Case No: HQ15D01507

Neutral Citation Number: [2016] EWHC 1218 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2016

Before :

MR JUSTICE WARBY

- -

Between :

Alexander Economou	**Claimant**
- and -	
David de Freitas	**Defendant**

- -
- -

Jonathan Barnes & Gervase de Wilde (instructed by **Fieldfisher**)
for the **Claimant**
Ian Helme (instructed by **Hanover Bond Law**) for the **Defendant**

Hearing date: 12th May 2016

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Judgment

Mr Justice Warby :

Introduction

1. This defamation action is fixed for trial commencing on 13 June 2016. The time estimate is 6-10 days. At the Pre-Trial Review on 12 May, some five weeks before the trial, three matters arose for my decision.

    (1) The most important application was by the claimant for permission to amend the Particulars of Claim in two respects: first, by adding a new cause of action in respect of a publication that had not hitherto been complained of (paragraphs 9A to 9D) and secondly to modify an existing claim contained in paragraph 10 of the Particulars.

    (2) An application by the defendant to serve a short supplementary statement to correct what is said to be an omission by oversight in his trial witness statement. This application was issued on 11 May 2016, the day before the hearing.

    (3) An application for permission to amend the Defence, which is not the subject of a formal application notice.

2. I refused permission to amend to add the new cause of action. I granted permission to amend paragraph 10 in principle, though the wording required certain modifications to reflect my decision in respect of paragraphs 9A to 9D. I granted both the defendant's applications. These are the reasons for those decisions.

The factual background

3. The claimant is a company secretary at a ship management business, aged 37. The defendant is the father of the late Eleanor de Freitas, who was his only child. In 2012, the claimant and Ms de Freitas had a relationship. On or about 4 January 2013 Ms de Freitas made an allegation of rape against the claimant, who was arrested and interviewed. He was never charged. In February 2013 he was informed that there would be no proceedings against him.

4. Six months later, on 2 August 2013, the claimant brought a private prosecution against Ms de Freitas for perverting the course of justice. The particulars of the charge were that she had "between 24 December 2012 and 20 February 2013 with intent to pervert the course of justice done an act which had a tendency to pervert the course of public justice in that she made a false allegation of rape against the Claimant to the Metropolitan Police Service."

5. In December 2013 the Crown Prosecution Service took over the prosecution, and thereafter continued it. In January 2014 the charge was put to Ms de Freitas at a public hearing. She pleaded not guilty, and a date was fixed for trial in April 2014. Shortly before the trial she killed herself.

6. The anonymity conferred by s 1 of the Sexual Offences Amendment Act 1992 does not prohibit the reporting of criminal proceedings such as those faced by Ms de Freitas: see s 1(4) of the 1992 Act. Her death would have resulted in the loss of that anonymity, as it only lasts during a person's lifetime.

7. An inquest had to be held into Ms de Freitas' death. A date was set for 7 November 2014. The defendant was anxious that this should be an extended inquest which would consider, among other issues, the role of the CPS. The coroner initially declined to extend the scope of the inquest. The defendant's case is that he considered that media publicity would help achieve his objective. His disclosure indicates that his solicitor thought so too.

8. The claim concerns a series of media publications about these matters in November and December 2014, each of which is said to contain libels for which the defendant bears responsibility.

The pleaded issues

9. In a claim form accompanied by Particulars of Claim, served on 6 March 2015, the claimant complains of seven sets of words. The first two are contained in articles published in *The Guardian* newspaper, in hard copy and on its website on 6 and 7 November 2014. The next two publications complained of are BBC interviews given by the defendant, the first on the *Today* programme on Radio 4 on 7 November 2014, and the second a TV interview given later the same day. The next complaint concerns a public statement or interviews which the defendant is alleged to have made or given, leading to reports in *The Daily Telegraph* and *The Guardian* on 9 December 2014. Finally, the claimant complains of an article written by the defendant himself, and published in *The Guardian* on 10 December 2014.

10. The defamatory meaning attributed to each of the publications complained of is to the same or similar effect. The gist of the claim can be illustrated by selecting one. The meanings attributed to the first Guardian article are "that the claimant (1) prosecuted Ms de Freitas for perverting the course of justice on a false basis and (2) therefore is guilty of the rape of Ms de Freitas."

11. None of the words complained of identified the claimant by name. His case is that those who read or heard the words complained of will have identified him as the man referred to because (1) it was a matter of public knowledge and record that it was he against whom Ms de Freitas had made an allegation of rape, and he who had initiated the criminal prosecution against her; (2) many of his social and business friends and contacts knew enough to identify him; (3) a number of journalists knew enough to do so; (4) on and after 7 November 2014 he was identified on social media and (5) after 7 November 2014 he was identified in the *Daily Mail*.

12. The basis on which the defendant is said to bear responsibility for those of the publications which he did not personally make by speaking or writing the words complained of is set out in some detail in the Particulars of Claim. In summary, it is said that he prepared and communicated, or authorised the communication to the media of a number of documents, including a draft of a witness statement he intended to give to the inquest into Ms de Freitas' death and some press statements. Those documents are said to have been quoted by or relied on in making the media publications complained of. The publications complained of are alleged to have "gravely injured the personal and professional reputations of the claimant" and to have caused him "intolerable" embarrassment and distress.

13. A detailed Defence was served on 22 May 2015. It does not advance any defence of truth or honest opinion. It takes issue with the claimant's case on his identification by readers, disputes his case on meaning, raises issues as to the defendant's responsibility for some of the media publications, and denies that the claimant's reputation has suffered serious harm as a result of publication. The pleaded case in relation to the first *Guardian* article is that "the Claimant was neither named in nor referred to in the statement complained of." It is not admitted that the second Guardian article was understood to refer to the claimant by any substantial number of those to whom it was published. Reliance is placed on the fact that the claimant was not named.

14. In the alternative a substantive defence of publication in the public interest is put forward in relation to each publication complained of, in reliance on s 4 of the Defamation Act 2013. The defence pleads, with supporting details, the two essential elements of that defence: that the statements complained of were statements on matters of public interest, and that the defendant reasonably believed that publishing the statements complained of was in the public interest.

15. The matters of public interest identified include

    (1) the need for the CPS to explain the circumstances in which a vulnerable young woman who was suffering from a psychiatric illness and who made a complaint of rape came to be prosecuted first by her alleged attacker and then by the CPS and whom as a result, committed suicide shortly before she was due to stand trial;

    (2) the inquest into the death of Ms de Freitas;

    (3) the serious implications for the reporting of rape if victims fear that they may end up the subject of a prosecution if their evidence is in any way inconsistent, or if their complaint does not result in a prosecution;

    (4) the need for the CPS to consider very carefully whether it is in the public interest to prosecute in such cases.

16. In a Reply, the claimant accepts that the issues referred to are matters of legitimate public interest, but disputes that the defendant can show that he reasonably believed that what he caused to be published was in the public interest. It is disputed that he held such a belief. Allegations tantamount to allegations of malice are made.

17. The issues in the action are, therefore, so far as liability is concerned, these:-

    (1) Responsibility for publication

    (2) Reference

    (3) Meaning

    (4) Serious harm to reputation

    (5) Whether the publication was reasonably believed to be in the public interest.

18. Witness statements for trial have been prepared in relation to these issues, and exchanged on 4 May 2016. The claimant has served 16 witness statements, the defendant ten, and one witness summary.

19. It is relevant also to note a matter which Mr Barnes very fairly disclosed in his skeleton argument. This is that the claimant is due to be tried in the Westminster Magistrates Court between 26 and 31 May 2016 on a charge of harassing the defendant. The allegation is that between 5 November 2014 and 20 October 2015 he pursued a course of conduct which amounted and which he ought to have known amounted to harassment. The conduct alleged is the writing of a letter to the defendant, the sending of a series of emails to the defendant's solicitor, the uploading of various items to websites, and setting up and maintaining a website in Ms de Freitas' name. The claimant's solicitors in that case are those acting for him in this one. The defendant and one of his witnesses in this case, the solicitor Harriet Wistrich of Birnberg Peirce, are to be prosecution witnesses.

The applications

Claimant's amendment application

20. The first disputed amendment involves the proposed introduction of the following, which is entirely new to the claim.

> **0. 6th November 2014 12:59 – email to 'Sandra Laville'**
>
> 9A. On 6th November 2014 at 12:59 the Defendant's solicitor, Ms Harriet Wistrich, sent by email on behalf of the Claimant to Ms Sandra Laville of Guardian Newspapers Limited and therefore to that company and others at it (of whom the Claimant cannot presently provide better particulars) under the rubric "draft statement" a written statement by the Defendant which he through Ms Wistrich therefore published or caused to be published to Ms Laville, Guardian Newspapers Limited and others which contained the following words defamatory of the Claimant:
>
> > "(6) On the 23rd December 2012, Eleanor had arranged to see a man who she had become friendly with, Alexander Economou (who I shall refer to as AE). On the evening of 23rd December I could not get hold of Eleanor on the phone and therefore sent her a couple of text messages to AE asking about her safety and whereabouts….In the early hours, I received a text from Eleanor via AE's phone saying that she was fine. In fact, I subsequently learnt, although not until the following week, that Eleanor had been raped by AE.
> >
> > …
> >
> > (9) On 4th January 2013 I received a threatening phone message from AE along the lines of "your

daughter is making very serious allegations about me, if she does not stop immediately, I will take legal action". In the meantime Miranda *[who is the Defendant's wife]* called me to say Eleanor was going to the police station to report that she had been raped. She asked me to go down with her and I immediately made arrangements to meet her there. In fact, after Eleanor reported the rape, AE turned up at Chelsea Police station to lodge his complaint and the police arrested him…..

…

(10) I understood later that Eleanor had been advised to report the rape when she spoke about what had happened to her with a community police officer who used to come into the Body Shop where she worked. After she made the report, I think she was relieved and felt she had done the right thing.

(11) On 21st February 2013 I was informed that the police had taken the decision that they could not proceed further with the investigation as they considered there was not a realistic chance of a successful conviction because of all the surrounding circumstances concerning the allegations. I later learnt that these circumstances included the fact that she had reported the crime late and therefore there was no forensic evidence that could be collected to support her belief that she may have been drugged by AE. Furthermore, she had behaved in a way following the rape which might, by a Jury, be considered inconsistent with her allegations particularly in relation to her communications with the alleged perpetrator and others both before and after the event. The police did not want to put Eleanor in the position where she would feel that SHE was being tried when under cross-examination. The police felt particularly strongly about this as they considered Eleanor to be a vulnerable person.

…

(13) Unfortunately, on 14th August 2013, Eleanor received an email from Edmonds Marshall McMahon solicitors, acting for AE, issuing her with a private prosecution summons for perverting the course of justice….

…

(15) In due course, she instructed EBR Attridge solicitors. Their advice was that the prosecution would not pass the test with the Code for Crown Prosecutors and that they should seek to get the Crown Prosecution Service to take over the prosecution and bring it to an end.

(16) Over the following few months I attended court with Eleanor on a number of occasions. The judge invited the CPS to provide their assessment of the case. In October 2013, Sarah Maclaren Head of Homicide and RASSO at the CPS met with Detective Inspector Julian King of the Sapphire Team at Fulham Police Station, who had investigated the original allegations made by Eleanor. They were invited to pass on evidence, including the ABE tape, and to discuss whether Eleanor should be prosecuted. I know that the police told the CPS that there was no evidence that Eleanor had in fact lied with regards to the allegations and that her allegation was still recorded as a crime of rape….

…

(19) Eleanor was very happy with her legal team and I am aware that they were making representations to the Crown Prosecution Service to take the case over and then stop it. Unfortunately, on 5th December 2013, the CPS made a decision that they would take over the prosecution and continue with it. Eleanor's legal team was very surprised by this and made urgent representations to try to get the prosecution stopped….

…

(26) The decision of the CPS to pursue the case against Eleanor is one which Eleanor herself was unable to reconcile with the facts. Eleanor was a vulnerable young woman who made a complaint of rape as a result of which she herself became the subject of legal proceedings. This was despite the fact the police did not believe there to be a case against her. There are very serious implications for the reporting of rape cases if victims fear that they may themselves end up the subject of a prosecution if their evidence is in any way inconsistent. It is therefore of the utmost importance that the CPS consider very carefully whether such cases are in the public interest.

…'

9B. The said words referred and were understood to refer to the Claimant by the Defendant's use of the Claimant's name, Alexander Economou, and the abbreviation "AE".

9C. In their natural and ordinary meaning the said words meant and were understood to mean that the Claimant:

9C.1. Is guilty of the rape of Ms de Freitas; and

9C.2. Prosecuted Ms de Freitas for perverting the course of justice on a false basis.

9D. That the said words caused or are likely to cause serious harm to the reputation of the Claimant is obvious from their gravely damaging nature, context and circumstances of publication, including that their publication was in the first instance directly to a highly influential journalist and print and Internet media organisation."

21. The proposed amendment to paragraph 10 of the Particulars of Claim is of a different nature. It involves a further or alternative way of putting the existing case of responsibility for the publication of the first Guardian article. The proposed amendments are those shown in underlined or bold text below:-

"**A. 6th November 2014 – first *Guardian* interview**

On or about 6th November 2014 the Defendant gave an interview to the *Guardian* newspaper and/or in any event between about 15:34 and 18:41 supplied to Ms Laville and therefore Guardian Newspapers Limited and others at that company by email through the agency of Ms Shona Crallan at INQUEST and/or Ms Wistrich a written statement or statements entitled "Press Statement of David de Freitas" during which he said or wrote and so published or caused to be published to those who interviewed him and/or received the said written statement or statements and in any event (where the words below appear in bold) in the *Guardian* for 6th November 2014 and at its website www.theguardian.com/uk from that date onwards the following words defamatory of the Claimant:

> "The decision of the CPS to pursue the case against Eleanor is one which Eleanor herself was unable to reconcile with the facts. ~~"~~**Eleanor was a vulnerable young woman, diagnosed with bipolar, who made a complaint of rape as a result of which she herself became the subject of legal proceedings. This was despite the fact the police did not believe there to be a case against her.**

> **"There are very serious implications for the reporting of rape cases if victims fear that they may themselves end up the subject of a prosecution if their evidence is in any way inconsistent. It is therefore of the utmost importance that the CPS consider very carefully whether such cases are in the public interest."**
>
> I urge the CPS to conduct a review of the decision to prosecute Eleanor and specifically how the full code test was met. It would be impossible for Eleanor to have perverted the course of justice without wasting police time. The police looked at this matter twice and concluded that there was no case to answer. Who has a better idea of whether the police's time is being wasted: the police or the CPS?...
>
> …
>
> **"…I feel that the system of fairness in this country has let me down terribly, and something needs to be done so that this can never happen again."**

22. In addition to the amendments I have set out above there were also proposals to amend the pleaded case on reference at paragraph 11 to reflect paragraphs 9A to 9B, and amendments to paragraphs 13 and 15.2.1.

Defendant's applications

23. The claimant's application prompted the defendant's application to serve further evidence for trial and the defendant's application for permission to amend the Defence.

The factual and procedural context

24. These applications can only be understood if they are set in their factual and procedural context.

25. The following appears from the defendant's disclosure.

    (1) On the morning of 5 November 2014 Ms Wistrich emailed Sandra Laville at the *Guardian* asking whether she might be interested in "a story re state involvement that may have led to the suicide of a rape victim". Ms Laville replied that she was in the following day and would be very interested. Ms Laville followed up by outlining the then situation and explaining the family's keenness to ensure a full enquiry. She wrote

    > "I have persuaded them a sympathetic story might help show the wider public interest and persuade the coroner of the need to widen the scope of the inquest – so would ideally want a story in Friday's paper I think?"

(2) It was arranged that the two would speak the following day to provide Ms Laville with more detail. Ms Laville asked "One more question?! Would I be able to get a quote from the family for the story thur for Friday?"

(3) By 6 November 2016 the defendant had prepared a draft witness statement for the inquest ("the draft Statement"). It contained the words set out and complained of in paragraph 9A of the draft Amended Particulars of Claim, above. It will be seen from those words that the draft Statement named the claimant as the man who raped Ms de Freitas.

(4) At 12:59 on 6 November Ms Wistrich, then acting for the de Freitas family, sent Ms Laville an email ("the Email") with a copy of the draft Statement. She described this as "statement from david for info purposes only – please check before using any of it -…"

(5) At 13:21 Shona Crallan of Inquest emailed Ms Wistrich, with copy to the defendant, to say that

> "I have spoken to Sandra [Laville] as I understand you have also…. We agreed that I will now provide her with a quote from David … I have discussed with David the possibility of press follow up tomorrow and suggested that he can decide with you at that time whether to give any interview or further quote then…."

(6) At 14:30 Ms Crallan emailed the defendant to ask "have you had a chance to prepare your statement?". At 15:19 he replied attaching "the two paragraph press statement as promised". The defendant's disclosure includes two versions of a document called "Press Statement of David de Freitas" ("the Press Statement"). One version, which appears to be the earlier of the two, is a two paragraph document. The defendant's email explained: "I was getting the witness statement sorted and it took longer than expected. I attach this too."

(7) At 15:30 Ms Wistrich forwarded something to Ms Laville saying "David prepared this but he said you can talk to him if you would like". It is not entirely clear what it was that was forwarded by Ms Wistrich. It may have been the defendant's email to Ms Crallan of 15:19 and its attachments. But eight minutes later Ms Crallan sent an email to Ms Laville and Ms Wistrich explaining that "I attached the wrong statement in error…. Attached now is David's statement for your article."

(8) At 18:41 on 6 November 2014 Ms Crallan emailed Ms Laville, with copy to Ms Wistrich, saying: "If it is not too late, David has considered further what he would like to say as part of your article and if you are able to include the following he would be grateful." A paragraph of text was set out, describing the defendant's feelings about his daughter and her loss. It ended with the sentence now quoted in the last paragraph complained of in the draft amendment to paragraph 10, above ("I feel the system of fairness in this country has let me down terribly …" etc.).

(9) The second version of the Press Statement contained in the defendant's disclosure is a three paragraph document. The third paragraph is in the same terms as the quote set out Ms Crallan's email of 18:41 on 6 November 2014.

26. The first *Guardian* article complained of was published on 6 November 2014 and in hard copy on 7 November.

27. When the Defence was served on 22 May 2015, it responded to the claim as set out in paragraph 10 of the Particulars of Claim as they then stood by admitting the publication of the first *Guardian* article but denying that the defendant had given an interview to *The Guardian*, as was then the claimant's case. The Defence set out what the defendant said was the true sequence of events. This was, so far as relevant, as follows:

> "10.3 ...On 6 November Ms Wistrich sent to Ms Laville, on the Defendant's behalf, various documents including a copy of the witness statement which the Defendant had provided to the Coroner.
>
> 10.4 The first and second paragraphs of the statements complained of pleaded at paragraph 10 are quotes taken from the Defendant's witness statement. The Defendant will rely on the whole of the witness statement at trial."

28. At paragraph 10.5 it was pleaded that the third paragraph of the words complained of was a quote from a written statement which the defendant had provided to Ms Laville at her request on 6 November 2014.

29. Paragraph 72 of the Defence pleaded that "Ms Wistrich advised the defendant not to name the claimant to any journalists, advice with which the defendant agreed and which he followed …".

30. This account was verified by a statement of truth signed on behalf of the defendant by his solicitor, Mr Parladorio.

31. On 1 June 2015 the claimant sought inspection of the documents mentioned in these paragraphs, pursuant to CPR 31.14 and copies of the Email and the draft Statement were sent on 12 June and received on 15 June 2015. The two paragraph version of the "Press Statement" was also produced, though it is contended that the longer version was not produced until disclosure in February 2016.

32. On 23 June 2015 the claimant served his Reply which made reference to the Email and draft Statement. This was said:

> "In the light of what is alleged by paragraphs 10.3 to 10.6... ...the Claimant may in due course have to amend the Particulars of Claim to complain further over the documents now allegedly published on 6th November 2014 by the Defendant to Sandra Laville of the Guardian newspaper"

33. On 6 July 2015 the claimant served a Part 18 request. The answers came on 3 August 2015. Three are relevant for present purposes.

(1) In relation to paragraph 10.3 of the Defence the claimant asked "on how many occasions and in each instance on what date or dates and at what times Ms Wistrich contacted Ms Laville". The answer was that the information was not necessary or proportionate in order to enable the claimant to prepare his case or understand the case he had to meet.

(2) Asked how Ms Wistrich was said to have "raised with the defendant the possibility of highlighting in the media the issues he was seeking to raise in the inquest", the defendant gave the same answer.

(3) Asked how he could reconcile paragraphs 10.3 (admitting that Ms Wistrich sent Ms Laville the draft Statement which named the claimant) and 72 (asserting that Ms Wistrich advised and the defendant followed her advice not to name the claimant to journalists), the defendant responded as follows:

> "Ms Laville was provided with an advance copy of the statement which was provided to the coroner for the inquest hearing on 56 November 2014. The Defendant believes that Ms Laville was given [the draft Statement] by way of background and was told that she should not name the Claimant or use or quote the contents of the statement without prior permission from the Defendant."

34. The limitation period for any claim in respect of the publication of the Email expired on 6 November 2015.

35. On 31 March 2016 the claimant's solicitors first proposed the draft amendment. They did so on the basis that the "necessity" for such amendments had become apparent on reviewing the defendant's disclosure. That was disputed in the defendant's solicitors' reply of 6 April. There was no reply until 27 April. That reply acknowledged that the claimant's side had had the documents for some time, but did not explain why the matter had not been addressed earlier.

36. On 4 May 2016 witness statements were exchanged. On 6 May 2016 the current application was issued.

37. On 10 May 2016 the defendant provided the claimant with a draft of an application notice seeking permission to serve and rely at trial on a second witness statement of the defendant. The application was issued on 11 May 2016 and I dealt with it at the hearing the following day on short notice.

38. The second statement did two things. First, it filled in a gap in the defendant's trial witness statement. He had failed to deal with the claimant's complaint about the *Guardian* article published on 9 and 10 December 2014. He did so, in two short paragraphs. Secondly, in response to the proposed amendment of the Particulars of Claim, he sought to "clarify" paragraph 97 of his trial statement.

39. Paragraph 97 states that Ms Wistrich had told him she would provide Ms Laville with background information and

> "I agreed to this, although I had no input into what particular documents or information she provided them with or how she would do this. As I later learned after the claimant had issued the claim against me, HW sent SL … my statement prepared for the inquest …"

40. The second statement says that

> "What I intended to convey … was that I did not authorise HW to provide this document to SL and I would not have done so had I been consulted and my authority sought. It would have been contrary to the advice being given to me at that time by HW…"

41. The defendant also sought to amend paragraph 10.3 of the Defence to correct what Mr Parladorio described in a supporting witness statement as an "error in Defence". The point, which was first made in the defendant's solicitors' letter of 6 April 2016, is that "what is pleaded in the Defence in relation to the draft Statement is actually wrong".

42. It is said that the document to which paragraphs 10.3 and 10.4 of the Defence were meant to refer was the Press Statement, not the draft Statement. It was the Press Statement that was the source of the words complained of. There is a further error, in that the draft Statement had not been sent to the coroner at the time. The application is to delete the final sentence of paragraph 10.3 (the averment that Ms Wistrich sent various documents including the draft Statement to Ms Laville on 6 November) and to amend paragraph 10.4. Paragraph 10.4 would be amended by deleting the averment that the words complained of are taken from the draft Statement, and substituting an averment that those words come from "a two paragraph press statement" made by the defendant and supplied on 6 November 2014 to Ms Laville for publication.

Discussion

Amendment of the Particulars of Claim

43. I refused permission to amend by adding paragraphs 9A to 9D on several grounds. The application seeks to amend to add a new cause of action in defamation more than one year after the cause of action arose. That may be allowed in certain circumstances, but I do not consider that it would be right to allow it here. It is clear in my judgment that this is an amendment which the court would be prohibited from allowing unless persuaded that the primary limitation should be disapplied pursuant to s 32A of the Limitation Act 1980. That section allows the court to disapply the one year limitation period, where persuaded that this would be "equitable". The court rarely exercises this discretion in favour of a late amendment. Here, I do not consider it would be equitable to disapply the limitation period. Even if I did I would exercise my discretion against allowing this late amendment, on grounds of proportionality and case management.

44. Authority indicates that the right way to approach such a question is to start by considering the general principles as to amendments to add new causes of action outside the limitation period: see *Wood v Chief Constable of the West Midlands Police* [2005] EWCA Civ 1638, [2005] EMLR 20 [84]. The general rule is set out in s 35(3) of the Limitation Act 1980: "neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above … to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim." There is no doubt that the time limit for enforcing this proposed claim had expired many months before the present application was made. A "new claim" is defined to include "the addition or substitution of a new cause of action". It is clear that the proposed amendment now under discussion would add a new cause of action.

45. The general prohibition on allowing new causes of action to be pleaded by amendment after the limitation period has expired is qualified by the opening words of s 35(3): "Except as provided by section 33 of this Act or by rules of court". Section 33 has no bearing on this case. Section 35(4) provides that rules of court may provide for allowing a new claim, but only if certain specified conditions are met. The relevant condition is that "the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action": s 35(5)(a).

46. The approach the court should take in determining whether a new claim arises out of facts which are the same or substantially the same facts as those in issue on an existing claim has been considered in a number of authorities. The following points of relevance emerge:

    (1) "The policy of [s 35] was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts." *Lloyd's Bank plc v. Rogers* [1997] TLR 154 (Hobhouse LJ).

    (2) "Whether one factual basis is 'substantially the same' as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim." *Goode v Martin* [2001] 3 All ER 562 (Colman J).

    (3) "The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts": *BP plc v Aon Ltd* [2006] 1 Lloyd's Rep 549 [54] (Colman J). This passage was later described as "helpful" by the Court of Appeal in *Ballinger v Mercer Ltd* [2014] EWCA Civ 996, [2014] 1 WLR 3597.

47. CPR 17.4 governs applications to amend a statement of case where "a period of limitation has expired under (i) the Limitation Act 1980". The wording of r 17.4(2) reflects the statutory provisions, though it is arguably narrower. It allows the court to grant permission to add a new claim

> "only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

48. In *Komarek v Ramco Energy plc*, unreported 21 November 2002, the provisions of s 35 and the predecessor of CPR 17.4(2) were considered by Eady J in the context of a defamation action. The claimant sought to amend outside the limitation period to add a claim in respect of further publications of the very same words as were already in issue in the action. The further publications were to Sir Jeremy McKenzie, and republications by him. The judge refused permission. As he pointed out at [62]:-

> "In one sense, the facts sought to be relied upon in the proposed amendments are similar to those already pleaded; that is to say, the allegations about the claimants are similar. The essence of a claim in libel, however, is not the nature of the allegations but their publication. Each publication gives rise to a different cause of action. The publication to Sir Jeremy cannot, therefore, be characterised as (even "substantially") the same fact as the publication to the Ambassador. … the litigation of the factual issues relating to the 20 May publication does not mean that the issues relating to the alleged later publications to and by Sir Jeremy are bound to be litigated in any event."

49. Eady J concluded at [65] that since the new causes of action did not arise out of the same or substantially the same facts as were already in issue he had no power or discretion to permit the amendments. I have reached the same conclusion in this case. The meanings attributed to the draft Statement are very similar to those which are attributed to publications of which the claimant already complains, but that is not enough to satisfy s 35(5)(b) or CPR 17.4(2). The new claim "arises out of" the communication of the draft Statement to Ms Laville. There is no extant claim that arises out of that communication. The claimant's present case in respect of the first *Guardian* article is that it resulted from an "interview".

50. Even after disclosure of the draft Statement and the chain of email communication which I have outlined above, the claimant does not seek to complain that the first *Guardian* article resulted from the sending of the draft Statement by Ms Wistrich to Ms Laville. His intended case is that it resulted either from the "interview" originally alleged, or from the communication of the Press Statement, or both. The case set out in the draft amendment to paragraph 10 is that the Press Statement was communicated by Ms Crallan or Ms Wistrich. Whichever it was, it was done by a communication separate from the Email. So even if I grant permission to make the amendment to paragraph 10, as I do, that does not help the claimant. It remains the case that the proposed "new claim" in paragraphs 9A to 9D arises from facts which are not the same, or substantially the same, as "a claim in respect of which the party applying for permission has already claimed a remedy" within CPR 17.4(2).

51. The communication of the draft Statement to Ms Laville is, as the Defence stands before amendment, something positively averred by the defendant. So the question of whether the facts relied on for the new claim are the same or substantially the same as "are already in issue on any claim previously made" within the meaning of s 35(5)(a) might have been a subtler one. But the discretion available to me is defined and confined by the wording of the CPR. It follows that I have none.

52. What I do have is power to disapply the primary limitation period pursuant to s 32A of the Limitation Act. If I were to do that, s 35 and CPR 17.4(2) would not apply, because the claim would no longer be one "made after the expiry of any time limit under this Act" or "where a period of limitation has expired" under the Limitation Act.

53. Section 32A provides for the "discretionary exclusion of time limit for actions for defamation …" Section 32A(1) provides that the court "may" direct that s 4A "shall not apply to the action or shall not apply to any specified cause of action …" The threshold conditions for the availability of the discretion are set out in s 32A(1). So far as relevant they are these:

> "If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which
>
> a) The operation of section 4A of this Act prejudices the plaintiff … and
>
> b) Any decision of the court under this subsection would prejudice the defendant …"

54. It is well-established that the power under s 32A will only be exercised in exceptional circumstances. The reasons are well-known, and include the need for defamation proceedings to be brought promptly, and the inference commonly drawn that if that does not occur the reason is likely to be that the publication in question is not of real or legitimate concern to the claimant. The principal authority is *Steedman v BBC* [2001] EWCA Civ 1534, [2002] EMLR 17. When acting under the section the court is required to have regard to all the circumstances of the case and in particular to a number of factors expressly listed in s 32A(2). These include the length of and reasons for the delay.

55. The length of the delay is something the court can work out for itself, but the reasons for it will often be less than obvious. Since the burden of persuading the court to act under s 32A lies on the claimant, it must be his task to explain the delay. Sometimes, the reason will be that the claimant did not know the relevant facts until after the limitation period had expired. But if he has found out before the expiry of the limitation period yet failed to act, the court will inevitably expect some explanation. As observed by HHJ Chambers in a passage approved by Lord Phillips MR in *Cornwall Gardens PTE Ltd v R O Garrard & Co Ltd* [2001] EWCA Civ 699 [56]:-

> "where a party to proceedings has put itself in a position by its own conduct that it requires the discretion of the Court to be exercised in its favour to be allowed to continue in those proceedings it must proffer an explanation to the Court as to

> how the state of affairs has arisen … The Court is being asked to apply its discretion in favour of a party who would otherwise suffer the consequences of being statute barred."

56. Mr Helme submits, and I accept, that in the present case there has in reality been no explanation of the lateness of this application. The explanation given in the evidence and by Mr Barnes in argument is that the present application is the result of the claimant's lawyers reviewing this point in the round, with the benefit of disclosure and reading back over the statements of case. That explains why it is made now, but not why it was not made earlier. Mr Barnes candidly accepts that with the benefit of hindsight it may be that the point could have been raised formally at an earlier stage. He submits, however, that a failure to do that "does not make it inequitable" to allow the amendment now. That may be so. But an applicant under s 32A who has been guilty of wholly unexplained delay of many months is likely to find it harder to persuade the court that relief against that delay would be equitable.

57. I do not consider that it would be equitable to grant that relief. The unexplained delay is a factor in that conclusion, but a more important one is the fact that the application comes so close to the trial. I am not persuaded that the grant of the amendment would threaten the trial date. But I do consider that the defendant would suffer substantial prejudice if I were to grant disapplication:

(1) It would deprive him of an otherwise unassailable limitation defence, and require him at this very late stage to plead, and prepare evidence, in answer to a new head of claim.

(2) A new factual investigation would be necessary which would not only cover the question of publication by Ms Wistrich to Ms Laville but also, if I allowed the amendment as it stands, the question of whether Ms Laville communicated to others. In the short time available the defendant has obtained a witness summary from her, based upon information she has provided, in which it is asserted that she did not communicate to others.

(3) It appears from the witness summary that a serious issue would also arise as to whether the publication caused serious harm to the claimant's reputation in the eyes of Ms Laville.

(4) All this would have to be done in conjunction with the already significant burden of preparing for a fairly long trial, at a time when (at the time of the hearing and so far as I know still) the parties also have to prepare for and deal with a criminal trial.

(5) The need to engage with these new issues in this context would represent serious prejudice to the defendant in my view.

58. By contrast, the normal operation of s 4A would not in my judgment cause any serious prejudice to the claimant. His case that this publication caused serious harm to his reputation is purely inferential, and it appears that it would be denied by the single publishee. His case in this action to date has been, understandably, based on publication to the world at large. If he succeeds in relation to the publications of which he complains already he will obtain vindication, damages and an injunction. It

seems improbable that he would succeed in relation to publication to Ms Laville if he failed on those other publications. He has no real need of any remedy in respect of such publication.

59. I would have exercised any discretion against the grant of relief under s 32A. The reasons overlap with those I have already given. In summary, the addition of the new claim would have a damaging impact on the orderly preparation for trial of the issues already before the court. The additional cost and disruption would be out of proportion to the importance of the claim. It would be unfair to impose on the defendant the burdens that would result. It is fair for Mr Barnes to point out that the defendant has not been careful, or particularly candid, in the presentation of his own case. His Defence was pleaded in a way that he says was inaccurate, and there is no explanation offered for that "error", which he has only belatedly sought to correct. His approach to the Part 18 Requests was less than co-operative. But the fact is that the possibility of amending has been recognised on the claimant's side since last June, and action has been taken far too late.

60. The approach to be taken to the discretion under CPR 17.4(2), where that arises, is essentially the same as the approach to s 32A: see *Wood v Chief Constable of the West Midlands* (above) at [84]. It follows that I would have arrived at the same discretionary conclusion if I had concluded that this new claim falls within CPR 17.4(2).

61. I would not have rejected the application in its entirety on pleading grounds, as Mr Helme invited me to do. I would not have allowed complaint to be made of publication to Ms Laville "and others", in the absence of any basis for inferring that there was wider publication. The allegation appears to be purely speculative. To allege publication to Guardian Newspapers Limited would seem artificial, if the only basis for it was that Ms Laville is employed by the company. But otherwise the pleading seems to me acceptable as a pleading.

62. Nor do I accept Mr Helme's submission that there is no prospect of establishing that the defendant was responsible for the publication of the draft Statement by Ms Wistrich to Ms Laville. It may be that the relevance of the matter is limited to the question, if there is one, of whether Ms Laville knew who was being referred to by the words of the Press Statement which appeared in the *Guardian*. To the extent that this remains a relevant issue, however, there is in my judgment a real rather than fanciful prospect of proving that he was responsible. The revised account given in the defendant's second witness statement and proposed draft Amended Defence may be correct, but that is a matter fit to be tested at a trial.

63. Criticisms were levelled at the drafting of the amendments to paragraph 10. Some reflected the criticisms of 9A to 9D and had similar force. Again, I have been shown no evidential basis for alleging publication to "others" at Guardian Newspapers. Such evidence as I have suggests the contrary. To allege publication to the company seems artificial, if communication was to only one employee.

64. There is a further point. Mr Helme confirmed that if the amendment was limited to putting the existing claim in a further or alternative way he would not object. But as he has pointed out, that does not seem to be the case. The draft amendment appears to rely on the alleged publications to Ms Laville and others not only as a means of

causing publication in *The Guardian* but also as stand-alone causes of action. That seems to have been the intention, otherwise there could be no basis for complaining of the words which are not in bold. Those are words that were communicated to Ms Laville by email, but not published in *The Guardian.* The defendant had not previously thought that he was facing a claim for publication to the media, as opposed to in the media. That is understandable, not least because (a) the claim form alleges "libel arising from statements published or caused to be published by the defendant *in* the media" (emphasis added); (b) the means by which publication in the first *Guardian* article is presently said to have been caused is by an "interview"; yet (c) there is no claim for slander in the claim form or the Particulars of Claim.

65. Mr Barnes ultimately confirmed that the only defamation claim his client wishes to pursue in this respect is a claim for libel <u>in</u> the Guardian, in hard copy and online. If so, the wording of the draft amendment needs adjustment to eliminate reference to any email communication other than to Ms Laville; to remove the words that did not appear in the *Guardian*; and (if any further change is required for this purpose), to make clear that the only claim is for libel, by causing publication in *The Guardian*. It is on that basis that I granted permission to amend.

66. Questions as to whether other paragraphs of the Particulars of Claim are apt and intended to advance claims for publication to the media, as well as in the media, were debated at the hearing but I did not consider it appropriate to rule on them. Mr Barnes wanted time to take instructions, and I saw no need to press him to deal with these matters on the hoof, in the absence of an application.

The defendant's applications

67. It was plainly right to allow the defendant to put right his omission to deal with part of the claim. I could see no reason why he should not be allowed to "clarify" at trial paragraph 97 of his statement. It will be open to Mr Barnes to challenge his account of things. Likewise, the grant of permission to amend the Defence as sought will bring the pleaded case into line with what the defendant now says is the true position without impeding a challenge to the defendant's case.

68. In short, the amendments will bring the defendant's pleadings and evidence into line, and into line with what he says is the truth. Whether that is correct can be fairly thrashed out at trial. The amendments will cause no prejudice to the claimant that cannot be compensated in costs, and will tend to make the administration of justice smoother rather than to delay or complicate it.