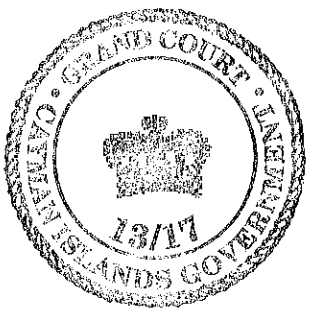
The Application

1. I have before me an application by the Plaintiffs brought by Summons dated 2 April 2019 seeking to have a number of paragraphs of the Defence and the

Counterclaim of the Second Defendant struck out. The Defendants contend that the Summons should be dismissed as (i) it is not supported by evidence; (ii) it is not a clear and obvious strike out case; (iii) there has been a failure to address McMillan J's *"concerns"* about the application and procedure being adopted made at a hearing on 30 May 2019 at which the Plaintiffs attorney was not present; and (iv) the Summons is unmeritorious.

2. The Plaintiffs' Summons seeks:

"(i) That the following paragraphs of the Defence be struck out pursuant to GCR Order 18, rule 19(1)(a)(b)(c) and/or (d) and or the inherent jurisdiction of the Court, on the grounds that it discloses no reasonable cause of action or defence, it is scandalous, frivolous or vexatious, it may prejudice, embarrass or delay the fair trial of the action, or it otherwise is an abuse of the process of the Court:

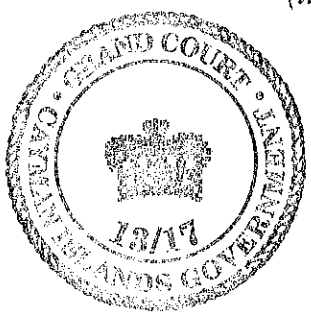


1.1 Paragraph 2.2;
1.2 Line 1 of Paragraph 14;
1.3 Subparagraphs 14.1 – 14.3;
1.4 Paragraphs 15.3(b);
1.5 Line 3 of Paragraph 15.3(c) (from the word 'but');
1.6 Second Sentence of Paragraph 15.4;
1.7 Paragraph 15.5;
1.8 Paragraph 16.2;
1.9 Paragraph 16.3 (reference to "chain of enquiry");
1.10 Last three lines of Paragraph 16.5;
1.11 Second sentence of Paragraph 16.8;
1.12 Paragraph 18;
1.13 Line 1 of Paragraph 20.1 from (and including) 'however' to end of sub-paragraph;
1.14 Second sentence of Paragraph 20.2;
1.15 Second and third sentence of Paragraph 20.3;
1.16 Lines 4-5 of Paragraph 24;
1.17 Last sentence of Paragraph 24;
1.18 Sub-paragraphs 21.1 - 27.6; 21.8-21.10, and 27.11
1.19 Paragraphs 30-31;

1.20 Paragraph 33 after (but not including) 'malice' to end of paragraph;

1.21 Sub-paragraph 35.2;

(ii) Further that the Counterclaim be struck out in its entirety pursuant to GCR Order 18, rule 19(1)(a)(b)(c) and/or (d) and or the inherent jurisdiction of the Court, on the grounds that it discloses no reasonable cause of action or defence, it is scandalous, frivolous or vexatious, it may prejudice, embarrass or delay the fair trial of the action, or it otherwise is an abuse of the process of the Court."



3. The action is contained in the Plaintiffs' Statement of Claim which accompanied their Writ of Summons dated 28 September 2019 and it relates to their claim for damages and an injunction for slander and for libel. On 30 November 2018, the Defendants filed (i) their Defence in which they contend that the Plaintiffs have not suffered any damage and (ii) the Second Defendant's Counterclaim. In the Counterclaim the Second Defendant seeks damages for slander against the First Plaintiff on the basis that *"false"* statements made by him *"maliciously"* at the AGM were *"in their natural and ordinary meaning, meant and were so understood to mean that the Second Defendant had misappropriated funds away from Lacovia without paying it back."*

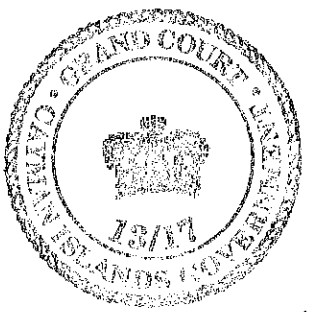
4. On 10 January 2019 the Plaintiffs wrote to the Defendants setting out what they viewed as being deficiencies in the pleaded Defence and Counterclaim and invited the Defendants to review the same and amend where necessary. They also requested further and better particulars of the Defence and Counterclaim. As no satisfactory response was received, this Summons was issued by the Plaintiffs in

April 2019. No application has been made to adjourn the hearing of the Summons to enable any amended Defence and Counterclaim to be filed.

Background

5. The parties in these proceedings were all owners of or have an interest in condominium units within the Lacovia Complex ("Lacovia"). The First Defendant became a member of Lacovia's Executive Committee ("Exco") on 9 February 2013 and was its Chairman including for the period between January 2018 and May 2018. The Second Defendant was elected to Exco on 7 February 2015 and remained a member during a period including between January and May 2018. The First Plaintiff had been a member and Chairman of Exco but resigned on 5 October 2015. The Second Plaintiff served as member of Exco from February 2003 until January 2018.

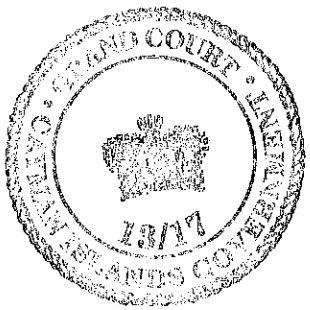
6. On 27 January 2018 an Executive Committee Chairman Report 2018 ("the Report") was read out at Lacovia's Annual General Meeting of Lacovia. The Plaintiffs claim that the Report was published by the Defendants. In February or March 2018 the Report was circulated in writing to various parties including all owners in Lacovia. The Defendants say that the First Defendant is the author of the Report and, because the Second Defendant only typed the report from the author's handwritten notes, the latter did not publish it.



7. The Plaintiffs contend that the Report was defamatory of them *"as in their natural and ordinary meaning, and the words within the statement were understood to mean:*

*i. That the Plaintiffs had sought to prevent the truth coming out about the nature and extent of the criminal fraud practiced by Lacovia's former General Manager[1], which fraud had involved the dishonest misappropriation of very large sums of money from Lacovia, because the Plaintiffs had (or there were strong grounds to believe that they had) been party to that fraud and benefitted financially from it and because they wished to conceal their involvement in that fraud ("**the Fraud Allegation**").*

*ii. That the Plaintiffs had bullied and intimidated Teresa Foster, the administrator of Lacovia at the time, and that their treatment of Ms. Foster had been so intolerable that she had given up her job ("**the Bullying Allegation**")."*

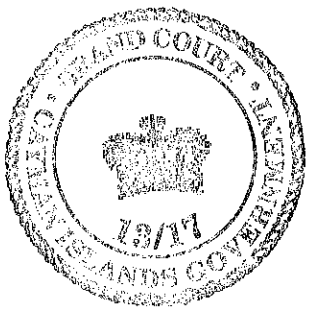


8. The Defendants submit that no fraud allegation was made as they deny that the words bore the meaning complained of on any reasonable, ordinary or natural interpretation, or that they were understood to bear the meaning attributed to them. It is contended that the words used did not implicate the Plaintiffs in a fraud as alleged by them.

9. The Defendants contend that the Bullying Allegation was included in the Report and was justified as it was true. Brooke LJ in ***Elaine Chase v Newsgroup Newspapers Ltd*** [2002] EWCA Civ 1772 at paragraphs 33-36 addressed the relevant principles of English libel law as follows:

[1] Also referred to as RM in this judgment.

"33. English law does not permit a claimant to recover damages in respect of an injury to a character which he/she does not possess, or ought not to possess. For this reason a successful plea of justification is an absolute defence to a claim in libel because it shows, as a matter of objective fact, that a claimant is not entitled to the unblemished reputation which he/she claims to have been damaged by the publication of which complaint is made.

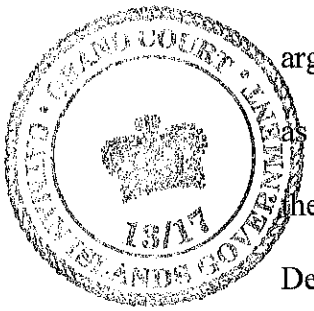


34. For such a plea to succeed, there must be a final finding on the merits by a court (usually a jury) on admissible evidence that the defamatory "sting" of the allegation complained of is objectively true as a matter of fact. The defendant does not have to prove that every word he/she published was true. He/she has to establish the "essential" or "substantial" truth of the sting of the libel. To prove the truth of some lesser defamatory meaning does not provide a complete defence.

35. The burden of proving justification rests on the defendant. Although the standard of proof is the balance of probabilities, the more improbable an allegation the stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence will be established.

36. I take these principles from such cases as McPherson v Daniels (1829) 10 B&C 263, 272; Berezovsky v Forbes Inc [2001] EMLR 1030, 1039 at para 12; McPhilemy v Times Newspapers Ltd [1999] EMLR 751, 774; and Re H (minors) [1996] AC 563, 586F-H."

10. The Defendants plead that the statements were all made in good faith on occasions of qualified privilege, as all of the people at the AGM who received the Report had a common duty and interest in receiving the information contained in it. The Defendants also contend that when the Report was later circulated by the present manager at Lacovia, on behalf of Lacovia, the same qualified privilege applied. The Defendants submit that as the content of the Report was set out in the



Statement of Claim which was then posted on www.offshorealert.com, if it is argued that publication is not covered by qualified privilege, such publication was as a result of the Plaintiffs' own actions. The Plaintiffs do not seek to strike out the qualified privilege defence, but argue that it cannot be relied upon by the Defendants as they contend that the publication was not limited to those with a legitimate interest and that the Defendants were motivated by malice.

11. On 15 May 2018 the Plaintiffs wrote to the Defendants concerning the content of the report and they sought a retraction and apology. As neither was forthcoming the Plaintiffs issued these defamation proceedings in September 2018

Preliminary Issue – Lack of Affidavit Evidence filed by Plaintiffs in Support of Summons

12. The Defendants contend that the non-filing of affidavit evidence by the Plaintiffs in support of their strike out Summons is fatal to the success of the Summons. I accept that in such proceedings a summons is usually supported by an affidavit however it is not mandatory. The Supreme Court Practice 1999 Vol 1, page 348 at 18/19/15 notes that in such applications *"affidavit evidence may be and ordinarily is used."* [My emphasis]. There is an exception which appears at Grand Court Rules ("GCR") O.18, r.19(2) which provides that no affidavit can be used in support of an application made on the ground that a pleading discloses no reasonable cause of action or defence[2]. However, it is common for this rule to be

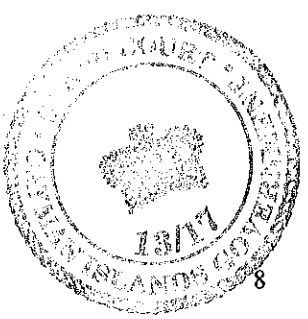
[2] See paragraphs 17 and 19 below and ***Taylor v RBC*** 2018 (1) CILR Hellman Ag. J. at para 121 on page 450.

circumvented by combining an application under that ground with some of the other grounds listed in paragraph 17 herein.

13. The absence of an affidavit in support, despite the Plaintiffs' stating in the Listing Form that one would be furnished, is not fatal to the present application in the circumstances in this case. I note that, well before issuing the Summons and this hearing, the Plaintiffs rehearsed almost all of their present concerns about the Defence and Counterclaim in a letter sent by their attorneys to the Defendants on 10 January 2019.

Preliminary Issue – The "Concerns" of McMillan J at the Hearing on 30 May 2019

14. The Defendants contend that McMillan J made observations and expressed concerns about the Summons and the procedure being adopted at the hearing. The Plaintiffs' Counsel was not in attendance at the hearing. There is no transcript from that hearing and not even a minute of order from that hearing on the Court file. Any observations made by McMillan J, no matter how wise and how potentially helpful, would have been based primarily on what the Learned Judge heard from only one side. If, as is reported by Counsel for the Defendants, McMillan J referred to the matter as being *"a storm in a tea cup"* and recommended that the parties seriously consider attending mediation, I wholeheartedly share his view about the merits of an alternative dispute resolution approach in this case.



15. The fact that the Plaintiffs may not have addressed the concerns of McMillan J, whatever they may have been, is not a ground for dismissing or not hearing the Summons.

16. I understand that the hearing in May was supposed to be commuted from the actual hearing of the Summons into a directions hearing. Possibly due to the non-attendance of the Plaintiffs' attorney, no directions appear to have been made and, unfortunately, no directions were agreed or submitted to the Court by the parties over the last three months. As a consequence, preparation for this hearing has been characterised by a late flurry of activity in August, which has resulted in some of the time consuming arguments being raised today rather than being resolved by timely discourse out of Court. I would have expected the parties to have agreed directions at the time of or shortly after the May directions hearing and not simply have this Summons drift to a hearing in an unstructured manner.

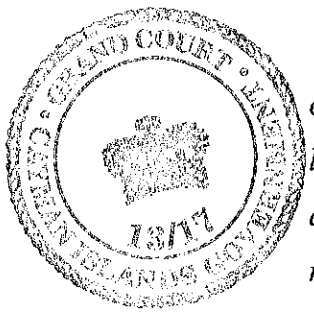
The Law in Relation to Strike Out Applications

17. GCR O.18, r.19 states: -

> *"i. The Court may at any stage in the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in the any pleading or in the endorsement, claiming -*
>
> *a. It discloses no reasonable cause of action or defence, as the case may be; or*
> *b. It is scandalous, frivolous or vexations; or*
> *c. It may prejudice, embarrass or delay the fair trial of the action; or*
> *d. It is otherwise an abuse of the process of the Court.*

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

18. The Plaintiffs rely upon GCR O.18, r.19(1)(a) in relation to the Counterclaim as it is contended that it has no real chance of success. The Plaintiffs also rely upon this sub-rule in relation to other challenged paragraphs in the Defence *"which do not set out (or form part of) any reasonable defence."* The Supreme Court Practice 1999 Vol 1, page 349 at 18/19/10 notes that:



"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered.... So long as the statement of claim or the particulars...disclose some cause of action, or raise some question fit to be decided by a Judge or Jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out."

19. As this ground raises an entirely legal question, no evidence as to the facts is allowed and the Court will assume the facts in favour of the Defendants in this case, as it is their pleading that is being challenged. As the Court will be looking at the pleadings and particulars, no affidavit evidence is needed and affidavits therefore cannot be filed in relation to this ground.

20. Mr. Goodman most ably and helpfully sets out in his Skeleton Argument[3] the approach of the Courts in a series of oft quoted cases concerning the test when considering GCR O.18 r.19(10)(a) which I have regard to. I adopt the following

[3] Paragraphs 21-25.

as principles applicable to the consideration of the parties' submissions in relation GCR O.18, r.19(1)(a):

(a) The Court is to assume that the facts pleaded are true (unless they are entirely speculative and without foundation).

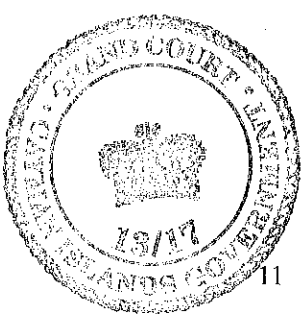
(b) The pleading must be clearly untenable in the sense that the Court can be certain that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, even if requiring extensive argument.

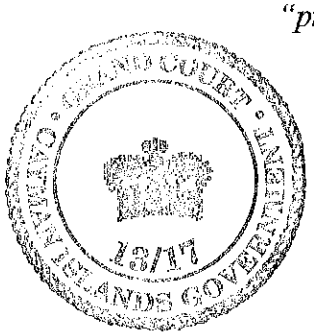
21. The Plaintiffs rely upon GCR O.18, r.19(1)(b) in relation to paragraphs of the Defence where they contend that accusations are made against the Plaintiffs which are not material or relevant to any proper defence to the claim and which are *"inserted purely to cast aspersions against the Plaintiffs."* The Supreme Court Practice 1999, Vol. 1, page 350 at 18/19/15 notes that:

> *"The Court has a general jurisdiction to expunge scandalous matter in any record or proceeding...." The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed" (per Selbourne L.C. in Christie v Christie (1873) L.R. 8Ch.App. 499 at 503...)....If any unnecessary matter in a pleading contains any imputation on the opponent, or makes any charge of misconduct or bad faith against him or anyone else, it will be struck out, for it then becomes scandalous."*



A frivolous pleading is one which trifles with the Court's processes, while a vexatious one contains an element of impropriety. The Supreme Court Practice 1999, Vol 1, page 350 at 18/19/16 notes that frivolous and vexatious means *"cases which are obviously frivolous or vexatious or obviously unsustainable."*

22. The Plaintiffs also rely upon GCR O.18, r.19(1)(c) in relation to challenged paragraphs of the Defence, many of which they contend *"introduce extraneous and irrelevant issues"* and which would occupy considerable unwarranted time and expense to address. Pleadings which can cause delay include those that are unnecessarily prolix; are scandalous and irrelevant; plead purely evidential material (especially if it is excessively drafted); or are unintelligible. The Supreme Court Practice 1999, Vol 1, page 351 at 18/19/17 notes that in relation to *"prejudice, embarrass or delay the fair trial"*:



> *"The Court is disposed to give a liberal interpretation to these words....At the same time parties must not be too ready to find themselves embarrassed. "The rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right." (per Bowen L.J. In Knowles v Roberts (1888) 38 Ch.D 263 at 270)."*

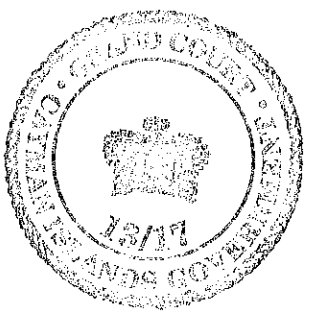
The note at 18/19/17 later records:

> *"The mere fact that an opponent's pleading contains some unnecessary matter is not sufficient ground for an application under this rule. A*

statement will not be struck out merely because it is unnecessary, so long as it is otherwise harmless....It is no part of the defendant's duty to reform the plaintiff's pleading; but if wholly immaterial matter be set in such a way that the applicant must plead to it, and so raise irrelevant issues which may involve expense, trouble and delay, then the irrelevant matter will be struck out as it will prejudice the fair trial of the action"

23. The Plaintiffs also rely upon GCR O.18, r.19(1)(d). The note in the Supreme Court Practice 1999, Vol. 1, page 351 at 18/19/26 states that *"the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process."* The Plaintiffs contend that this may apply to challenged parts of the Defence which also fall under the other sub-heads. It is submitted by the Plaintiffs that it is an abuse of process to (i) launch a claim that has no realistic chance of success and (ii) to *"introduce tranches of irrelevant material into a defence with the purpose of setting up false issues and/or attacking the character of the Plaintiffs."*"[4]

24. Long winded, ill-drafted pleadings may defeat the purpose of a Statement of Claim or a Defence and Counterclaim to such an extent that it is an abuse of process. This principle is intended to prevent the improper use of the Court's time and to prevent a pleading being a means of oppressive conduct against the other party.



[4] Ibid, page 353 at 18/19/26.

The Plaintiffs' Position

25. A central criticism of the Defence made by the Plaintiffs is that, having regard to the defences actually pleaded, the pleading contains a good deal of irrelevant, embarrassing and prejudicial material that needs to be excised (especially so if there is to be trial by jury). It is contended that this has been done by the Defendants in *"an attempt to besmirch the Plaintiffs and/or engage in litigation over immaterial issues"* and will result in delay and increased costs due to the parties having to litigate in relation to the immaterial allegations. It is submitted that the allegations are scandalous as they seek to assert that the Plaintiffs were guilty of misconduct with respect to matters that are irrelevant to the pleaded defence.

26. The Plaintiffs submit that there would be an injustice if they were required to plead to the Defence and Counterclaim, make disclosure in accordance with it, and proceed to trial on the basis of it. They submit that a party who has to contend with a pleading which does not coherently articulate the case against it is denied procedural fairness. The Plaintiffs highlight the injustice of additional expense and inconvenience in preparing for trial in relation to irrelevant issues which could significantly lengthen the proceeding's duration.

The Defendants' Position

27. The Defendants contend that the Plaintiffs' Summons should be dismissed as it is *"unmeritorious"* and outline the reasons for stating that as follows at paragraphs 52-53 of their Skeleton Argument. They submit that:

(i) The Plaintiffs have failed to show that any parts of the Defence or Counterclaim are "obviously unsustainable" or "obviously and almost incontestably bad" or "hopeless";

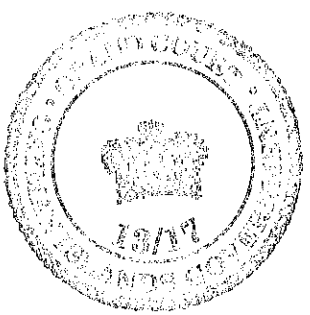
(ii) The Defendants have not made any allegations of fraud/dishonesty against the Plaintiffs and as such the Defence and Counterclaim cannot be said to be scandalous;

(iii) The Plaintiffs have failed to show that the Defence or Counterclaim are frivolous, vexatious or an abuse of the Court process;

(iv) The Plaintiffs have failed to show that the Defence or Counterclaim are embarrassing and/or will delay a fair trial; and/or

(v) The application is disproportionate and inconsistent with the Overriding Objective.

28. The Defendants contend that the Defence includes a *prima facie* response to the Plaintiffs' allegation and that the Counterclaim includes a *prima facie* case against the First Plaintiff. It is submitted that they both include relevant supporting evidence.

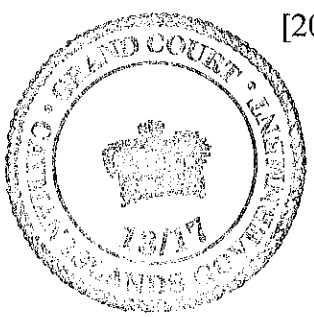


Requirements of Pleading

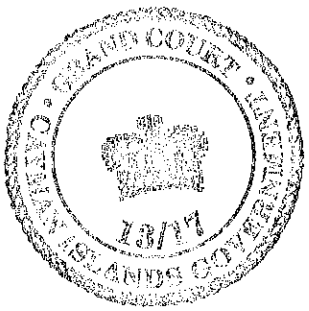
29. Having regard to the argument being made in relation to the content of the pleadings, before I concentrate on the specific parts of the pleading which are in issue, I see merit in first highlighting some general observations about the requirements of pleading.

30. The purpose of particulars in a pleading is to inform the opposing party of the case that will be made against it on the relevant issue. Particulars should be clear, state precisely the basic facts upon which the Party relies, be non-argumentative and not be rhetorical. Particulars serve the related purpose of defining the issues for decision thereby enabling the relevance and admissibility of evidence to be determined at trial. Furthermore, if the case goes to trial without precise pleadings, much time can be wasted and a party might be taken by surprise when the real issue not previously stated clearly suddenly emerges.

31. When considering why it is important to adhere to the requirements for pleadings in a defamation case I note Lord Justice Pill and Mrs. Justice Sharp concise and uncontroversial observations in the Court of Appeal decision in ***Stephen Foley & Independent News and Media Limited & Roger Alton v Lord Ashcroft KCMG*** [2012] EWCA Civ 423 when they stated at paragraph 50:



"There are difficulties in managing a case justly to which a loose and ineffective pleading will give rise at each stage of the litigation. These include at the reply stage when a claimant must specifically admit or deny the allegations against him, giving the facts on which he relies: see CPR

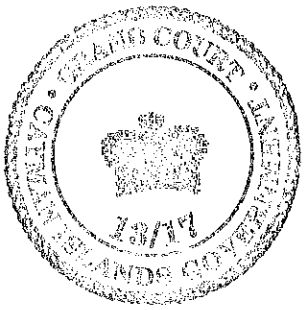


52 PD 19 para 2.8, when disclosure takes place, when witness statements are prepared, and at the trial itself which may take place before a jury. Time and money will almost inevitably end up being wasted over matters which have little to do with the overall merits of the litigation."

32. Requirements of pleading exist both in terms of the GCR and as a matter of the Court's inherent jurisdiction to regulate its own processes. The requirements in relation to pleading a claim and a defence have a commonality of purpose although some particular requirements necessarily vary according to whether the Court is considering a Statement of Claim or a Defence.

33. The procedural requirements for pleadings are spelled out in the GCR. For instance O.18, r.12(1) (requires necessary particulars of any claim, defence or other matter intended to be advanced at trial) and O.18. r.6(2) (requires the pleading to be divided into numbered paragraphs, with each allegation being, so far as convenient, pleaded in chronological order and contained in a separate paragraph).

34. Relevant for present purposes, O.18, r.7(1) requires parties to restrict to pleading the facts which are material to the claim or defence advanced, and must not plead the evidence by which those facts are to be proved. However, the distinction between facts and evidence is not always clear. So, for instance, where a party relies upon a document he will plead the document and thereby set out both the fact relied upon and the evidence of that fact.



35. In summary the key principles are:

i. The pleading must be accurate, clear and intelligible;

ii. Sufficient particulars must be given to enable the defendant to be fairly informed of the case to be met;

iii. While adequate particulars are required, the statement of claim must not stray into setting out the evidence relied upon;

iv. Separate causes of action must be separately stated;

v. The effect and not the exact words of a document or conversation should be pleaded[5]. However, where the words used are material, such as in a defamation case, the exact words should be fully pleaded. The need to fairly inform the other party of the case being advanced is particularly important in defamation cases because the specifics of publication, and the words used, are a significant factor in the defences that may be available and will determine what defendants need to plead and prove for their defences; and

vi. The pleading should set out all the elements of the cause of action; and the relief sought must be clearly pleaded in respect of each cause of action and, where there is more than one plaintiff and multiple defendants, the relief sought by each plaintiff against each defendant must be clearly stated.

36. The requirements (i)-(iv) set out in paragraph 35 above apply to both Statement of Claims and to Defences. O.18, r.13 identifies additional requirements which apply specifically to a Defence. Every allegation of fact made in a Statement of Claim is deemed to be admitted unless it is expressly traversed by being denied or not

[5] O.18 r.7(2).

admitted. A general denial of allegations or a general statement of non-admission of them is not sufficient to traverse them. A denial of an allegation of fact in the Statement of Claim must go to the root of the allegation and must not be evasive.

37. In defamation cases the practice is where a defence of qualified privilege is relied upon it must be distinctly pleaded with proper particulars of the context which created the privilege.

38. With these principles in mind, I move on to apply them to the Plaintiffs' application to strike out the Counterclaim and parts of the Defence.

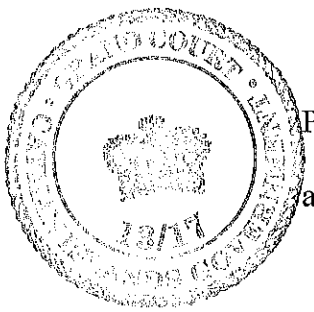
Issues Surrounding the Pleading of the Bullying Allegation

39. The Plaintiffs challenge the appropriateness of the pleading, at paragraphs 2.2, 30, 31 and 35.2 in the Defence which relate to what the parties refer to as the Bullying Allegation. This relates to words in the statement made at the AGM that the Plaintiffs had bullied and intimidated Ms. Foster, who was the Administrator of Lacovia at the relevant time, to such an extent that she felt compelled to resign from her employment. The Defendants at paragraph 2.2 of their Defence accept that the Bullying Allegation was made, but contend that what was said was not defamation because it was true. They also rely upon the defence of qualified privilege and no issue is taken by the Plaintiffs as to how this latter defence has been pleaded at paragraphs 32-34 of the Defence in relation to either the Fraud Allegation or to the Bullying Allegation.

40. In in the Court of Appeal decision in ***Elaine Chase v Newsgroup Newspapers Ltd*** [2002] EWCA Civ 1772 Brooke LJ helpfully commented upon the relevant principles of English Libel law as follows:

> *"33. English law does not permit a claimant to recover damages in respect of an injury to a character which he/she does not possess, or ought not to possess. For this reason a successful plea of justification is an absolute defence to a claim in libel because it shows, as a matter of objective fact, that a claimant is not entitled to the unblemished reputation which he/she claims to have been damaged by the publication of which complaint is made.*
>
> *34. For such a plea to succeed, there must be a final finding on the merits by a court (usually a jury) on admissible evidence that the defamatory "sting" of the allegation complained of is objectively true as a matter of fact. The defendant does not have to prove that every word he/she published was true. He/she has to establish the "essential" or "substantial" truth of the sting of the libel. To prove the truth of some lesser defamatory meaning does not provide a complete defence.*
>
> *The burden of proving justification rests on the defendant. Although the standard of proof is the balance of probabilities, the more improbable an allegation the stronger must be the evidence that it did occur before, on the balance of probabilities, its occurrence will be established.*
>
> *35. I take these principles from such cases as McPherson v Daniels (1829) 10 B&C 263, 272; Berezovsky v Forbes Inc [2001] EMLR 1030, 1039 at para 12; McPhilemy v Times Newspapers Ltd [1999] EMLR 751, 774; and Re H (minors) [1996] AC 563, 586F-H."*

41. The Plaintiffs submit that such a defence of justification requires the Defendants to plead (i) the precise defamatory meaning said to be true in relation to each



Plaintiff and (ii) the particulars of the facts and matters relied on in support of the allegation contended to be true in relation to each Plaintiff.

42. The Defendants contend that they have adequately pleaded their defence by setting out the content of email from Ms. Foster dated 24 January 2019 at Paragraph 30 in the Defence. The Defendants submit that the email contains material facts upon which they rely. They argue that for the purpose of the present Summons, the Court should accept the content as being true, and that the ultimate determination of the success of the Defence should be left for trial, and should not be dealt with at an interlocutory stage. The Defendants add that if the Court considers that this aspect of the Defence requires further particularisation, then they should be afforded the opportunity to re- particularise their case and not be deprived of *"their right to a trial by jury of the issues."*

43. The Plaintiffs contend that the Defendants have (i) failed to state what case is alleged against each of the Plaintiffs and (ii) failed to state what each of the Plaintiffs is alleged to have done or said that amounts to "*bullying*" or *"intimidation*". They submit that simply relying on and quoting in full at paragraph 30 in the Defence from an email sent by Ms. Foster to Lacovia owners on 24 January 2018 and adding at paragraph 31 that Ms. Foster expressed views similar to those set out in the email does not adequately contain or refer to the facts that could form the basis of an allegation that the Plaintiffs (or one of them) had bullied Ms. Foster and that it was so intolerable that she had to leave her

employment. I note that the reference to *"{Dr Slutsky}"* in the email set out in paragraph 30 of the Defence is incorrectly included, as his name was not actually in the email.

44. The Plaintiffs are correct to highlight that, pursuant to O.18, r.7(1), only facts must be pleaded and not the evidence upon which those facts are to be proved. The precise words in the email must not be stated except so far as those words are material. In this case, it is not appropriate to simply reproduce the full content of the email, especially without any elaboration as what parts of the email are relevant to a contention that the bullying allegation is true in relation to the Defendants. The allegation is serious and there is a duty upon the Defendants who choose to allege bullying to let the "accused" Plaintiffs know with complete frankness the case they have to meet. As they raise the defence of justification the Defendants understandably plead at paragraph 2.2 in the Defence that the bullying allegation is true. The Defendants may plead that they *"will rely upon Mrs. Foster's email to Lacovia owners dated 24 January 2018."* However, the defence of justification must then be pleaded in a more concise manner with full particulars of all the facts and matters relied on in support of the allegation that what was said was true. The particulars should *"succinctly set out the scope of the intended justification, leaving the detail to be given once only in witness statements."*[6] That said, the observations in ***McPhilemy*** should not be taken to sanction any relaxation of the basic rule that a Plaintiff is entitled to know the

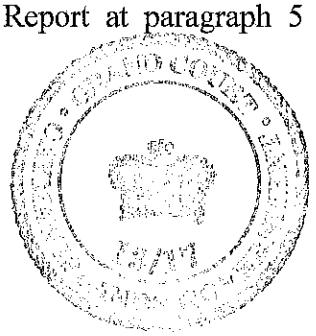
[6] May LJ in ***McPhilemy v Times Newspaper Limited*** [1999] 3 All E.R. 775 at 789a – Case discussed on page 848 of Gatley on Law and Slander Tenth Edition which the Court was referred to during the hearing.

case he has to meet; nor would it justify postponing that entitlement to the later stage of proceedings when witness statements are exchanged.

45. The requirements are succinctly set out by Brooke LJ at paragraph 37 in ***Elaine Chase v Newsgroup Newspapers Ltd,*** where he stated:

> *"Under modern libel practice a defendant must set out in his/her statement of case the defamatory meaning he/she seeks to prove to be essentially or substantially true. This is now known as the Lucas-Box meaning, following the leading case of Lucas Box v News Group Ltd [1986] 1 WLR 147. By this means the claimant (and the court) will know unequivocally what the defendant is seeking to justify. In the Lucas-Box case itself Ackner LJ said at p 153G that if the particulars originally given by a defendant of a Lucas-Box meaning are not clear then the situation must be made unequivocal. The defendant must then give proper particulars of the facts on which he/she relies to justify that meaning (see McPhilemy v Times Newspapers Ltd [1999] EMLR 751, 770)."*

46. The reproducing of the content of the email and leaving the Plaintiffs to then try to identify any parts that may be relevant to the truthfulness of an allegation of bullying against each Defendant does not amount to proper particularisation. The course taken by the Defendants cannot be justified by equating it with the Plaintiffs who pleaded, as they are required to do when bringing a defamation claim, extensively from the Exco Report at paragraph 5 of the Statement of Claim.



47. Accordingly, I strike out paragraph 30 in the Defence from after the words *"dated 24 June 2018"*. Paragraph 31 in the Defence is too vague and should also be struck out. However, having regard to the Overriding Objective, I am satisfied that opportunity should be given at this early stage of the proceedings to enable the Defendants to rectify their pleading by properly pleading their defence of justification.[7] They should plead the precise meaning said to be true in relation to each Plaintiff. They should also particularise the facts and matters relied upon in support of the allegation that what was said about bullying was true. This should involve providing sufficient detail in the particulars about what each Plaintiff is alleged to have done or said that amounts to intolerable bullying or intimidation.

48. Having regard to my above decision, I do not strike out the justification defence at paragraph 2.2 and 35.2 in the Defence at this time.

Issues Surrounding the Pleading of the Fraud Allegation and Qualified Privilege

49. As already highlighted herein, in relation to this allegation the Defendants dispute meaning and also rely upon a defence of qualified privilege. It is contended that what was said was not an allegation of complicity in fraud, but was an expression of concern by Exco and the Chairman about past management at Lacovia and the conduct of members of Exco.

[7] As is suggested by the Defendants at paragraph 59 in their Skeleton Argument to be an alternative approach.

50. Having regard to the Defendants' contention, it is helpful to understand what one is tasked with when seeking to determine the natural and ordinary meaning of words complained of. Although not a case mentioned by the parties, I see merit in referring to the following oft quoted summary at paragraph 14 in the judgment of Sir Anthony Clarke MR in ***Jeynes v New Magazines Limited*** [2008] EWCA Civ 130:

> *"(1) The governing principle is reasonableness.*
>
> *(2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.*
>
> *(3) Over-elaborate analysis is best avoided.*
>
> *(4) The intention of the publisher is irrelevant.*
>
> *(5) The article must be read as a whole, and any 'bane and antidote' taken together.*
>
> *(6) The hypothetical reader is taken to be representative of those who would read the publication in question.*
>
> *(7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation...' ...*
>
> *(8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense.' Neville v Fine Arts Company [1897] AC 68 per Lord Halsbury LC at 73."*

51. In the Skeleton Argument filed on behalf of the Defendants it is contended that the particulars are in the Defence to put the words complained of into context,

thereby assisting the Court and jury to determine the meaning they are capable of bearing. It is correct to say that as stated in the context may also be relevant when determining meaning.

52. As stated in section 3 in Gatley on Libel & Slander ("Gatley"), in order to determine the natural and ordinary meaning it is also necessary to take into account the context in which a statement appeared (for example its nature and its source) and the circumstances of the publication are relevant. Context means that a plaintiff cannot highlight an isolated passage in an article and complain of that part alone as other parts of the article might *"throw a different light on that passage."* In section 3 in Gatley the authors referred to Lord Halsbury's observations at p.72 in ***Neville v Fine Art & General Insurance Co.*** [1897] AC 68 where one of the issues on appeal was whether the contents of a letter were capable of bearing defamatory meaning. Lord Halsbury said that he was unable to know in what sense any ordinary reasonable man would understand the words complained of to be defamatory to the Plaintiff adding:

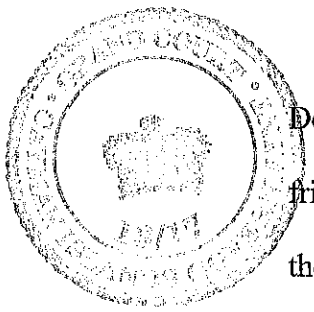
> *"In saying that, of course, it is necessary to take into consideration, not only the actual words used, but the context of the words, and the persons to whom the communication was made."*

53. However, when considering what is intended by taking into account context, it is clear that the inclusion of irrelevant and embarrassing material cannot be justified on the ground that it is part of the factual matrix. Section 33.7 of Gatley makes clear that if a plaintiff relies on the natural and ordinary meaning of the words, no

evidence is admissible by the defendant as to their meaning. This is not a case in which a plaintiff is relying upon an innuendo meaning which would enable a defendant to lead evidence contradicting the extrinsic facts relied upon by the plaintiff. It is clear from the Defence that this is not one of those cases where a defendant is seeking to displace the natural and ordinary meaning of the words. In such a case a defendant could do so by giving evidence of circumstances known to all of those who read the words in the Report to show that the words would not have been understood in their natural and ordinary meaning, but in some lesser defamatory or innocuous meaning.

54. This summary, together with the qualifications identified by Sir Anthony Clarke MR in relation to points (2) and (7), set out an authoritative approach to determining meaning.

55. The Defendants state that they are entitled to plead the material facts upon which they rely in their defence to state their case. It is well established principle that a plea of justification should focus on conduct of the claimant. As the Plaintiffs highlight, the Defendants plead a more restricted case and do not plead in relation to the Fraud Allegation that what was stated was true and have not pleaded a defence of justification or fair comment. In light of this approach by the Defendants, the Plaintiffs contend that a number of paragraphs in the Defence should be struck out pursuant to *"any or all"* of the sub-paragraphs of O.18, r.19(1). They specifically contend that the grounds for strike out are that (i) the



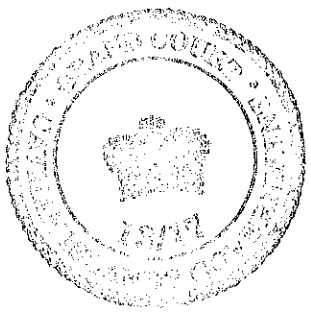
Defence contains irrelevant and extraneous material; (ii) parts of the Defence are frivolous and vexatious; and (iii) the Defence may prejudice, embarrass or delay the fair trial of the action.

56. However, the Defendants contended at the hearing that the Plaintiffs have misunderstood how their defence has been put when placing reliance upon the case of ***Polly Peck (Holdings) plc v Trelford*** [1986] 2 All ER 84 at 94, [1986] QB 1000 and upon the justification cases, as the Defendants do not seek to justify the allegation of fraud. Their defence is that if the words are determined to be an accusation of fraud, then they attract qualified privilege. In the oral submissions on behalf of the Defendants it is submitted that *"to put the chairman's report into context and to justify the plea of qualified privilege, we must provide particulars of why we say it was an occasion of qualified privilege."* It is further submitted that even if some of the information does not go to the issue of qualified privilege, it goes to answer the issue as to whether the Defendants were driven by malice.

57. When one looks at the structure of and the content in the Defence, coupled with the approach taken in the Defendants' Skeleton Argument, one can understand why the Plaintiffs approached their submissions in the way that they did. Paragraphs 33-34 the Defence contain the type of particulars that one would ordinarily expect to see when pleading a defence of qualified privilege without malice. The parts of the Defence challenged by the Plaintiffs are not contained in paragraph 34, save for one cross reference to the detailed email correspondence

replicated in paragraph 27 of the Defence. The majority of the parts of the Defence that are challenged appear in the section in the Defence which purports to be in response to the Fraud Allegation particulars set out in 10.1 to 10.15 in the Statement of Claim, as it specifically cross references to those paragraphs.

58. In light of the submissions, I have regard to the observation made by O'Connor LJ when he was setting out four relevant principles in ***Polly Peck (Holdings) plc v Trelford*** [1986] 2 All ER 84 at 94, [1986] QB 1000 at 1021B, that defamation cases generally should be strictly confined to those matters which are essential to the proper disposal of the real issues between the parties. O'Connor L.J stated:



> *"The fourth principle is that the trial of the action should concern itself with the essential issues and the evidence relevant thereto and that public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for a fair determination of the dispute between the parties."*

59. This may mean cutting out peripheral matters, the burden of whose investigation is disproportionate to their importance. That said, I am also aware that the action should be so structured that a defendant is not prevented from deploying his full essential defence and so that the plaintiff, if he wins, will obtain proper vindication upon a proper basis.[8] In ***Basham*** Neill LJ said:

> *"A balance has to be struck between the legitimate defence of free speech and free comment on the one hand and on the other hand the costs which*

[8] ***Basham v Gregory*** [1996] CA Transcript 148 at 10 and 11- Case discussed on page 844 of Gatley on Law and Slander Tenth Edition which the Court was referred to during the hearing.

may be involved if every peripheral issue is examined and debated at the trial."

Neill LJ then adopted the fourth principle set out in ***Polly Peck*** and stated that:

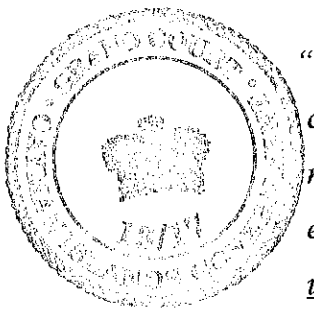
"There had been a great deal of criticism both in appellate courts and more generally about the length of the trial of libel actions and about their expense and complexity. It might well be that in the past insufficient attention had been paid to the importance and relevance of that principle."

60. It appears that both parties wish the trial to be by jury. If so, that is a factor which only serves to underline the need for clarity, economy and efficiency in identifying the issues. This is consistent with the Court of Appeal's clear indication in ***Polly Peck*** that the case needs to be focused on what are left as the real issues between the parties and confined to the evidence which is necessary and proportionate for achieving a fair result. I am satisfied that the inclusion of irrelevant and embarrassing material cannot be justified on the rather lame ground that it is part of the factual matrix.

61. The most structured way to deal with the strike out application is to deal with the paragraphs in the order that they were dealt with by the parties in their submissions. When I do so, I have in mind the above principles.

Paragraph 14 Defence

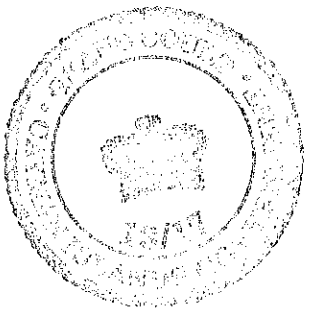
62. Paragraph 14 of the Defence which as plead purports to be responsive to Paragraph 10.2 of the Statement of Claim. Paragraph 10.2 states that:



"The Defendants knew that the plaintiffs were not party to any fraud committed by the former General Manager of Lacovia and that there was no basis for any allegation against the Plaintiffs (or either of them) to the effect that they were responsible or liable for any such fraud (whether under the criminal or civil law of fraud)." My Emphasis

63. At paragraph 14 of the Defence the Defendants admit paragraph 10.2, but then go on to say that is save for matters set out in subparagraphs explaining the role of the Plaintiffs on Exco, their alleged fiduciary duties to Lacovia and alleged breaches of those duties. It reads like an admission that they knew that they were not party to a fraud and that there was no basis for an allegation that they were responsible or liable for any criminal or civil law fraud, but then raises unrelated allegations that do not go to the Fraud issue.

64. The Defendants state that they provided the acts in the sub-paragraphs *"to contextualise why the Report named the Plaintiffs and why the report identified concerns about the Plaintiff's conduct."* The issue of whether they had a fiduciary duty and whether they breached that and had the benefit of an indemnity, both found in the mostly unresponsive paragraph 14, is not relevant to the contention plead at paragraph 10.2 of the Statement of Claim. If that not pleaded but inferred veiled claim of improper conduct remained in the Defence, the Plaintiffs would feel compelled to have to deal with it in some detail in their Reply when in reality



it had little to do with the merits of the real issues in the litigation. The factual dispute raised could also potentially unnecessarily occupy a great deal of Court time and detract from the real issues for determination at trial. The raised allegation of breach of fiduciary duty is not helpful in assisting the Court and jury in determining the meaning of the words used in the Report.

65. If the detail in paragraph 14 had been pleaded around paragraph 34 in the Qualified Privilege section of the Defence, I would still be of the view that it raises irrelevant unrelated material in relation to the qualified privilege issue. The positions held by the Plaintiffs are properly pleaded in other parts of the Defence. The existing outstanding relationship between those at the meeting and the Defendants and the fact that they share a common and corresponding interest in the subject matter are also set out elsewhere in the Defence. For a determination to be made as to whether this is an occasion of qualified privilege or whether there is malice to be made, it does not require a review and finding about what fiduciary duty may exist, whether such a duty may have been breached and whether an indemnity existed. I repeat this is not a case in which there is a contention that the Fraud Allegation is true, it is irrelevant whether the Defendants thought that another allegation they made was true, especially as there is no counterclaim, for example, for negligence in relation to that allegation. In fact, in this case they are not actually pleading about a belief, but actually plead that the allegations against the Plaintiffs are true and if they remain in the Defence the Plaintiffs would have to address it in their reply.

66. Accordingly having regard to GCR O.18, r.9(i)(b) and (c) I strike out:

i. Line 1 of Paragraph 14 up to the word "below";

ii. Subparagraph 14.1 after the words "RM's appointment" to the end of that sub-paragraph; and

iii. Subparagraphs 14.2 - 14.3.

Paragraph 15 Defence

67. Paragraph 15 of the Defence which as plead purports to be responsive to Paragraph 10.3 of the Statement of Claim. Paragraph 10.3 states that:

> *"As members of the EC, the Plaintiffs had been party to decisions made by the whole EC in about 2003 with a view to putting in place a proper and effective system for the management of Lacovia's financial affairs. The EC members voted in favour of those decisions. In particular:*
>
> *a) the EC appointed a General Manager and a Deputy, in the belief that they would be an honest and competent management team;*
> *b) the EC appointed Cayman Management Limited (CML) to carry out specified financial and accounting services for Lacovia, in effect, to act as a competent treasurer for the EC; and*
> *c) the EC ensured that Lacovia's accounts each year were audited externally, by a leading independent accountancy firm."*

68. At paragraph 15.3(b) of the Defence the Defendants plead that as Mr. David Roberts was a principal of CML and a member of Exco there existed a conflict of interest. The Defendants pleaded that Mr. Roberts also owed the same fiduciary duty to the strata company as owed by the Plaintiffs.

69. The Plaintiffs in the Statement of Claim went beyond simply stating the specific role of CML by adding that they were to act as a competent treasurer. The

Defendants are entitled to respond to that by elaborating on the similar appointed agreements later signed and mentioned at paragraph 15.5(a) of the Defence. They are also entitled to plead that Mr. David Roberts was the principal of CML and a member of Exco as this may arguably be regarded as being partly responsive. However, the allegation of any alleged conflict of interest is not responsive and it is irrelevant to the issue of the meaning of the words used in the Report or to the qualified privilege defence. What the auditors did is similarly irrelevant and not responsive as is the reference to audit representation letters. The pleading at paragraph 15.5(b) contains a recital of evidence and falls foul of the procedural requirements in GCR O.18, r.7(1), not only because the facts are not material to the defence advanced, but also because it is inappropriate to plead the evidence by which facts are to be proved.

70. Accordingly, having regard to GCR O.18, r.9 (i)(b) and (c):

i. The words in paragraph 15.3(b) are struck out after the words *"a member of Exco"* and to before *"Mr Roberts resigned."*

ii. The words in paragraph 15(3)(c) are struck out from *"but that neither..."* to the end of the sub paragraph.

iii. The second sentence in paragraph 15.4 is struck out.

iv. Paragraph 15.5(b) is struck out after the words *"addressed to the auditors..."* to the end of that sub-paragraph.

Paragraph 16 and 18 Defence

71. Paragraph 16 of the Defence which as plead purports to be responsive to Paragraph 10.4 of the Statement of Claim. Paragraph 10.4 states that:

> *"It was only after the General Manager left Lacovia in 2015 that it came to light that it appeared that he had been guilty of grave misconduct amounting to criminal (and civil) fraud against Lacovia, as a result of which Lacovia had suffered very significant financial losses, the precise extent of which was unknown. In outline, it appeared that:*
>
> *a) for a substantial period, large payments had been made to CAM Enterprises Limited (**CAM**) by Lacovia;*
> *b) while CAM had carried out work at Lacovia (in relation to maintenance and other matters), some of its invoices had been inflated, adding an unwarranted percentage to what should have been the contract price;*
> *c) further, entirely false CAM invoices had been generated, billing Lacovia for work that had not been carried out (at all), in a period of about six months prior to the General Manager's departure;*
> *d) all of those invoices had been paid in full by Lacovia;*
> *e) the total payments made to CAM by Lacovia were in the region of $1.6 million; and*
> *f) CAM was an unregistered and unlicensed company that was owned or controlled by the General Manager."*

72. Paragraph 18 of the Defence is pleaded following the Plaintiffs' assertion at paragraph 10.5 of the Statement of Claim that they were unaware of any misconduct on the part of the General Manager ("RM").

73. At paragraph 16.2 of the Defence the Defendants plead concerning the enquiries made by the Second Defendant shortly before RM's departure and enquiries of another Exco member shortly after RM's departure. I am satisfied that on the whole the detail is relevant as it is responsive to the detail in the Statement of Claim.

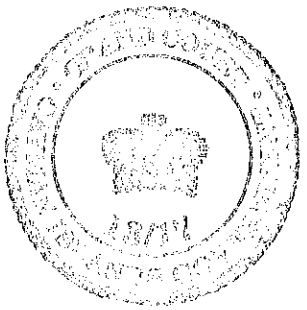
74. However, I find the words in subparagraph 16.5 from *"In the Red Flag"* until the end of that paragraph should be struck out. That wording is irrelevant and is included, not to put the meaning of the words in the Report into context, but with the intention by the Defendants to be part of the background to their allegation that the Plaintiffs were negligent and/or in breach of their fiduciary duty and that this resulted in Lacovia incurring greater loss due from RM's conduct. This is an allegation that is developed by them in far greater detail in paragraph 18 of the Defence.

75. At paragraph 18 great detail is plead about irrelevant allegations of serious mismanagement which do not go to the meaning of the words used in the Report nor do they, in the way that they have been pleaded, go to the defence of qualified privilege or to the issue of malice. The Plaintiffs rightly contend that the opposed parts are not responsive and raise irrelevant and extraneous allegations which do not go to the Defence being advocated or to the counterclaim being made. The real question for determination is how the court and jury go about ascertaining the range of legitimate meanings of the words used. The content of paragraph 18 seems designed to create an impression of misconduct by the Plaintiffs in a case in which there is no justification defence being put forward. If paragraph 18 was to remain in its current format in the pleading the allegations contained therein would have to be dealt with by specific admissions or denials in the Reply by the Petitioner. This creates the same case management concerns that have been expressed herein when dealing with paragraph 14 in the Defence.

76. Accordingly, having regard to O.18, r.9(i)(b) and (c):

i. The words in paragraph 16.2 of the Defence are struck out; and

ii. Paragraph 18 is struck out in its entirety



Paragraph 20 Defence

77. Paragraph 20 of the Defence which as plead purports to be responsive to Paragraph 10.7 of the Statement of Claim. Paragraph 10.7 states that:

> *"As the Defendants well knew, while it appeared that there was evidence that the General Manager was guilty of a very substantial fraud:*
>
> *a) there was no suggestion that CML had been guilty of, or party to, any fraud practised on Lacovia; and*
> *b) there was no suggestion that any member of the EC (including the Plaintiffs) had been guilty of, or party to, any such fraud."*

78. The same objections in relation to paragraph 14 and 18 of the Defence referred to herein, apply to sub paragraphs: 20.1, 20.2 and 20.3 of the Defence. The Defendants rely on paragraph 18 of the Defence and again seek to plead allegations against the Plaintiffs that are not relevant to the meaning of the words in the publication or to any defence raised. They again seek to raise irrelevant allegations that the Plaintiffs *"may have been"* negligent or in breach of a fiduciary duty as well as making allegations about breach of contract by RM and negligence and breach of agreement by CML.

79. Accordingly, having regard to GCR O.18, r.9(i)(b) and (c):

i. The second sentence in sub paragraph 20.2 having regard to my observations concerning CML set out in paragraph 69 herein;

ii. The second and third sentences in sub paragraph 20.3 are struck out.

80. In light of the content of paragraph 10.4 of the Statement of Claim, sub paragraph 20.1 in the Defence is not struck out.

Paragraph 24 of the Defence

81. The final two sentences are struck out of this paragraph as they refer to paragraph 18 and paragraph 27.10 of the Defence which have been struck out for reasons given herein when dealing with those paragraphs. The Defendant's case is that the Report did not contain a Fraud Allegation and therefore whether they believed the words to be referring to something else is irrelevant when determining the meaning of the words in defamation proceedings.

82. Accordingly from the words *"Including those set out..."* until the end of the paragraph 24 of the Defence are struck out.

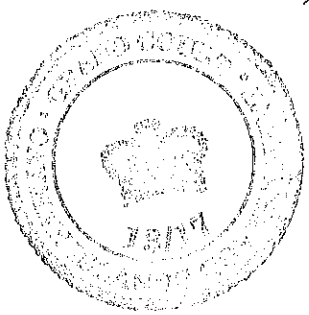
Paragraph 27 and Paragraph 33 of the Defence

83. Paragraph 27 of the Defence which as plead purports to be responsive to Paragraph 10.14 of the Statement of Claim. Paragraph 10.14 states that:

> *"The Defendants also set out to present an account of the First Plaintiff's communications with Lacovia's lawyers that were a travesty of the true position.*
>
> *a) At the outset (and as the Defendants knew), the First Plaintiff gave every co-operation to lawyers who had been instructed to act for Lacovia, seeking to assist them in advancing legal claims against the General Manager and CML;*

b) *The implication that the First Plaintiff sought to hide material or deliberately to obstruct Lacovia's lawyers in their legitimate work on its behalf was false and without foundation. When asked for documentation, the First Plaintiff provided a complete set of electronic copy documents, obtained by using automatic search functions. He was not asked to provide that information in a different (more easily searchable) form.*

c) *The allegation that the First Plaintiff had been dishonest in his communications with those lawyers, as part of the alleged "cover up", was false and without foundation. Any suggestion (if there were any) of a discrepancy between any documentation provided by the First Plaintiff and any "answers" given by him to Lacovia's lawyers should have been raised in correspondence, with appropriate detail so that he could consider and respond. Instead, the Defendants chose to make a generalised claim of unspecified contradictions, in a manner that was unwarranted, unfair and highly misleading."*



84. Paragraph 27.1 refers to paragraph 20.3 of the Defence which has been struck out for reasons given herein when dealing with that paragraph.

85. The Defendants are entitled in their Defence to respond to the Plaintiffs' assertions about the parties' communications set out in paragraph 10.14 of the Statement of Claim. However, having regard to Order 18, r.7 (1), this should not be done by simply regurgitating in detail the content of letters and emails as seen in paragraphs 27.2-27.4 and 27.8-27.11 in the Defence. It should also not be done to raise an irrelevant allegation of negligence, contributory negligence or breach of fiduciary duty which form no part of the relevant defence pleaded or to the counterclaim.

86. Accordingly:

i. Paragraphs 27.1 is struck out

ii. Paragraph 27.2 to 27.5 are struck out

iii. Paragraph 27.6 may remain;

iv. Paragraphs 27.8 to paragraph 27.11 are struck out; and

v. The words after *"malice"* to the end of paragraph 33 are struck out.

Counterclaim of the Second Defendant against the First Plaintiff

87. The Defendants argue that the Counterclaim as drafted should be struck out as it has no real chance of success and as required facts and matters are not pleaded it is an embarrassing pleading. It is contended that it has been brought not as a genuine claim but for tactical reasons in relation to the Plaintiffs' claim.

88. For the purpose of this application, I may proceed on the basis that that is what was said and that the facts are correct. The Plaintiffs contend that no reasonable person could come to the conclusion that the words spoken by Mr Murphy in their natural and ordinary meaning meant that the Second Defendant stole the funds rather than simply using them to renovate this apartment.

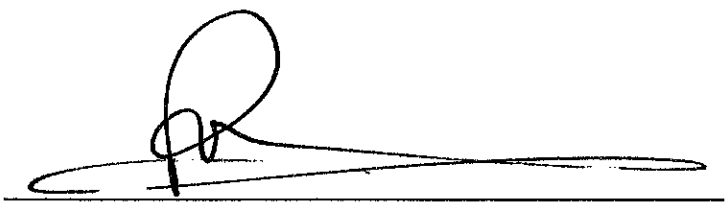
89. At paragraph 41 of the Defence, the Second Defendant relies upon the content of his Defence as a part of the counterclaim. I am conscious that I have struck out paragraph 18.1 to 18.3 which purportedly plead to the misuse of Lacovia funds to refurbish the relevant unit at Lacovia. The Plaintiffs claim that those paragraphs do no assist the Defendants as they simply relate to allegations that the unit was refurbished and contain a series of quotations from emails. It is argued that there is an absence of particular facts and matters of knowledge of falsity. They rightly

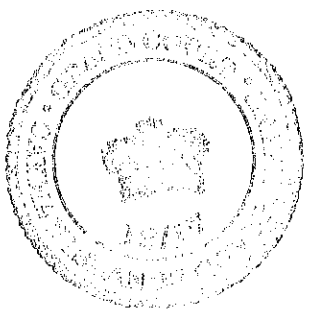
highlight that some of the paragraphs fall foul of Order 18, r.7(1), wrongly pleading evidence rather than facts.

90. It is clear that, in light of my decision about paragraph 18 of the Defence, further particulars of fact, not evidence, could well be pleaded in the counterclaim section to further clarify the basis of the claim. Again, having regard to the early stage of these proceedings and to the Overriding Objective, the Second Defendant should be given an opportunity or leave to re-plead that and would be well advised to do so. In light of that I do not believe it would be right, at this stage, to conclude that the statements could not possibly constitute a slander and that an unsustainable counterclaim claim is being advanced.

91. Accordingly, I do not strike out the Counterclaim at this stage.

92. I would like to take this opportunity to thank Counsel for their well-presented oral and written submissions which have been helpful, especially in a vacuum of relevant precedent in defamation cases.





THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT