Neutral Citation Number: [2020] EWHC 3058 (QB)

Case No: QB-2019-001740

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 November 2020

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Jamal Hijazi **(by his litigation friend Abdulnaser Youssef)**	**Claimant**
- and -	
Stephen Yaxley-Lennon	**Defendant**

- -
- -

Ian Helme and **Emma Foubister** (instructed by **Burlington Legal LLP**) for the **Claimant**
John Stables (instructed by **Watson Woodhouse Limited**) for the **Defendant**

Hearing date: 3 November 2020

- -

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date of hand-down is deemed to be as shown above.

- -

Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. This is a claim for libel. The Claimant complains of two videos that were posted on Facebook by the Defendant on 28 and 29 November 2018 ("the First/Second Video"). Both videos were self-recordings showing the Defendant addressing his remarks directly to the camera. They were the Defendant's response to the dissemination via social media of a video clip showing an altercation between the Claimant and another boy, "B", in which the Claimant was pushed to the floor by B, which has been referred to as the "Viral Video". The First Video was just short of 7 minutes long, and the Second Video just over 8 minutes. The Defendant has admitted publication of the Videos, that they defamed the Claimant at common law, and that their publication has caused serious harm to the Claimant's reputation. The Claimant's case is that the First Video and Second Video were "viewed directly" respectively over 850,000 and 100,000 times.

2. On 21 April 2020, I determined the natural and ordinary meaning of the two Videos ([2020] EWHC 934 (QB) [18]-[19] – "the Meaning Judgment"). Agreed transcripts of the two videos are set out in Appendices 1 and 2 to the Meaning Judgment. The meaning found by the Court was:

    i) the First Video:

    > "The Claimant had (1) as part of a gang, participated in a violent assault on a young girl which had caused her significant injuries; and (2) threatened to stab another child."

    ii) the Second Video:

    > "The Claimant had, as part of a gang, participated in a violent assault on a young girl which had caused her significant injuries."

3. The proceedings have not progressed very far. The Claim Form was issued on 15 May 2019. In his Defence, dated 27 June 2019, the Defendant relied upon a defence of truth, under s.2 Defamation Act 2013. No Reply has yet been served. After the parties had filed their statements of case, there was a Costs and Case Management hearing on 14 November 2019. Costs budgeting – on the basis of the statements of case as they stood at that time – was carried out and directions given for determination of meaning as a preliminary issue. There has been something of a running dispute, ever since service of the Defence, over the failure (and later, refusal) by the Defendant to provide the names of some of those alleged in the particulars of truth to have been subjected to alleged incidents of violence by the Claimant. I will return to this below.

4. Following the ruling on meaning, by Order dated 21 April 2020, I directed that, in consequence of the determination of meaning:

    i) the Claimant was to file and serve an Amended Particulars of Claim by 28 April 2020; and

    ii) the Defendant was to file and serve an Amended Defence by 19 May 2020; and

    iii) the Claimant was to file and serve a Reply by 2 June 2020.

5. On 12 May 2020, the Defendant issued an Application Notice seeking directions for an application for non-party disclosure against a local authority, seeking records from a school in relation to certain incidents that had been pleaded in the original defence of truth, and a variation of the timetable provided by the Order of 21 April 2020.

6. I refused that application, by Order dated 18 May 2020. Following the ruling on meaning, the Defendant was required to serve an Amended Defence. Any application for third-party disclosure would only be considered once his Amended Defence was filed. Whether the Defendant continued to rely upon a defence of truth, and if so in what terms, would only be apparent once the Amended Defence was served. Simply as a matter of practicality, I extended the time for the service of the Amended Defence to 29 May 2020 and for service of the Reply to 19 June 2020. The parties later agreed to extend the time for the Amended Defence to 5 June 2020.

7. On 4 June 2020, the Defendant filed his Amended Defence. In it, the Defendant:

   i) amended his defence of truth to defend, as substantially true, the meanings of the two Videos found by the Court;

   ii) added some further material to the Particulars of Truth; and

   iii) added a new defence seeking to defend the publication of the two Videos as publications on a matter of public interest under s.4 Defamation Act 2013 ("the public interest defence").

8. The public interest defence was unheralded – in the sense that no prior indication had been given by the Defendant that he intended to seek to rely upon such a defence. It was also plainly outside the permission to amend granted by the Order of 21 April 2020: it was not consequential on the ruling on meaning. The Claimant objected to the addition of the public interest defence and also to the amendments to the particulars of truth. The Defendant's solicitors responded on 17 June 2020:

> "It is my experience that an opponent would usually agree to such additional amendments unless there was some glaring problem with them. However, if you refuse to do so then an application will be made and if successful there may be costs consequences."

9. That stance was misplaced. The Defendant should have sought consent from the Claimant to include amendments beyond those permitted by the Order of 21 April 2020 and, if consent was not given, made an application to the Court seeking permission for these amendments. The Defendant did neither. Instead, there appears to have been an unproductive exchange of correspondence between the parties, including a dispute about whether the Claimant ought to serve a Reply. In their letter of 6 July 2020, the Claimant's solicitors said:

> "As you have now accepted, your client did not have permission pursuant to the Court Order of 18 May 2020 to plead a new public interest defence… It is disappointing that you did not raise this issue at the time you originally sought to serve the Amended Defence. Further no warning was given of the proposed amendment, which of course could have been previously pleaded at any stage. We note that even now there has been no explanation of why your client has chosen to take this course."

The solicitors sought confirmation from the Defendant's solicitors that the parts of the Amended Defence for which the Defendant had not obtained permission to amend would be removed.

10. The Defendant did not do so and, eventually, he issued an Application Notice dated 20 July 2020 seeking permission to amend his Defence. The application was supported by his second witness statement, dated 20 July 2020. On 31 July 2020, I gave directions that the application to amend the Defence was to be listed before me in the autumn term. I also ordered that the time for service of the Reply be extended until after the Court had determined the amendment application.

11. Save for some specific examples, I will not set out the full text of the amendments for which the Defendant seeks permission. The following will suffice by way of description.

    i) Under the existing particulars of truth, the proposed amendments fall into two categories and can be summarised as (a) adding clarification and further details to existing incidents of alleged violent behaviour of the Claimant; and (b) seeking to add three new incidents.

    ii) Under the particulars of the new public interest defence, the Defendant has relied upon the following matters (with paragraph numbers referring to paragraphs in the draft Amended Defence):

        a) The Viral Video was recorded on or around 25 October 2018 and then published via social media on or around 27 November 2018 (§§13-14).

        b) The appearance of a *Go Fund Me* page, on 27 November 2018, enabling people to donate money to the Claimant. The Defendant alleges that the Viral Video (§§15-18):

> "…was made public in order to enrich the Claimant and that the Claimant had a financial interest in misrepresenting the playing ground incident as one of the racist bullying of a refugee in order to maximise his income from the Go Fund Me page. Alternatively, the Claimant was being controlled by third parties who were using him to raise these funds by misrepresenting the incident on the playing field."

        c) By the time of publication of the Videos by the Defendant, the Claimant had received substantial amounts of money via the *Go Fund Me* page (§22).

        d) The Viral Video was reported upon by national media and B, who was 15 years-old, was "*universally condemned*" for his racist bullying of the Claimant, a Syrian refugee. No attempt had been made to obtain B's side of the story. B had received death threats, was under police protection and he and his family had been forced to leave their home (§§19-21).

        e) The Defendant was contacted by parents of children at the school attended by B and the Claimant. They told him that the allegations against B were not true. Whilst the events in the Viral Video were

factually accurate, the context or background was not one of racist bullying (§23).

f) The Defendant contacted B and visited him to record an interview. B told him that he had had an argument with the Claimant, had pushed him to the ground and squirted water on him; denied that there was any racist element; explained that the media attention provoked by the Viral Video had led him to be permanently excluded from his school without proper investigation; gave details of another incident of violence involving the Claimant; explained that he had and his family had received threats of violence (and provided the Defendant with copies of the death threats made against him on social media); and asked the Defendant to tell people his side of the story (§§24-25).

g) The Defendant travelled to Huddersfield to meet the mother of another child, who gave a video interview to him and complained of verbal and physical abuse by the Claimant of her and her 12-year-old son (§27).

h) The Defendant also met the mother of another pupil who alleged that her daughter had been assaulted by the Claimant with a hockey stick (§28).

i) The Defendant "*discovered*" an allegation which had been made against the Claimant on social media by another parent who, "*following the publicity generated by [the Viral Video]*", had posted that her daughter had been bitten on the head by the Claimant. The Defendant contacted the mother, and later met with and interviewed her, and she provided further details of the alleged incident (§§29-30).

j) In the final paragraph (§31), the Defendant summarises his public interest defence as follows:

> "At the time of publication of each [Video]:
>
> 31.1 B was being wrongly traduced and he and his family were suffering very badly as a result. He needed and wanted his version of events to be made public.
>
> 31.2 The Claimant was making a great deal of money out of the coordinated publication of the [Viral Video] and the deployment of the *Go Fund Me* page. A false image of the Claimant was being presented to the world at large in order to make money for him and/or which was incidentally but wrongly causing him to make money.
>
> 31.3 The Defendant had, as a result of the investigation outlined above, discovered that there was far more to the story concerning the [Viral Video] than had been reported.
>
> 31.4 It was in the public interest that B's version of events was publicised and the Claimant's and/or the public's and media's perception of the relevant events challenged.

31.5 The Defendant was the only person who had investigated the story from B's point of view.

31.6 There was no requirement to contact the Claimant prior to publication because his version of events had already been published. The [Videos] were reacting to that version of events and putting forward the position from B's point of view.

31.7 Therefore in all the circumstances there was a public interest in broadcasting the videos complained of and the Defendant reasonably believed in the existence of that public interest."

Application to Amend: the Law

12. There is a large measure of agreement between the parties as to the principles the Court should apply when considering an application to amend.

i) The threshold test for permission to amend is the same as that applied in summary judgment applications: ***Elite Property Holdings Ltd -v- Barclays Bank plc*** **[2019] EWCA Civ 204** [40]-[42] *per* Asplin LJ.

a) The person applying for permission to amend a statement of case must show that the amendments have a real, as opposed to fanciful, prospect of success; one that is more than merely arguable and carries some degree of conviction: ***ED&F Man Liquid Products Ltd v Patel*** **[2003] EWCA Civ 472** [6]-[8] *per* Peter Gibson LJ.

b) A claim does not have such a prospect where: (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the applicant does not have material to support at least a *prima facie* case that the allegations are correct; and/or (c) the applicant has pleaded insufficient facts in support of his/her case to entitle the Court to draw the necessary inferences: ***Three Rivers District Council v Bank of England (No.3)*** **[2003] 2 AC 1** [95] *per* Lord Hope.

c) The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents. It is appropriate for the court to consider whether the proposed pleading is coherent, and contains the properly particularised elements of the cause of action or defence relied upon: ***Elite Property Holdings Ltd*** [42] *per* Asplin LJ.

ii) Amendments sought to be made to a statement of case must contain sufficient detail to enable the other party and the Court to understand the case that is being advanced and they must disclose reasonable grounds upon which to bring or defend the claim: ***Habibsons Bank Ltd -v- Standard Chartered Bank (HK) Ltd*** **[2011] QB 943** [12] *per* Moore-Bick LJ.

iii) In an area of law which is developing, and where its boundaries are drawn incrementally on the basis of decided cases, it is not normally appropriate

> summarily to dispose of the claim or defence. In such areas, development of the law should proceed on the basis of actual facts found at trial and not on the basis of hypothetical facts assumed to be true on an application to strike out: ***Farah -v- British Airways plc***, *The Times* 26 January 2000 [42]-[43] *per* Chadwick LJ.

13. In the field of defamation, the application of these core principles has been elucidated further in relation to particular defences.

14. Particulars provided in support of a plea of truth must be both sufficient and pleaded with proper particularity; the precise nature of the case advanced must be clear. To disclose a case with a real prospect of success, the particulars must be capable of proving the substantial truth of the defamatory imputation(s) complained of. Loose and ineffective pleadings, containing irrelevant particulars, are likely to obstruct the fair disposal of the proceedings by obscuring issues, rather than provide clarification: ***Ashcroft -v- Foley*** **[2012] EMLR 25** [49] *per* Sharp LJ.

15. The pleading of a public interest defence, under s.4 Defamation Act 2013, must reflect the parameters and requirements of that defence. There are three issues:

    i) was the statement complained of, or did it form part of, a statement on a matter of public interest? If so,

    ii) did the defendant believe that publishing the statement complained of was in the public interest? If so,

    iii) was that belief reasonable?

    - ***Economou -v- de Freitas*** **[2019] EMLR 7** [87].

16. The first issue is unlikely to require protracted investigation and, in most cases, should be capable of being set out in a statement of case succinctly. As Warby J noted in ***Doyle -v- Smith*** **[2019] EMLR 15** [64]:

> "… The statement must be 'on' a matter of public interest, or form part of a statement that is 'on' such a matter. This is plainly an objective question. It must therefore be possible to look at the statement, and identify and describe quite shortly something the words are about - one or more topics or subjects - which is or are of public interest. The wording of the statute indicates as much quite clearly…"

17. The second issue is the defendant's belief that publishing the statement was in the public interest: ***Economou*** [139(2)]. This concerns the defendant's actual state of mind at the time of publication: ***Doyle*** [75]. This element of the defence is not established by demonstrating that a reasonable person could have believed that the publication was in the public interest: ***Turley -v- Unite the Union*** **[2019] EWHC 3547 (QB)** [138(vii)]. As the inquiry is whether the defendant believed that publishing the statement was in the public interest, the objective truth or falsity of the allegation complained of is irrelevant: ***Doyle*** [73]. The defendant's belief is a fact that must be pleaded and later proved. If it is not, the defence will fail: see e.g. ***Doyle*** [76]; ***Turley*** [149]. The focus is therefore on things the defendant knew or did, or failed to do, up to the time of publication. Events which happened *after* publication, unless they have a probative value in relation to events prior to publication, are irrelevant.

18. Assuming that the defendant establishes that, at the time, s/he believed that publication was in the public interest, the final question is whether, judged objectively, that belief was reasonable. At this stage, again, the objective truth or falsity of the allegation(s) is not relevant: ***Doyle*** [87].

19. In ***Serafin -v- Malkiewicz*** **[2020] 1 WLR 2455**, Lord Wilson giving the judgment of the Supreme Court traced the legislative history of s.4 through the post-*Reynolds* authorities in [57] to [59], and then observed:

> [60] In [***Flood -v- Times Newspapers Ltd*** **[2012] 2 AC 273**] ..., the defendant published an article taken to mean that there were reasonable grounds to suspect that the claimant, a police officer, had corruptly taken bribes. The allegation was false. This court held that the defendant nevertheless had a valid defence of public interest. Lord Phillips of Worth Matravers, the President of the court, said at para 26 that in that case analysis of the defence required particular reference to two questions, namely public interest and verification; at para 27 that it was misleading to describe the defence as privilege; at para 78, building on what Lord Hoffmann had said in the Jameel case at para 62, that the defence normally arose only if the publisher had taken reasonable steps to satisfy himself that the allegation was true; and at para 79 that verification involved both a subjective and an objective element in that the journalist had to believe in the truth of the allegation but it also had to be reasonable for him to have held the belief. Lord Brown at para 113 chose to encapsulate the defence in a single question. "Could", he asked, "whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?". Lord Mance at para 137, echoing what Lord Nicholls had said in the ***Reynolds*** case at p 205, stressed the importance of giving respect, within reason, to editorial judgement in relation not only to the steps to be taken by way of verification prior to publication but also to what it would be in the public interest to publish; and at para 138 Lord Mance explained that the public interest defence had been developed under the influence of the principles laid down in the European Court of Human Rights ("the ECtHR").

20. Lord Wilson noted that the Explanatory Notes to the Defamation Act 2013 had stated that intention behind s.4 was to: "*reflect the common law as recently set out in the* ***Flood*** *case and in particular the subjective and objective elements of the requirement now both contained in subsection 1(b)*" [66].

21. In [60], Lord Wilson referred to Lord Brown's question from ***Flood***. In ***Economou*** **[2017] EMLR 4** [241], Warby J summarised the objective assessment of whether the defendant's belief in the public interest was reasonable:

> "I would consider a belief to be reasonable for the purposes of section 4 only if it is one arrived at after conducting such inquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case".

This statement was approved by Sharp LJ in ***Economou*** [101] and by the Supreme Court in ***Serafin*** [67].

22. It is clear from the terms of s.4(2), and emphasised both in ***Serafin*** and ***Economou***, that an assessment of the public interest defence under s.4 requires a consideration of all the circumstances. In ***Economou***, Sharp LJ explained:

> [110] … This defence is not confined to the media, which has resources and other support structures others do not have. Section 4 requires the court to have regard to all the circumstances of the case when determining the all-important question arising under section 4(1)(b): it says the court must have regard to all the circumstances of the case in determining whether the defendant has shown that he or she reasonably believed that publishing the statement complained of was in the public interest. In my judgment, all the circumstances of the case must include the sort of factors carefully identified by the judge, including, importantly, the particular role of the defendant in question. The statute could have made reference to the ***Reynolds*** factors in this connection, but it did not do so. That is not to say however, that the matters identified … may not be relevant to the outcome of a public interest defence, or that, on the facts of the individual case, the failure to comply with one or some of the factors, may not tell decisively against a defendant. However, even under the ***Reynolds*** regime, as Lord Nicholls made clear, the weight to be given to those factors, and any other relevant factors, would vary from case to case. As with ***Reynolds*** therefore, with its emphasis on practicality and flexibility, all will depend on the facts."

23. The parameters of the public interest defence identify matters that are relevant to plead in a statement of case; and those that are irrelevant. In order to achieve clarity, the particulars pleaded in support of a public interest defence should identify clearly to which of the three stages they are addressed. The use of clear headings to reflect the three-stage assessment is likely to assist this process. Of fundamental importance is the clear identification of the information the defendant possessed and the inquiries s/he carried out prior to publication; and what the defendant believed that this information and these inquiries established. What documents did the defendant have, what was s/he told by those s/he contacted and critically when?

24. Lord Nicholls' list of non-exhaustive factors from ***Reynolds*** is likely still to have continuing relevance to the overall assessment of whether the belief that publication was in the public interest was reasonable, providing they are not applied as any form of 'check-list' or straitjacket: ***Economou*** [110]; ***Serafin*** [69]. At the stage of the assessment as to what information the Defendant had and what inquiries s/he made, Lord Nicholls' third to fifth factors are likely to remain valid in many cases:

> "3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect."

25. Information or documents obtained after publication are not relevant and cannot be relied upon. So, the defendant must therefore set out clearly in his/her particulars what investigations were carried out, what they produced and when. Particulars that advance a case that certain facts are objectively true or correct are likely to be irrelevant. The focus must be on the defendant's belief and the reasonableness of it. Loose and vague particulars pleaded in support of a s.4 defence carry the same vice as would if

pleaded in support of a defence of truth (see [14] above): they are likely to obstruct the fair disposal of the proceedings. If the particulars under a public interest defence contain irrelevant averments, or leave the claimant and the Court in doubt as to their relevance and probative value, then they are liable to be struck out or disallowed. In the worst cases of loose or ineffective pleading, the Court may conclude that the defendant has failed to set out a case that discloses a defence with a real prospect of success, with the consequences that follow from such a decision. The burden is upon the defendant to plead a clear and coherent case, setting out relevant and admissible particulars, which has a real prospect of establishing the required elements of the public interest defence. The Court will insist on this being done, otherwise there is a very real risk the resources of the parties and the court will be wasted on interlocutory skirmishing and/or the litigation of issues that are irrelevant or on a defence that is bound to fail.

Late or delayed amendments

26. A final issue in relation to applications to amend is the effect of delay. It is now well-established that a party who seeks to amend his/her statement of case at or very near trial may have his application refused if the effect of the amendment will be to jeopardise the trial: see ***Quah Su-Ling -v- Goldman Sachs International*** **[2015] EWHC 759 (Comm)** [37]-[38].

27. In ***Ali -v- Siddique*** **[2015] EWCA Civ 1258**, the Court of Appeal summarised the broad principles as follows:

> [45] … In considering any application to amend a court is concerned to ensure that the case is dealt with justly and that, so far as practicable, the real issue between the parties can be adjudicated upon. However, the court is also concerned to ensure that a party faced with an amendment is not unfairly prejudiced. If an amendment is sought at any early stage in a claim, it will often be the case that any such prejudice can be adequately compensated in costs. But where an amendment is sought at a very late stage and perhaps, as here, at the trial, the position may be very different. A party faced with an application to make such a late amendment may be placed in great difficulty in giving it adequate consideration, in determining how it affects the case that has been prepared and in assessing whether, for example, it requires a corresponding amendment to its own pleading, further disclosure or fresh evidence or even an adjournment.

28. Before the advent of the CPR, one ground of opposition to the grant of permission to amend was if the party seeking the amendment was guilty of "overreaching". For more than a century, the classic statement of the principles that the Court applied when considering an application for permission to amend was contained in the following passage from the judgment of Bowen LJ in ***Cropper -v- Smith*** **(1884) 26 ChD 700, 710-711**:

> "…I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace… It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in

> controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

29. The Concise Oxford Dictionary definition of "*overreach*" is "*circumvent, outwit, get the better of by cunning or artifice*". In ***Atkinson -v- Fitzwalter*** **[1987] 1 WLR 201**, the Court of Appeal considered whether there was any rule that a plea of fraud could not be added by amendment. Stocker LJ questioned whether such a rule existed, and said this (at p.219E-G):

> "For my part, I doubt if [***Bentley & Co. Ltd. -v- Black*****, 9 T.L.R. 580**] does support the general proposition that fraud, if not pleaded initially, cannot be raised by subsequent amendment. No doubt it is a proposition which would apply in cases where the facts giving rise to the plea of fraud were all known at the time of the original pleading and certainly where the failure to plead such facts could amount to 'overreaching' or where the delay in pleading fraud was in connection with some tactical manoeuvre."

30. The principle does appear to have found expression in modern authorities. In ***Brown -v- Innovatorone plc*** **[2011] EWHC 3221 (Comm)**, included in the factors likely to be considered on an application to amend was "*the history as regards the amendment and the explanation as to why it is being made late*" ([14(1)] *per* Hamblen J). In ***Bourke -v- Favre*** **[2015] EWHC 277 (Ch)**, the claimants' application for permission to amend was refused on grounds that included their having delayed revealing details of their revised claim to the defendants until after they had seen the defendants' witness statements. Nugee J said this:

> [12] Mrs. Talbot Rice says that the claimants made a conscious decision to only plead a contractual claim in the first instance, and then not to amend until after receipt of the witness statements, and she invited me to characterise that as an abuse of the process of the court. I do not go so far as to characterise it as an abuse, but I do regard it as misguided. Once the necessity to amend has become apparent, a party really ought to tell the other side not only of their intention to amend but, at least in outline, of what the amendment consists, so that the opposing party has sufficient advance notice in order to enable him or her to give consideration whether to oppose or consent to such an amendment. The desire to see the other side's witness statements before amending is not, I think, a good reason for holding back on a proposed amendment…"
>
> …
>
> [21] … Although I have accepted that this was not a conscious abuse of process, it does strike me as *prima facie* unfair, and the sort of unfairness that cannot readily be compensated for in costs. It creates an unlevel playing field. The modern approach in litigation is to require parties to be open, above board and cooperative. For the claimants to prepare their own evidence knowing that they might very well seek to amend to plead a proprietary estoppel claim but not telling the defendants that that was what they were going to do until after they had seen the evidence that the defendants had already prepared, strikes me as contrary to these principles.

Application to Amend: Submissions

31. Mr Stables for the Defendant contends:

i) The amendment seeking to add the public interest defence is not late. The amendments were raised after the Court's determination of meaning and the Claimant's resistance to the amendment is simply obstructive. Relying on observations of Moore-Bick LJ in ***Tesla Motors Ltd -v- BBC*** **[2013] EWCA Civ 152** [50], Mr Stables has argued that, since the proceedings have not progressed even to the stage of close of pleadings, the action is still in its infancy and any delay that is caused by permitting the amendments will not jeopardise any trial date. No trial date has been set.

ii) Following the CCMC, the Defendant filed a witness statement dated 5 December 2019. It contained a section headed, "*Interviews with parents and research prior to uploading the [Videos]*", in which the Defendant described the steps he had taken to investigate what he later published in the Videos. That led Mr Stables to suggest: "*On any view, therefore, the Claimant must have been aware that the Defendant believed his statements to have been properly researched and that a defence arising from the fact of that investigation was a likelihood.*"

iii) Relying upon the principles relevant to summary judgment applications from ***Easyair Ltd -v- Opal Telecom Ltd*** **[2009] EWHC 339 (Ch)** [15], the public interest defence has more than fanciful prospects of success, and the Court should not, on an application to amend, carry out a mini-trial. He submits that the Claimant's attack on the merits of the public interest defence – for example, the failure to put the allegations to the Claimant or seek his comment prior to publication – is effectively carrying out a mini-trial of the factors that ought properly to be assessed at a trial. As made clear in ***Economou*** [110] (see [22] above), the Court must have regard to all the circumstances of the case when deciding the central question of whether the Defendant reasonably believed that publishing the statement complained of was in the public interest. It is simplistic, and wrong in principle, to contend that a failure to put the allegations to the subject of a defamatory publication will inevitably prove fatal to a public interest defence: see remarks of Lord Wilson in ***Serafin*** [76].

iv) In relation to the amendments sought to be made to the defence of truth, Mr Stables submits that, by objecting, the Claimant is seeking, impermissibly, to "*hobble*" the defence of truth (see ***Mackenzie -v- Business Magazines (UK) Ltd*** (unreported CA, 18 January 1996) and ***Basham -v- Gregory*** (unreported CA, 21 February 1996), both referred to in the judgment of Tugendhat J in ***Rothschild -v- Associated Newspapers Ltd*** **[2011] EWHC 3462 (QB)** [16]-[17]). He submits, echoing a point made in the Defendant's second witness statement, that objecting to the proposed amendments to the particulars of truth is "*pointless*" as the same material is relied upon under the public interest defence: "*the facts would be before the court in any event*".

32. Mr Helme has made three broad submissions in opposition to the proposed amendments:

i) The evidence put forward in support of the draft amendment is patently insufficient and does not enable the Court to conclude that the public interest defence is one that has a real prospect of success.

ii) Assuming all matters in the Defendant's favour, the draft defence in any event has no reasonable prospects of success, given its limitations and the uncontested factual position.

iii) Taking into account all of the circumstances and the balance of prejudice the application should be refused as contrary to the overriding objective as a matter of the Court's discretion.

33. In relation to the public interest defence, Mr Helme submits that neither in the draft Amended Defence nor in the Defendant's evidence in support is there any explanation of the timing of the events upon which he relies. He argues:

i) The Viral Video was put online on 27 November 2018. The Videos were published on the following two days; 28 and 29 November 2018 respectively. Mr Helme submits that that is a very short time in which the Defendant could have conducted his alleged 'investigations'.

ii) Further, the Viral Video did not in fact contain the allegations made in the two videos. The suggestion that the Viral Video was evidence of a racist attack by B upon the Claimant came later. The Defendant does not state when he first heard of those allegations (or from where), but Mr Helme argues it must have post-dated the publication of the Viral Video, further shortening the time available for his alleged 'investigations'.

iii) The draft Amended Defence refers to 'making contact' with B, then the Defendant visiting him and recording an interview (§24), travelling to Huddersfield to meet with the mother of another pupil (§27), and physically meeting with the mothers of two more alleged complainants (§28 and §30). Whether by oversight or design, the Defendant has not provided any information about the dates on which these interviews took place; and there is no corroborating evidence from any of these interviewees.

iv) Mr Helme contends that the evidence strongly suggests that these alleged investigations post-dated the publication of the Videos, and so cannot be relied upon.

a) In the First Video (paragraph references to Appendix 1 to the Meaning Judgment), at paragraph [4], the Defendant stated that he had "*heard from the child in question*"; at [5], that he "*spoke[n] to the kid's mum and dad*"; and, at [6], that he had "*spoke[n] to other kids at the school*". This is inconsistent with the details provided in the particulars of the public interest defence, but there is also no reference in the First Video to any physical meetings.

b) In paragraph [7] of the First Video, the Defendant stated that "*I've been busy… today, I've literally just got onto this story, gone through my messages saying this isn't the story…*". This is inconsistent with the

Claimant having carried out any (or any extensive) investigations prior to the First Video.

c) In paragraph [10] of the First Video, the Defendant stated: "*I'm hoping I can get an interview out of these other people, I've got all those screenshots*". This strongly suggests that such interviews or physical meetings had not yet taken place.

d) In paragraph [1] of the Second Video, there is again a reference to "*conversations I've had with the family of that child*" without mention of a meeting. And, at [10], "*I've got the mum talking to me right now. Showing me details of her son's injuries*…" which appears unlikely to be a reference to a physical meeting.

e) In his first witness statement, dated 5 December 2019, the Defendant described his interview with B and exhibited a transcript. In his statement, the Defendant said:

> "[B] then described what had happened to him and his family since the viral video and how he had to leave school. He explained that he was initially told that he would receive a detention as punishment, but then he was excluded for 2 days."

f) In the transcript of the interview, answering a question from the Defendant, B gave his account of what happened in the incident with the Claimant. Then the Defendant said this:

> "Yes, in the first couple of days of this incident, I was contacted by parent after parent in the school. I met a parent this morning from your school, whose 12-year-old son goes [to] your school. The hockey-stick incident."

Mr Helme submits that, although the chronology is somewhat unclear, these statements strongly suggest that the interview with B (and other steps relied upon by the Defendant in relation to his pre-publication investigations) actually took place after publication of the two Videos.

v) For these reasons, Mr Helme submits, the Court cannot be satisfied that the Defendant has a real prospect of establishing that the 'investigations' relied upon in support of the public interest defence were carried out before the publications complained of.

34. Separately, and forming a free-standing objection to the grant of permission to amend, Mr Helme contends that the Court can hold, now, that the public interest defence is bound to fail.

i) The particulars pleaded in support of the defence do not address the first element required by s.4: whether the statement complained of was, or formed part of, a statement on a matter of public interest. The Videos were not concerned with public reaction to the Viral Video, or even the content and context of the Viral Video itself. Instead, in the Videos, the Defendant made a series of very serious defamatory allegations about the Claimant. The Claimant is a private figure and

a child. Allegations about his conduct did not fall under any of the identified categories of public interest set out in ***Reynolds*** and applied in ***Doyle***: e.g. matters relating to the public life of the community; the conduct of government and political life, elections and public administration; and the governance of public bodies, institutions and companies.

ii) Whilst Mr Helme accepts that the Defendant has clearly stated his belief that publication of the Videos was in the public interest, the Court can be satisfied, now, on the available evidence, and without a trial, that such a belief was not reasonable. He submits that the starting point is that the words complained of contained very serious allegations against the Claimant. The Videos alleged that, as part of a gang, he had participated in a violent assault on a young girl which had caused her significant injuries; as well as threating to stab another individual. The language used was condemnatory. It did not raise questions or suggest that there was need for an investigation. There was no suggestion of any doubt of the Claimant's guilt. As the Defendant stated in the First Video: "*I now have it as absolute fact*". The allegations were not put to the Claimant prior to publication and the Videos do not contain the Claimant's 'side of the story' about these allegations. The Videos did not, in any sense, put B's side of the story; B did not dispute that the events shown in the Viral Video happened. The Videos included new allegations – unrelated to the incident with B – which alleged a separate violent gang assault by the Claimant on a young girl. There was no urgency in publishing. In summary, all the Defendant had done in the Videos was unilaterally to publish serious defamatory allegations about the Claimant to the world at large.

iii) Mr Helme contends that, if the ultimate question is whether the Defendant "*given whatever [he] knew (and did not know) and whatever [he] had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?*", then the Court can answer that question now, and the answer must be no.

35. On the issue of delay, Mr Helme submitted that the Court will always consider the explanation provided by the party seeking the amendment as to why the case sought to be advanced by amendment was not pleaded or raised earlier. Mr Helme contends that the Defendant has not given an adequate explanation for the delay in bringing forward this public interest defence.

i) In his second witness statement in support of his application to amend the Defence, the Defendant says this:

> "Filing and service of the Defence was delayed by my wanting to include facts that I could obtain only from my social media accounts that had been suspended. This data needed to be obtained from the US… My Defence was filed and served on 28 June 2019 on the basis of the information that I had at that time. It was always my intention that the Defence would be amended, including to add a public interest publication defence. Later, on 3 October 2019, my solicitors sent an email to [the Claimant's solicitors] in which it was made clear that I intended to apply to amend my defence… Soon after that, on 10 October 2019, my solicitors write to [the Claimant's

> solicitors] again explaining why the Defence was not fully pleaded and indicated that amendments will be made… The Claimant was therefore well aware by early October 2019 at least of my intention to amend generally.
>
> …
>
> An Amended Defence was filed and served on 3 June 2020. The Amended Defence includes a s.4 defence. This was something I had always intended to include… I believe this is an appropriate point in the proceedings for me to plead the defence of public interest publication that I had always wished to and that had been foreshadowed to the Claimant…"

ii) The email of 3 October 2019 had been sent by the Defendant's solicitors in response to a continuing complaint by the Claimant's solicitors that the Defendants' defence of truth had failed to identify individuals towards whom it was alleged that the Claimant had been violent. It included the following:

> "In a nutshell, the defendants (sic) position is that… the issues regarding anonymity will be formally addressed at the CCMC. The defendants (sic) witnesses [are] willing to provide details of identity on the basis that you provide a formal undertaking that the identity will only be revealed to your client and legal representative sin (sic) this action and that your client undertakes the same. This will also require an agreement that they are not identified in open court or mentioned in any document put before the court. However, we accept that we will have to obtain anonymity orders prior to the trial take place.
>
> The defendant intends to apply to amend the defence and we would request that any application is postponed until after the application for the amended defence has been considered – at the latest we would ask this to be dealt with at the CCMC if the Court are (sic) unable to facilitate this before."

iii) The letter of 10 October 2019, to which the Defendant also referred, included the following in relation to the Defence:

> "The suggested lack of detail provided in my client's defence is as a result of his real and genuine concern that the identity of witnesses will be misused…"

36. In the light of that history, Mr Helme submits that the application to amend should be refused on this ground alone.

i) The Videos were published in November 2018. The claim was commenced in May 2019. There is still no date set for trial; pleadings have not even yet closed. Mr Helme lays blame for this delay principally on the Defendant. He pleaded a Defence that failed to identify the victims of the alleged incidents of violence, thereafter failed properly to engage with the Claimant's Part 18 request, refused to agree to a trial on meaning (until the 11th hour), and only revealed his intention to apply to add a public interest defence after costs budgeting had taken place and after the Court had ruled on meaning. The Claimant is seriously prejudiced

because the procedural skirmishing is delaying the trial at which he hopes to obtain vindication.

ii) Mr Helme contends that the s.4 defence could and should have been pleaded at the outset. The Defence was pleaded by Leading Counsel. The Defendant's evidence is that he had "*always wanted*" to plead a public interest defence. In the light of what must have been a conscious decision not to do so in the original defence, the change of position cries out for explanation, but there is none. As a public interest defence is confined to material existing at the time of publication, it cannot be (and is not) suggested that it is the subsequent discovery of material or evidence that has given rise to a re-assessment of whether a public interest defence ought to be advanced. The Court has not been provided with an adequate explanation.

37. In respect of the amendments to the particulars of truth, Mr Helme's principal argument is that the amendments are incapable of proving the truth of the meaning found by the Court (see [2] above). Those that do not allege a gang attack, or that it caused serious injuries, are not capable of proving the meaning substantially true. The Court, he submits, should refuse permission on that basis.

Application to Amend: Decision

38. I refuse the application for permission to amend insofar as it seeks to introduce a public interest defence. I grant permission for the amendments to the particulars of truth. My reasons follow.

Public interest defence

39. I am not persuaded by Mr Helme's submission that the Court can determine, now, that a public interest defence (if properly pleaded) will inevitably fail at trial. It is clear that the Defendant's public interest defence relies principally in his reasonably believing there to be a public interest in setting the record straight, through him allowing B to put forward his answer to the proposition that the Viral Video demonstrated a racially motivated attack on the Claimant.

40. I recognise that the Claimant's answer to that is that it was nothing of the sort, but in fact nothing more than a serious defamatory attack on the Claimant by the Defendant.

41. If this had been the only basis of opposition to the proposed amendments, I would have granted permission. Section 4 is a developing area of the law. There have been few cases in which the Court has assessed the public interest defence (whether as provided under s.4 or its predecessor ***Reynolds***) outside the traditional context of professional journalism, but it is clear that the s.4 defence applies to anyone who publishes, not just journalists (see ***Economou*** [110], quoted in [22] above). How the s.4 defence applies to what might be called 'citizen journalists' has not really been explored, but the increasing popularity of blogging and posts on social media platforms mean that it will only be a matter of time before these issues will arise for determination. I would not have considered it appropriate, effectively, to dismiss a public interest defence raised by the Defendant on only a summary assessment of its merits. Following the principle in ***Farrah -v- British Airways plc*** (see [12(iii)] above), I would have allowed the defence to go forward and be considered at trial. That would have enabled actual

findings of fact about the investigations prior to publication and whether the defendant's belief that publication of the Videos was in the public interest and whether that belief was objectively reasonable.

42. However, I am satisfied that Mr Helme's other objections do have force, and that permission to amend to add a public interest defence – in the terms advanced – ought to be refused.

43. A fault that runs through virtually all of the particulars in the draft Amended Defence is the failure to respect the line between the subjective belief of the Defendant and objective truth. By way of example only, the case advanced in relation to the setting up of the *Go Fund Me* page is confused. Paragraph 15 of the draft Amended Defence advances an objective case that the *Go Fund Me* page "*must have been set up with the Claimant's cooperation*" and that, alleged again to be an objective fact, the Viral Video had been made public, "*to enrich the Claimant*" and that the Claimant had a "*financial interest in misrepresenting the playground incident as one of the racist bullying of a refugee in order to maximise his income from the Go Fund Me page*". Then, paragraph 15 advances an alternative case, also stated as objective fact, that "*the Claimant was being controlled by third parties who were using him to raise these funds by misrepresenting the incident on the playing field*". Pleaded as objective facts, none of this can be relevant to any public interest defence. If they remained as part of the statement of case, then they could potentially lead to an argument that the Claimant ought to disclose documents relating to the *Go Fund Me* page.

44. It might be relevant if the Defendant pleaded a case that he believed that the *Go Fund Me* page had been set up to "*enrich the Claimant*", and then particularised the basis on which he reached that conclusion. That would reflect the proper parameters of the public interest defence. This fundamental flaw in the particulars of the public interest defence is repeated in several paragraphs. Paragraph 17 even starts with the unpromising words, "*In fact*…" before going on to aver that the Claimant's arm had been broken in another incident. Whether – in fact – the Claimant had broken is arm in some other incident, is wholly irrelevant. The issue is what the Defendant believed to be the position and on what basis. Paragraph 31.1 and 31.2 (quoted in [11(ii)(j)] above) are similarly pleaded as objective facts, rather than the Defendant's belief. Paragraph 31.7 misstates the statutory test.

45. I am also satisfied that the complaint that the Defendant has not properly particularised the investigations which he says he carried out is well-founded. To be relevant and admissible, the particular steps must have taken place before publication. There is a complete absence of chronology in the particulars pleaded in the Amended Defence. This is no idle point. I am satisfied that Mr Helme has identified evidence (see [33(iv)] above) which, at the very least, calls into question whether the investigations relied upon did take place prior to publication of the Videos. In order to disclose a case with a real prospect of success, the Defendant must make clear when the various interviews, and other steps, upon which he places reliance took place.

46. I considered whether, rather than refuse permission, I should pick through the particulars pleaded in support of the public interest defence to see whether it was possible to allow some (perhaps on condition of provision of further information and further detail) and refuse others. I have decided against this course. In the long run, I am satisfied that this is likely only to risk causing further delay, argument and costs. On an

amendment application, the burden lies on the Defendant to advance a coherent pleading that discloses a defence with a real prospect of success. The Defendant has not done so. It is not right that the Court and the Claimant should have to shoulder the burden of knocking the defence into shape.

47. Finally, I am very far from satisfied that the Defendant has provided an adequate explanation for why he did not include a public interest defence in his original Defence and why he did not apply to add it by way of amendment a great deal sooner than inserting it – without warning – into the Amended Defence. The suggestion that the Defendant had not originally pleaded a public interest defence because he was having difficulties obtaining some records from his social media accounts is not an adequate excuse. The defence now advanced relies upon material completely unconnected with social media accounts. The draft Amended Defence could have been advanced in its current form when the original Defence was filed.

48. The first indication that the Defendant gave of his intention of relying upon a defence of public interest was when he served his Amended Defence on 3 June 2020. Having reviewed the events from the service of the original Defence up to the CCMC on 14 November 2019, it is clear that the only reference to any amendments to the Defence were in the context of the Claimant's continued complaint about the failure, in the particulars of truth, properly to identify the complainants. There was no mention of any possibility that permission to amend might be sought by the Defendant to introduce a public interest defence. Had this been raised, I am satisfied that the Senior Master would not have carried out the costs budgeting exercise in the way she did at the CCMC, if she had done so at all. As it was, the Defendant failed to disclose to the Court and the Claimant that it was "*always [his] intention that the Defence would be amended… to add a public interest defence*", and so allowed the costs budgeting exercise to be carried out on a false basis. The costs budget did contain an element of contingency for amendments to the Defence, but these sums were limited, and based on anticipated amendments only to the particulars of truth.

49. Senior Master Fontaine directed trial of meaning as a preliminary issue. I heard argument on 12 March 2020. Judgment was handed down on 21 April 2020. Even after judgment had been given, the Defendant <u>still</u> did not raise his intention to apply to amend to introduce a public interest defence. As recorded above (see [8] above), the public interest defence arrived, unheralded, in a pleading served in purported compliance with the Order to provide an Amended Defence consequential on the Court's decision as to meaning. The Defendant's first Witness Statement dated 5 December 2019 did set out an explanation of his investigations, but that was not stated to be with a view to making an application to amend to rely upon a public interest defence. I reject Mr Stables' argument that the Claimant should have deduced from this that the Defendant intended, at some point in the future, to seek to rely upon a public interest defence.

50. I have not received an adequate explanation from the Defendant as to the decision not to include a public interest defence in his original Defence, the failure to alert the Court (or the Claimant) prior to the CCMC that this was "*always his intention*", the failure to raise the issue with the Court after the decision on meaning on 12 April 2020 or the failure to raise it at any point before the service of the Amended Defence.

51. In my judgment, the Defendant has clearly not been "*open, above board and cooperative*". Far from it. He has conspicuously and repeatedly failed to be candid with the Claimant about his intention (on his evidence, held since the original Defence was filed) to amend to add a public interest defence. If there is a proper explanation for this failure, it has not been provided. If the Defendant wants the Court, as an exercise of its discretion, to permit his Defence to be amended, notwithstanding this history, then he needs to provide one. The evidence before me is capable of supporting a conclusion that the Defendant made a conscious and deliberate tactical decision not originally to include a public interest defence, a decision (for reasons unexplained) he would like now to revisit. If that is the explanation, then, as a "*tactical manoeuvre*", in my judgment, it comes perilously close to the old-fashioned notion of "overreaching". At the very least, it was misguided and demonstrated a failure to be open, above board and cooperative. Most importantly, it is not adequately explained.

52. It is not the case that allowing the Defendant to change his mind about pleading a public interest defence has no consequence. The Defendant allowed costs budgeting to go ahead on a false basis. If permission is granted to allow the addition of a public interest defence, costs budgeting will have to be revisited. I recognise, of course, that, as a condition of being granted permission to amend, the Defendant could be made to bear all the costs of that re-budgeting exercise, but I am not satisfied that, just because the other party can be compensated in relation to the wasted costs caused by an amendment, that therefore permission should be granted. This only takes account of the impact on the resources of the parties. It overlooks the effect of the drain on the court's resources from demands on court time to resolve issues that could and should have been raised sooner, and the consequential delay in the resolution of other cases. It also ignores that progression of this case towards disposal at a final trial has been substantially delayed, to the detriment of the Claimant. Parties who conduct litigation like this can hardly expect much sympathy if the Court refuses to permit them to cause this disruption if it arises from a tactical decision that they now regret and wish to revisit.

53. I therefore refuse permission to amend to add the public interest defence. The door is not finally closed. If the Defendant considers that he can advance a properly particularised public interest defence and provide a satisfactory explanation for the very belated decision to seek to rely upon it, then the Court will consider a further application.

Truth

54. I can deal with this relatively shortly. I will grant permission to amend. Fundamentally, the amendments for which the Defendant seeks permission seek to expand on the existing defence. No application has been made to strike out or to dismiss the existing truth defence. To the extent that Mr Helme's complaints were objections that some of the particulars of truth are incapable of proving the substantial truth of the imputations found by the Court to be conveyed by the Videos, that position is undermined by the failure to challenge existing particulars which, if there is any substance in the complaint, could be levelled against them too. As those particulars will remain, amendments that do little more than clarify the nature of the allegation being made could hardly be opposed.

55. More generally, applying the test for amendments, I am satisfied that the additional particulars upon which the Defendant seeks to rely have a real prospect of success.

There was no suggestion that they expand the bounds of the truth defence disproportionately and should be refused on case management grounds. To the extent that the amendments add new allegations, these are discrete events all alleged to involve the Claimant. Subject to one issue that remains to be resolved, I am satisfied that he can deal with them in a Reply and ultimately the Court can adjudicate on them at a trial. Although I have permitted the amendments, I should make clear that I reject Mr Stables' rather surprising submission that objecting to the proposed amendments to the particulars of truth was "*pointless*" as the same material is relied upon under the public interest defence and therefore "*the facts would be before the court in any event*". This demonstrates the same fundamental confusion between establishing the objective truth of facts and a subjective belief in them. The former is what is required for particulars under a defence of truth whereas the parameters of the public interest defence concentrate on the latter. The distinction is very far from "*pointless*"; it is fundamental.

56. The outstanding issue is the identification of those who are alleged to have been the subject of violent incidents involving the Claimant. It was a matter of some surprise to me that, over a year from when the issue first arose, the Defendant has *still* failed to provide the names of those who are relied upon in the particulars of truth. As I made clear at the hearing, this is unacceptable. Whatever happens in relation to the identification of these individuals in any public hearing (and any orders the Court may make protecting their identities, bearing in mind that they are children), I can scarcely see the grounds on which the names can properly be withheld from the Claimant. I indicated, at the hearing, that I expected the parties to resolve this by agreement, but if they cannot, I will determine any remaining issues following the hand-down of this judgment.

57. Separately, this case has been delayed for too long by the parties' unproductive procedural wrangling. That is to stop. The Court will now fix a date for trial and actively manage this case expeditiously towards a final hearing.