

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2021/0006

BETWEEN:

CLAUDETTE JOSEPH

Appellant

and

DR. KEITH C. MITCHELL

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Ian L. Benjamin, SC with him Ms. Lisa Taylor for the Appellant

Mr. Nigel Stewart for the Respondent

2021: September 22;

2022: January 11.

Interlocutory appeal — Request for information — Part 34 of the Civil Procedure Rules 2000 — Rules 11.7(1) and 11. 13 of the Civil Procedure Rules 2000 — Whether the master erred in law in determining that there was no extant application pursuant to rule 34.2 on which it was open to him to make an order compelling the claimant to provide the information requested — Extension of time to file defence — Exercise of a master's discretion — Whether the master erred in fact and law and wrongly exercised his discretion in refusing the appellant's application for the time to file her defence to run from the time that the respondent gives full disclosure to the appellant, or alternatively an extension of time to file her defence

Claudette Joseph ("the appellant") is an attorney at law and politician in Grenada and is the defendant in a defamation claim filed against her on 30th July 2020 in the court below by the Prime Minister of Grenada, Dr. Keith C. Mitchell ("the respondent"). Without filing a defence to the claim, the appellant filed a request for information on 12th August 2020 pursuant to rule 34.1 of the Civil Procedure Rules ("CPR") seeking further particulars from the respondent. On 15th October 2020, the day after the expiry of the time for the appellant to file her defence, the respondent filed a provision of information requested, furnishing the appellant with a response to her request. On 30th October 2020, the

appellant's counsel in the court below wrote a letter to the respondent's counsel suggesting that the parties agree to an extension of time within which to file and serve a defence, to 9th December 2020. There was no response to the appellant's letter from the respondent. On 2nd November 2020 the appellant filed a second request for information seeking additional particulars, however, there was also no response from the respondent to this second request for information.

On 12th November 2020 the appellant filed an application seeking an order that the time to file her defence shall run from the time that the respondent gives full disclosure to the appellant, and in the alternative, an order that the court extend the time within which to file the defence pursuant to CPR 10.3 and 26.1(2)(k). The learned master determined that the application was not an application pursuant to CPR 34.2 but rather it was an application to extend the time for filing the defence. The learned master considered further whether an extension of time should be granted and determined that in the circumstances the application should be refused.

Being dissatisfied with the decision of the learned master, the appellant appealed on several grounds, including sub-grounds. The grounds and sub-grounds of appeal may be summarised into two main issues: (i) whether the learned master erred in law in determining that there was no extant application pursuant to CPR 34.2 on which it was open to him to make an order compelling the claimant to provide the information requested; and (ii) whether the learned master erred in fact and law and wrongly exercised his discretion in refusing the appellant's application for the time to file her defence to run from the time that the respondent gives full disclosure to the appellant, or alternatively an extension of time to file her defence.

Held: dismissing the appeal and ordering the appellant to pay the respondent's costs of the appeal to be assessed by a master if not agreed within 21 days, that:

1. In absence of any permission given by the court to pursue an order which did not feature in the application sought, an applicant may not ask the court for such an order. The appellant failed to set out any request in her application, and particularly in the orders sought, for the court to compel the respondent to produce the information requested. Therefore, a CPR 34.2(1) application cannot be inferred from the appellant's application as particularised and the learned master did not err in so finding.

Rules 11.7(1), 11. 13 and 34.2(1) of the **Civil Procedure Rules 2000** applied.

2. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is plainly wrong, that an appellate body is entitled to interfere with a discretion exercised by a master. Appellate authorities ought not to reverse a master's order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. Moreover, It must not be assumed that a litigant can intentionally flout the rules and then ask the court's mercy by invoking the overriding objective. It is pellucid from the master's order that he applied the relevant principles in considering the application to extend the time to file the defence. He also took into account relevant factors and did not take into account irrelevant factors in his determination of the appellant's application. His

assessment of the various factors was not irrational. Therefore, there is no basis for this Court to reverse the master's decision.

Dufour v Helenair Corporation Limited (1996) 52 WIR 188 followed; **Attorney General et al v Geraldine Cabey** MNIHCVAP2008/0008 (delivered 12th January 2009, unreported) followed; **Ming Sui Hung and others v JF Ming Inc and another (British Virgin Islands)** [2021] UKPC 1 followed; **The Treasure Island Company et al v Audubon Holdings Limited et al** British Virgin Islands Civil Appeal No. 22 of 2003 (delivered 20th September 2004, unreported) followed.

JUDGMENT

- [1] **THOM JA:** This appeal concerns the exercise of the learned master's discretion in refusing an application to extend the time to file a defence and his refusal to grant an order under rule 34.2(1) of the **Civil Procedure Rules 2000** (the "CPR").

Background

- [2] Claudette Joseph ("the appellant") is an attorney at law and politician in Grenada and is the defendant in a defamation claim filed against her in the court below by the Prime Minister of Grenada, Dr. Keith C. Mitchell ("the respondent"). On 27th February 2017 the respondent gave a key address at the Sod Turning Ceremony, at the site of a proposed Organic Shrimp Farm Project in Saint Mark, a project under the Citizen by Investment Programme ("the CBI Programme"). In his key address the respondent remarked that he was also an investor in the Parish of Saint Mark, with small aqua tourism potential, because he was involved in some activity in the agricultural sector. While lending support to the investor of the said Organic Shrimp Farm Project the respondent remarked further that the investor had the people of Saint Mark, the Parliamentary Representative and the respondent, another investor, with him.

The Court Below

- [3] On 30th July 2020 the respondent filed a defamation claim against the appellant alleging in his statement of claim that at a live press conference aired on 2nd December 2019, the appellant spoke the following defamatory words: '... Prime Minister Mitchell said during that launch, that he, he is an Investor in the

project... unlike Dr. Mitchell who claims that he invested monies in the Shrimp Farm...’.

- [4] Without filing a defence the appellant filed a CPR 34.1 request for information on 12th August 2020 seeking (i) the date on which the respondent assumed the portfolio for the CBI Programme and provide details of the document which confirms that he held the said responsibility at the relevant time; (ii) the entirety of the key address; (iii) and the entirety of the words allegedly spoken by the appellant at the press conference. On 15th October 2020, the day after the expiry of the time for the appellant to file her defence, the respondent filed a provision of information requested, furnishing the information regarding the first two requests but indicating that as it relates to the third request the respondent does not have the entirety of the appellant’s statement from the press conference in his possession and simply restated the alleged defamatory words as set out in the statement of claim.
- [5] On 30th October 2020, the appellant’s counsel in the court below wrote a letter to the respondent’s counsel suggesting that since the response to the first request was received by the appellant on 15th October 2020 and in light of the second request for information,¹ the parties should agree to an extension of time within which to file and serve a defence, to 9th December 2020 being the maximum period by which parties would be allowed to agree to an extension of time under CPR 10.3(7). There was no response to the appellant’s letter from the respondent. On 2nd November 2020 the appellant filed the second request for information seeking full details of all the investments of the respondent in Saint Mark and the date or dates when those investments were made and sought further the entire audio recording from which the transcript of the appellant’s key address was provided. There was also no response from the respondent to this second request for information.
- [6] On 12th November 2020 the appellant filed an application seeking an order that the time to file her defence shall run from the time that the respondent gives full

¹ In spite of the second request for information being referenced in the letter of 30th October 2020, it was not filed until 2nd November 2020.

disclosure to the appellant, and in the alternative, an order that the court extend the time within which to file the defence pursuant to CPR 10.3 and 26.1(2)(k).

- [7] In dismissing the appellant's application and making no order as to costs, the learned master outlined in his order several factors which he took into account, including the provisions of CPR 10.3, 3.5, 34.2, 69.2 and 69.3. The learned master determined that the application was not an application pursuant to CPR 34.2 but rather it was an application to extend the time for filing the defence. The learned master considered whether an extension of time should be granted and he determined that in the circumstances the application should be refused. In so finding, the learned master outlined in the preamble to his order, the factors he took into account.

The Appeal

- [8] The appellant being dissatisfied with the decision of the learned master appealed on several grounds of appeal, including sub-grounds. The grounds and sub-grounds of appeal may be summarised into two main issues:
- (i) whether the learned master erred in law in determining that there was no extant application pursuant to CPR 34.2 on which it was open to him to make an order compelling the claimant to provide the information requested; and
 - (ii) whether the learned master erred in fact and law and wrongly exercised his discretion in refusing the appellant's application for the time to file her defence to run from the time that the respondent gives full disclosure to the appellant, or alternatively an extension of time to file her defence.

Issue 1 - Was an application pursuant to CPR 34.2 before the master?

- [9] Senior Counsel, Mr. Ian Benjamin, argued on behalf of the appellant that the learned master erred in fact and in law in holding that the appellant had not made an application pursuant to CPR 34.2 and therefore it was not open to the master to make an order under CPR 34.2 compelling the respondent to furnish that which was requested under the second request for information. He stated that the application before the learned master was of a composite nature

seeking compliance with the second request for information and an order that time shall run from the time of compliance. He contended that it was evident from paragraph 1 of the application in the context of the pleadings, correspondence by letter and the first and second request for information pursuant to Part 34, that the application was making reference to an order under Part 34 for compliance. Mr. Benjamin asserted that this was emphasised by the use of the words 'in the alternative' in paragraph 1 of the application, from which the master ought to have discerned that the application to extend the time to file the defence pursuant to CPR 10.3 and 26.1 was being made on an alternative basis.

[10] During his submissions, Mr. Benjamin accepted that the appellant's application before the learned master was unfortunately drafted and that there was no express indication of the second CPR 34.1 request for information or a request for an order compelling the appellant to provide the said information. However, he invited this Court to interpret paragraph 1 of the application as seeking such an order and contended that his proposed interpretation is a viable one based on the affidavit in support of the application filed 12th November 2020; particularly paragraphs 5 to 11 which make express reference to the requests for information.

[11] In short, counsel for the respondent, Mr. Nigel Stewart, responded by asserting that there being no reference to Part 34, the appellant's application amounted to an application for an extension of time to file her defence. He insisted that this was made plain from the relief sought on the application, which did not include an order compelling the respondent to produce the information requested. Mr. Stewart submitted that the draft order of an application is a clear reflection of what an applicant seeks, and in this case it is plain that the appellant simply sought an extension of time. He also retorted that the paragraphs of the affidavit in support of the application before the master referenced by appellant do no more than set out the sequence of events between the appellant and the respondent.

Discussion

[12] An appropriate starting point for determination of this issue would be to have regard to the provisions of CPR 34.2 which reads:

“(1) If a party does not, within a reasonable time, give information which another party has requested under rule 34.1, the party who served the request may apply for an order compelling the other party to do so.

(2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.

(3) When considering whether to make an order, the court must have regard to-

(a) the likely benefit which will result if the information is given;

(b) the likely cost of giving it; and

(c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order.”

[13] I also consider it useful to have regard to the relevant provisions under Part 11 of the CPR which concern the general rules relating to applications for court orders. I am of the view that CPR 11.7(1) and 11.13 are particularly applicable in the circumstances. Both provisions read as follows:

“What application[s] must include-

11.7(1) **An application must state-**

(a) briefly, the grounds on which the applicant is seeking the order; and

(b) **what order the applicant is seeking.**

...

Consequence of not asking for order in application

11.13 **An applicant may not ask at any hearing for an order which was not sought in the application unless the court gives permission.”** (emphasis mine)

[14] In applying the plain reading of the above stated rules Mr. Benjamin’s invitation for a contextual interpretation of the appellant’s application cannot be accepted. It is pellucid that in absence of any permission given by the court to pursue an order which did not feature in the application sought, the applicant may not ask the court for such an order. It is not apparent that the appellant made any other application to the court for permission to seek an order under CPR 34.2. The appellant failed to set out any request in her application, and particularly in the orders sought, for the court to compel the respondent to produce the information requested. Therefore, the appellant’s application cannot be said to have given

fair notice of the case to be met. In fact, paragraph 14 of the affidavit filed by the respondent on 25th January 2021 in response to the appellant's application makes it plain that the respondent was unaware that the application engaged a request under CPR 34.2(1) to compel him to provide the requested information.

Paragraph 14 of the respondent's affidavit states:

"The Applicant/Defendant alleges that the Respondent/Claimant, has not responded to the further Request for Information filed on November 2, 2020, but nonetheless as permitted by part 34.2(1) of the CPR, failed to file a Notice of Application to this Honourable Court to compel the Respondent/Claimant to provide the further information requested."

- [15] The palpable obliviousness of both the master and the respondent of the appellant's supposed application for a CPR 34.2 order engages the importance for the relief sought in applications to be made clear. I find in the absence of the permission of the court (which was not sought), that the appellant would have been bound by the reliefs set out in her application as they were plainly stated. I also consider that neither the appellant's application nor affidavit, nor the affidavit of the respondent in reply, addressed two of the considerations under CPR 34.2(3) which would have been crucial to the master's consideration of a CPR 34.2(1) application; namely, the likely cost of giving the appellant the information and whether the respondent's financial resources are likely to be sufficient to enable him to comply with the order. Having regard to the circumstances of this case a CPR 34.2(1) application cannot be inferred from the appellant's application as particularised. Furthermore, such an application cannot be inferred based on context as Mr. Benjamin suggested, since this would run counter to the principle that a respondent must be made certain of the case he is to answer to. Moreover, the court must be alerted to the issues before it for adjudication. Therefore, it is important that any relief being sought by an applicant is made clear and the applicant ought not to expect the court's intervention to make good the deficiencies of their application.

- [16] In light of the above it cannot be said that the learned master erred in finding that there was no CPR 34.2(1) application before him and therefore it was not open to him to make an order pursuant to that provision. I find that the

application before the master was as he concluded, one seeking an extension of time within which to file a defence. The appeal on this issue therefore fails.

Issue 2- Exercise of the master's discretion in determining the extension of time application

- [17] As it relates to the second issue for determination on appeal, Mr. Benjamin submitted that the learned master incorrectly exercised his discretion and failed to apply the principles which the court will take into account in deciding whether or not to grant an extension of time, which include: (i) the nature of the failure and the consequential effect; (ii) the length of the delay and whether any good explanation has been put forward for excusing it; (iii) weighing the prejudice to the parties in the context of the failure and the delay; and (iv) whether there is a realistic prospect of success. He insisted that in exercising its power in determining an application for an extension the court must additionally at all times seek to give effect to the overriding objective. He relied on **Carleen Pemberton v Mark Brantley**² and **Lindsay F.P Grant and another v Tanzania Tobin Tanzil**³ in support of these submissions.
- [18] Mr. Benjamin emphasised the importance of the nature of the proceedings in the claim below and referred this Court to **Gatley on Libel and Slander**⁴ in support of his submission that in a claim for libel statements of case are extremely important. He stated that a defamation claim has specific pleading requirements, where the entirety of the cause of action and the defence concerns the specificity of the words allegedly used and their context and therefore the requirements go beyond the general provisions for a statement of case pursuant to CPR 8.7, 69.2 and 69.3. He asserted that the master erred by failing to have any or any proper regard to CPR 8.7 and 69.2 in respect of the respondent's pleadings. He argued that in the context of the inherent ambiguity of words which the respondent alleges were uttered by the appellant, the appellant had properly asked for the respondent to identify the whole or entirety

² [2011] ECSCJ No. 229.

³ [2020] ECSCJ No. 223.

⁴ J.C.C. Gatley; Alastair Mullis; Richard Parkes; Godwin Busuttill; Andrew Scott (12th edn, Sweet & Maxwell 2013) para 26.1.

of the words uttered and therefore, in his determination of the appellant's application, the master overlooked and failed to have regard to the legal requirements in all libel claims that the words complained of are material facts.

[19] Mr. Benjamin stated that the learned master erred in principle by failing to consider certain relevant factors, namely: (i) the provisions of CPR 10.3 and 26 so as to give effect to the overriding objective of ensuring that justice was done between the parties; (ii) that prior to making the application to the court, the appellant wrote to the respondent requesting that the parties agree to an extension of time to file the defence after the respondent replied to the first request for information more than two months after the request was made and a day after the time for filing the defence had expired; (iii) that the respondent did not reply to the letter seeking consent to an extension to file the defence nor to the second request for information; (iv) that in the absence of responses from the respondent, within 10 days, the appellant made an application to the court for the extension of time and to compel the respondent to provide the information requested; (v) that the overriding objective of the CPR is to do justice between the parties and does not allow for one party to conduct itself in such a manner as to put the other at an unfair disadvantage; and (vi) that the appellant promptly made an application to the court when a response from the respondent was not forthcoming.

[20] Mr. Benjamin insisted that the appellant was put at a disadvantage when the respondent (a) supplied the information pursuant to the first request after the time for filing the defence had expired; (b) failed to respond to the appellant's request to agree to an extension of time to file the defence; and (c) failed to respond to the second request for information. He also stated that the master's non-observance of the pleading requirements, the overriding objective and the requirement to deal with the case justly prejudices and unfairly disadvantages the appellant, contrary to Part 25 of the CPR. He therefore urged this Court to allow the appeal by setting aside the order of the master dated 28th January 2021, deeming the appellants defence filed and served on 29th January 2021 and amended defence filed and served 17th February 2021 both to have been properly filed and served, ordering that the respondent provide the information

sought by the appellant's second request for information, granting the appellant leave to file a further amended defence within 14 days of receipt of the information from the respondent and making no order as to costs.

[21] Mr. Stewart submitted that in hearing the appellant's application the master properly addressed his mind to all of the factors in making a determination on the order for an extension of time to file a defence, and rightfully concluded that the said application warranted a dismissal. He asserted that the excuses stated by the appellant as the reason for the failure to file a defence are unsatisfactory especially in light of the fact that the appellant is also an attorney-at-law who ought to be acquainted with the requirements for the period for the filing of a defence and the consequences of not doing so pursuant to CPR 10.2 and 10.3.

[22] Mr. Stewart contended that the inadvertent delay of the respondent in forwarding instructions to his counsel to provide a response to the second request for information was predominantly due to no direct fault of the respondent but as a result of the respondent's senior public position as the Prime Minister, and the period within which the information was sought in the height of the pandemic. He also stated that while CPR 10.3(5) provides for the parties to agree to an extension of time to file a defence, it is by no means a mandatory provision that requires parties to comply with it. Mr. Stewart made the point that while agreeing to an extension of time to file the defence is the conventional course, the appellant was also permitted to make the requisite prompt application pursuant to CPR 10.3(9) for the extension of time. He asserted that from the inception of the proceedings below the appellant failed to adopt a proper posture of advancing her defence, as evidenced by the filing of the application for an extension approximately one month after the time to file the defence had already expired.

[23] Mr. Stewart also submitted that based on the dictum of **Attorney General v Matthews**,⁵ the appellant was also at liberty to file the defence without the permission of the court after the time for filing a defence had expired, when the requested information was provided, since if the claimant does nothing or

⁵ [2011] UKPC 38 at paragraph 14.

waives late service the defence stands and no question of sanction arises. He however urged that **Matthews** is not authority for the proposition that a party may still file a defence after having applied for and being refused an extension of time to file that defence.

[24] In his oral submissions, Mr. Stewart referred this Court to the pronouncements of Adrian Saunders JA in **The Treasure Island Company et al v Audubon Holdings Limited et al**⁶ in support of the following principles: (i) it is not to be assumed that the litigant can intentionally flout the rules and then seek to invoke the overriding objective; (ii) the overriding objective does not by itself empower the court to do anything or grant to the court any discretion; (iii) it is a statement of the principle to which the court must seek to give effect when it seeks to interpret any provision or it exercises any discretion specifically granted by the rules; (iv) any discretion exercised by the court must be found not in the overriding objective but in the specific provision itself; and (v) the plain meaning of the rules should not be ignored.

[25] In light of the above, Mr. Stewart submitted that the learned master did not err in fact or in law in dismissing the appellant's application for an extension of time, and as such, the appeal should be dismissed with costs to the respondent.

Discussion

[26] The principles on which an appellate court will venture to interfere with the exercise of a judge's, or in this case a master's discretion are well settled. These principles are aptly encapsulated in the pronouncements of the former Chief Justice Sir Vincent Floissac in **Dufour and others v Helenair Corporation Ltd and others**.⁷ In **The Attorney General et al v Geraldine Cabey**,⁸ Gordon JA examined in more detail the conditions as set out by Sir Vincent Floissac which are to be satisfied to warrant appellate interference. Gordon JA stated:

“The first condition was explained by Viscount Simon L.C. in *Charles Oseinton & Co. v Johnston* (1941) 2 AER 245 at 250. There, the noble Lord Chancellor said:

⁶ British Virgin Islands Civil Appeal No. 22 of 2003 (delivered 20th September 2004, unreported).

⁷ (1996) 52 WIR 188.

⁸ MNIHCVP2008/0008 (delivered 12th January 2009, unreported).

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

The second condition was explained by Asquith L.J. in *Bellenden (formerly Satterthwaite) v Satterthwaite* (1948) 1 AER 343 at 345 in language which was approved and adopted by the House of Lords in *G v G* (1985) 2 AER 225 and which I have gratefully adopted in this judgment. Asquith L. J. said:

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

[27] In **Ming Sui Hung and others v JF Ming Inc and another (British Virgin Islands)**⁹ Lord Briggs reminded appellate courts, in relation to matters of weight, to be cautious not to interfere unless the judge’s assessment of weight was irrational. At paragraph 28 of his judgment on behalf of the Board, Lord Briggs stated:

“A view that a judge should have given ‘more weight’ to a relevant matter is not within the scope of appellate review. Matters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational.”

[28] I also find the principles set out in **The Treasure Island Company** case, aptly submitted by Mr. Stewart, to be applicable in the circumstances of this case. At paragraph 24 of his judgment Saunders JA stated the following with respect to the relationship between the overriding objective and specific provisions of the rules:

⁹ [2021] UKPC 1.

“In particular, it must not be assumed that a litigant can intentionally flout the rules and then ask the Court’s mercy by invoking the overriding objective. ... the overriding objective does not in or of itself empower the Court to do anything or grant to the Court any discretion. It is a statement of the principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself. As May LJ stated in *Vinos*, ‘Interpretation to achieve the overriding objective does not enable the Court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored’.”

[29] It is also useful at this juncture to reiterate the principles on which the grant of an application for an extension of time are considered. Chief Justice Pereira in **Lindsay F.P Grant and another v Tanzania Tobin Tanzil**¹⁰ explained the extension of time principles in the following way:

“The granting of an extension of time is discretionary. The principles governing the exercise of the discretion to extend time are also trite, having been stated and restated in several decisions of the Court dating back from the early days of the introduction of the CPR in *Rose v Rose* in 2003. Those principles were restated by me in *Carleen Pemberton v Mark Brantley* and endorsed in the later decision of the Court in *C.O. Williams Construction (Saint Lucia) Limited v Inter-Island Dredging Co. Ltd*. The court, in exercising its discretion, in giving effect to the overriding objective of ensuring that justice is done between the parties, undertakes an evaluation exercise by weighing all the relevant factors in the scale. These factors would normally include: (i) the nature of the failure and the consequential effect; (ii) the length of the delay and whether any good explanation has been put forward for excusing it; (iii) weighing the prejudice to the parties in the context of the failure and the delay; and (iv) importantly in this case, where the extension is sought to seek leave to appeal, whether the appeal has a realistic prospect of success.”

[30] In assessing the master’s evaluation of the principles and rules relevant to an application for an extension of time to file a defence, it is pellucid from his order that he had taken into account relevant factors and did not take into account irrelevant factors in his determination of the application. As it relates to the rules

¹⁰ [2020] ECSCJ No. 223 at paragraph 17.

in respect of the considerations on the grant of an extension of time, the master specifically had regard to CPR 3.5, 10.3, 69.2 and 69.3. CPR 3.5 contemplates the calculation of time during long vacations, which the master properly took into account since the court's summer vacation formed part of the period of time within which the appellant had to file her defence. CPR 10.3 sets out the stipulated period of time for the filing of a defence. Specifically 10.3(5) allows for the parties to agree to extend the period for filing a defence, and 10.3(9) allows the defendant to apply for an order extending the time for filing a defence. CPR 69.2 and 69.3 outlines that which is required of a claimant's and a defendant's statement of case respectively within the context of a defamation claim.

[31] It is not in dispute between the parties that the abovementioned CPR rules considered by the learned master were relevant to the determination of the application made by the appellant. It also cannot be disputed that the learned master did in fact have regard to the principles on which an extension of time should be granted. This is clearly borne out in the recitals to his order dated 28th January 2021, which make specific reference to those principles. The master also very clearly applied these principles to the context of the application before him. He considered that the defendant filed her application approximately one month after the expiry of the time to file the defence and further that no draft defence had been filed nor did the affidavit in support of the application adduce any evidence of the merits of the defendant's proposed defence. The master also considered any possible prejudice to both the appellant and the respondent, in particular that the defendant would be prevented from defending the claim if the extension was not granted. Contrary to the assertions of Mr. Benjamin, the master also gave deliberate consideration to the appellant's contention that she was not in a position to put forward a defence to the claim filed by the respondent without the information which had been requested.

[32] Though the master did not specify in his recitals CPR 8.7 and 10.5, which outline the claimant's and the defendant's duty respectively to set out their case, his recitals did have regard to the fact that the claim was at the stage of pleadings whereby a claimant is required to set out the facts upon which it intends to rely and a defendant is required to set out the facts upon which it intends to rely to

dispute the claim. The master further considered the options by way of application available to the appellant under the rules to challenge the case of the respondent (such as a striking out application) and the procedures available to a party to amend its pleadings to strengthen its case. He considered these options particularly within the context of the stage of the proceedings of the claim and, critically, the duties of a party at the pleading stage, and determined that within that context the appellant had failed to provide a good and substantial reason for the delay in filing a defence to the claim or seeking an extension of time to file the defence. In light of the foregoing I do not agree with Mr. Benjamin that the master failed to apply the relevant principles in considering the application to extend the time to file the defence.

[33] Moreover, I find that the appellant's assertion that the master failed to have regard to the requirements under CPR 8.7 and 69.2 in respect of the respondent's pleadings is ill placed. That submission would have been on better footing were the application before the master one to strike out the respondent's statement of case on the grounds that it did not satisfactorily set out the specificity of the words allegedly uttered and their context, or adhere to the requirements under CPR 8.7 and 69.2. However, this was not the case. The master was considering an application for extension of time to file a defence and it would have been inappropriate for the master to impugn the respondent's pleadings in circumstances where they were not being challenged by the appellant upon the appropriate application. In fact the master was clearly alive to this point as evidenced by his indication of the option available to the appellant to challenge the respondent's statement of case; an option which the appellant failed to pursue. Instead the appellant chose to allow what she considers insufficient pleadings, which do not properly align with the requirements set out in the rules, to deter her from fulfilling her duties as a defendant to file her defence in time. This being despite the multiplicity of unpursued options available to her to mitigate against her late filing of her defence, or at the very least to minimise the delay in the filing of the defence.

[34] The appellant also had the option to file her defence in time and seek to amend her defence once the information she requested was furnished to her. This

option too was not pursued. Mr. Benjamin accepted in oral submissions that a holding defence could have indeed been filed in time, however he argued that certain of the defences which might be available to the appellant could not be pleaded without first obtaining the requested information. He argued further that taking that route would have increased costs, amendments and applications. I am not convinced that this is a sufficient reason for the appellant's failure to adhere to the provisions under CPR 3.5 and 10.3 which stipulate the period within which her defence ought to have been filed. Though the fact of the appellant filing her defence on 29th January 2021 and amended defence on 17th February 2021 was not before the learned master, it is made plain in my view that the defence could have in fact been filed earlier in time in absence of the information sought on the second request for information and thereafter amended, as was eventually done. This would have minimized the delay in filing the defence and would have at least given the master an indication of the merits of the appellant's defence for consideration.

- [35] I also consider that while the respondent took approximately two months to respond to the appellant's first request for information, and indeed furnished the information a day after the time for filing the defence had expired, it was open to the appellant within that waiting period to seek a CPR 34.2 order from the court to compel the provision of the information within a reasonable time. This was yet another option available to the appellant that remained unpursued. Mr. Benjamin stated in oral submissions that this was not pursued as there was no indication from the respondent that the information would not be provided. I note, critically, that CPR 34.2 is not triggered by non-compliance simpliciter, but where 'a party does not, within a reasonable time, give information which another party has requested under rule 34.1'. It is on the basis of the lack of reasonability of the timing within which the respondent provided the information that the appellant could have sought an order compelling the respondent to provide the information. Given the uncomplex nature of the information sought in the first request, the appellant could have applied for a CPR 34.2 order once two to three weeks or even a month had passed without any response from the respondent so as to further mitigate against the late filing of her defence or at least to allow her to file it much earlier than she eventually did.

[36] In view of the foregoing, and with the principles of **The Treasure Island Company** case firmly in mind, I cannot agree with Mr. Benjamin that the master did not deal justly with the application in furtherance of the overriding objective. Saunders JA makes it plain that it must not be assumed that a litigant can intentionally flout the rules and then ask the court's mercy by invoking the overriding objective. Moreover, the appellant has failed to provide any adequate basis on which it can be said that the master's exercise of his discretion in refusing the application for an extension of time to file the defence was plainly wrong. I am not of the view that the conditions set out in **Dufour, Cabey** and **Ming Sui Hung** have been sufficiently satisfied to warrant this Court's interference on the basis that the master's decision exceeds the generous ambit within which reasonable disagreement is possible. Indeed, it is pellucid from the principles set out in **Cabey** that even if this Court were minded to exercise the original discretion, had it attached to this Court, in a different way it ought not to reverse the order merely on that basis. What is important is whether on the relevant facts and law, it was open to the master to conclude as he did. I find that it was so and therefore the appeal on this issue also fails.

Conclusion

- [37] Given the totality of all that I have foreshadowed, I would dismiss the appellant's appeal on both issues pursued. The respondent having successfully defended the appeal, I would also order the appellant to pay the respondent's costs of the appeal to be assessed by a master if not agreed within 21 days.

I concur

Davidson Kelvin Baptiste

Justice of Appeal

I concur

Gerard St. C Farara

Justice of Appeal [Ag.]

By the Court

Chief Registrar