Neutral Citation Number: [2020] EWHC 2792 (QB)

Case No: QB-2018-006668

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2020

Before :

THE HONOURABLE MRS JUSTICE TIPPLES

- -

Between :

ISAAC SARAYIAH	**Claimant**
- and -	
(1) UNIVERSITY OF DURHAM	
(2) DAVID WILLIAMS	
(3) CLAIRE MOLLOY	
(4) PERSONS UNKNOWN	**Defendants**

- -
- -

Mr Sarayiah appeared in person
Miss Adrienne Page QC (instructed by **Pinsent Masons LLP**) for the **first to third defendants**

Hearing date: 8th October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

The Honourable Mrs Justice Tipples DBE :

Introduction

1. There are two applications before me. The first is an application by the first to third defendants ("**the defendants**") to strike out the claim on the grounds that the claimant failed to serve his particulars of claim in time. The claimant has not made any written application to extend the time for service of the particulars of claim retrospectively or for relief from sanctions. However, at the hearing before me, and at the very end of his oral submissions, he sought to make such an application orally and without notice. I refused to allow him to do so and provided my reasons at the time.

2. The second is an application by the claimant for judgment in default of defence. That application will fall away if the defendants' application is successful.

3. The defendants were represented by Miss Adrienne Page QC. The claimant represented himself, as he has done in relation to all other hearings in relation to this matter. He is an experienced litigator and, as Sir David Eady observed, he is "highly intelligent and appears to have a good grasp of legal principles and procedure" ([2018] EWHC 342 (QB) at [17]). The same observation was made by Floyd LJ on 17 December 2018.

4. The claim form was issued on 24 January 2018 and served on the defendants on 23 May 2018. The particulars of claim were served on the defendants on 2 July 2019. Whether or not the claimant served his particulars of claim in time depends on the interpretation of an order made by Master Thornett on 5 June 2018.

5. The construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regards as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of the order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve: see *Sans Souci Limited v VRL Services Limited* [2012] UKPC 6, per Lord Sumption at para [13].

6. In order to resolve this dispute, it is necessary to set out the circumstances which were before the Court, and patent to the parties, together with the issue which the order was supposed to resolve. The defendants maintain that the correct interpretation of the order in these circumstances is that the time for service of the particulars of claim expired (at the latest) on 14 February 2019 and they were served out of time. The claimant, on the other hand, maintains that the time for service of the particulars of claim expired when he served them on 2 July 2019 (although the effect of his argument is that the time for service of the particulars of claim has not yet expired, and is still running in his favour).

7. The clear conclusion I have reached is that, as a result of Master Thornett's order, the last date for service of the particulars of claim was 14 February 2019, and the claimant served them on the defendants over four months' out of time.

Background

8. This dispute began in 2017 when the claimant commenced proceedings for a Norwich Pharmacal Order against the first and second defendants ("**the NP proceedings**"). On 20 September 2017 Fraser J made an order granting the claimant relief ("**the NP Order**"). On 20 October 2017 the first and second defendants served their response to the NP Order made by Fraser J. On 23 February 2018 Sir David Eady, sitting as a High Court Judge, handed down judgment (reserved from 16 January 2018) dismissing the claimant's complaints that the first and second defendants had failed to comply with the NP Order, together with the claimant's application to commit the first and second defendants for contempt. The order made by Sir David Eady was dated 22 March 2018 and sealed on 25 April 2020. On 14 May 2018 the claimant sought permission from the Court of Appeal to appeal this order ("**the PTA application**"). The claimant was granted permission to appeal in respect of two of his 21 grounds of appeal by Floyd LJ on 17 December 2018 ("**the PTA Decision**").

9. In the meantime, on 24 January 2018 the claimant issued a claim form against the defendants "for slander and libel" and "to disapply the limitation period" ("**the defamation proceedings**"). The latest time for serving the claim form was 24 May 2018. On 23 May 2018 the claimant served his claim form on the defendants. The particulars of claim were not contained in the claim form and therefore, under CPR 7.4(2), they had to be served on the defendants no later than 24 May 2018.

10. Following his application for permission to appeal in the NP proceedings on 14 May 2018, and before serving his claim form on 23 May 2018, the claimant emailed the defendants' solicitors informing them that he intended to serve the claim form, together with a pre-action protocol letter, on the defendants and inviting them to agree to a stay of the defamation proceedings, once he had served the claim form, pending the outcome of "[his] appeal to the Court of Appeal". The claimant sent the defendants' solicitors his pre-action protocol letter on 21 May 2018 and, in his covering email, he informed them that "I am also going to be making an imminent application to the Courts to stay the claim pending the outcome from the Court of Appeal… If you concur with the stay please let me know by midday on Tuesday 22 May 2018 otherwise I will seek my costs of the application …".

11. On 22 May 2018 the defendants' solicitors responded stating: "We note that you intend to serve your defamation proceedings on us imminently … In relation to your request that we agree a stay, it was previously pointed out to you that you were in a position to pursue your intended claim in defamation without the further information sought before Eady J. In any event, as previously stated, your intended claim in defamation faces insurmountable difficulties …".

12. The claimant responded to this by email on 22 May 2018 stating "… And as regards – can I plead my particulars without the info required from the court order – which is admission that you are in breach of the Order, actually no I cannot. The application to stay will be made shortly and you should receive the claim form today, but deemed served tomorrow."

13. Then, on 23 May 2018, the claimant issued two application notices.

The claimant's applications dated 23 May 2018

14. First, the claimant issued an application seeking "an extension of time to serve particulars of claim under CPR 3.1(2)(a) until application for stay is determined, time expires tomorrow (see attached application)". He asked for this application to be dealt with at a hearing with a time estimate of 10 minutes. The Court listed this application for hearing by Master Davison on the afternoon of 23 May 2018 with a time estimate of 10 minutes.

15. Second, the claimant issued an application seeking "(1) to seek a stay in proceedings under CPR 3.1(2)(f) and CPR 1.1 pending outcome of Court of Appeal in relation to enforcement of NPO of Fraser J and committal proceedings against D's; and an extension in time to serve particulars of claim until application for stay is determined under CPR 3.1(2)(a)." He asked for this application to be dealt with at a hearing with a time estimate of 30 minutes. On 23 May 2018 the Court listed this application for hearing by Master Thornett on 5 June 2018 with a time estimate of 30 minutes.

16. The purpose of this application was explained in the claimant's 15-page witness statement dated 23 May 2018 which said, amongst other things, that:

> "[1.] I am seeking a stay in proceedings under CPR 3.1(2)(f) and the overriding principles of the CPR including CPR 1.1(2)(b) saving expenses and CPR 1.1(2)(c) dealing with a case which is proportionate (i) to the amount of money involved, (ii) the importance of the case, (iii) the complexity of the issues and (iv) the financial position of each party. It is also in the interests of justice that the claim be stayed.
>
> [2.] I am also seeking an extension of time under CPR 3.1(2)(a) to serve the particulars of claim until the application for a stay is determined. This is the correct route as stated in *Totty v Snowden* [2001] EWCA Civ 1415 (31 July 2001).
>
> …
>
> [8.] The stay is required due to an application to the Court of Appeal for permission to appeal filed on 14 May 2018, against the order of Eady J, dated 22 March 2018, but only sealed on 25 April 2018 and which relates to the hearing held on 16 January 2018. This hearing was to enforce the Norwich Pharmacal Order of Fraser J and find the defendants in contempt of court for wilfully breaching it. 42 grounds of breach were pleaded.

> [9.] The particulars of claim have not been served, as the outcome of an appeal to the Court of Appeal is of great importance to the pleading of the particulars of claim and if successful will allow me to plead a properly constructed particulars of claim. It will also mean the defendants being held in contempt of court and having to be penalised.
>
> …
>
> [17.] And in cases where a Higher Court's decision may have a direct bearing on the claim and or a stay is needed to gain further information in order to plead a properly constructed case, it is the right and just thing to do to stay the claim (and or grant an extension of time even though a stay is being sought in this case) and is in accordance with the overriding principles of the CPR and the interests of justice.
>
> …
>
> [23.] … the information the Defendants refuse to provide goes to the very heart of my case and if permission to appeal is granted and then my appeal is subsequently allowed, it will have a significant bearing on the drawing up of the Particulars of Claim and allow me to plead a properly constructed Particulars of Claim, and the Defendants will have to comply with the Order of Fraser J in full.
>
> …
>
> [40.] Accordingly, it weighs heavily in my favour and is [in] accordance with the overriding principles of the CPR and my Article 6 Rights to have access to justice and a fair hearing, that the claim is stayed pending the outcome of the Court of Appeal.
>
> [41.] I have asked the Defendants to consent to a stay on several occasions, but they have refused. Accordingly, I request my costs of the application …"

17. There are a number of points that are clear from the two applications issued by the claimant on 23 May 2018, and his witness statement dated 23 May 2018. In particular:

    a. The claimant knew he had to serve his particulars of claim before the time for doing so under the Civil Procedure Rules 1998 expired. He also knew that, unless he obtained an extension of time from the Court, the time for serving his particulars of claim would expire on 24 May 2018. This is obvious from the terms of his first application, which was listed before Master Davison on 23 May 2018.

    b. The claimant considered that he would be in a better position to prepare his particulars of claim once the PTA application been determined by the Court of Appeal (see paragraphs 9, 17 and 25 of his witness statement).

    c. The claimant wanted to put off service of his particulars of claim until after determination of the PTA application by the Court of Appeal (see, for example, paragraphs 9, 17 and 23 of his witness statement).

    d. The date when the PTA application would be determined by the Court of Appeal was unknown.

e. The claimant maintained that, in these circumstances, the appropriate way forward was for the Court to stay the defamation proceedings pending the determination by the Court of Appeal of the PTA application (see paragraph 40 of his witness statement).

f. The claimant knew that his application for a stay issued on 23 May 2018 could not be heard and determined by the Court before the time for service of the particulars of claim expired the next day. Therefore, to protect his position he knew he had to obtain an extension of time for the service of the particulars of claim in order to "hold the ring" pending the determination of his application for a stay. This is plain from the terms of his first application and paragraph 2 of his witness statement.

g. The claimant knew that, if the Court granted him a stay of the defamation proceedings on the terms he was seeking, he would not have to serve his particulars of claim until the PTA application had been determined by the Court of Appeal. He understood therefore that the stay prevented time running against him in relation to the service of his particulars of claim (see paragraph 17 of his witness statement).

Master Davison's order dated 23 May 2018

18. The first application dated 23 May 2018 seeking an extension of time for the service of the particulars of claim was heard by Master Davison *ex parte* on the afternoon of the same day. The Master endorsed the application with the following order "Time extended. See endorsement on the unissued application notice. RD. 23/5/18" and the endorsement was stamped by the Court on 23 May 2018.

19. The unissued application notice, which was the second application issued on 23 May 2018 seeking a stay of the defamation proceedings, was endorsed in these terms: "Time for service of Particulars of Claim extended until this application is determined. R.D." and that endorsement was also stamped by the Court on 23 May 2018.

Events leading to the hearing before Master Thornett on 5 June 2018

20. On 1 June 2018 the defendants' solicitors wrote to the claimant in relation to his application for a stay which they had received on 29 May 2018. They said this:

> "We consider your application for a stay, and therefore further delay, of your defamation claim to be misconceived. As we have already argued, and as Sir David Eady agreed at paragraph 9 of his judgment, you have the information that you need to plead Particulars of Claim…
>
> In the light of these considerations our clients are willing to not oppose an extension of time for service of particulars of claim until 14 days after receipt of the Court of Appeal's decision in relation to your application for permission to appeal, assuming the

> Master is minded to agree that course, it being a matter for the Court. In the event that you are granted permission by the Court of Appeal then we would revisit the question of the stay having regard to the terms of that permission.
>
> Our clients' willingness to proceed as set out above would be on the following conditions:
>
> (1) The costs of your application are reserved; and
>
> (2) Whilst our clients would not be entitled to object to late service of the Particulars of Claim, they would in all other respects be able to refer to and rely on your delay in progressing your claim; the court expects defamation claims to be pursued promptly, and for the reasons set out we do not agree that there is a proper basis for seeking a stay.
>
> Please confirm your agreement to the approach set out above by 10am on 4 June 2018." (underlining added)

21. The defendants' proposal in relation to the claimant's application for a stay (and which I have underlined) therefore comprised two elements. First, the defendants did not oppose the time for the claimant to serve his particulars of claim being extended until 14 days after receipt of the PTA decision. Second, in the event the claimant was granted permission to appeal, then "the question of the stay having regard to the terms of that permission" would be revisited.

22. The claimant responded by email the same day stating that:

> "1) My application for a stay is not misconceived and in any event, in this case, there is very little difference between an application to extend time or to seek a stay. The case law says that once a claim form is served, the better option is to seek a stay rather than an extension of time depending on the circumstances.
>
> …
>
> 10) I am happy to accept the extension of time of 14 days from the date of the Court Appeal decision, but I want my costs paid within 14 days, which at the moment are £757.90 as you had every opportunity to agree the stay (or an extension of time) but refused. I even floated the idea of a standstill agreement – again that was rebuffed. My costs will be in excess of £1000 at the time of the hearing.
>
> …
>
> 12) So in order to avoid the hearing on Tuesday:
>
> 1) I will accept the 14 day extension of service of my particulars of claim from the Court of Appeal decision in my application for permission to appeal subject to a stay should permission be granted.

2) However, I would like my costs paid of £757.90 within 14 days.
3) Also you say 30 mins isn't long enough. Please tell me how long you will need for the hearing…

I have given your firm and clients every opportunity to agree a stay (or an extension), it is analogous in this situation that they are practically the same relief, but it is clear you knew what I was seeking and why. Your refusal to agree such was unreasonable and in breach of the overriding objectives and forced me to run up significant costs. Accordingly, if you accept my terms please inform me by 4pm today."

23. On 4 June 2018 the claimant emailed the defendants' solicitors as follows:

"As regards your offer of a 14 day extension of the particulars of claim from the time of the Court of Appeal decision, having reflected on it over the weekend, if consent is possible, I would prefer a 21 day extension if going down the extension of time route, as the particulars will be complicated for a litigant in person and I would have to seek legal advice at the CAB. Obviously the exact steps I will need to take will depend on what the Court of Appeal says."

24. In a letter which appears to have crossed with the claimant's email, on 4 June 2018 the defendants' solicitors wrote to the claimant and, amongst other things, identified the differences between the parties in these terms:

"The differences between us appear to be: (1) The terms of the stay: our clients do not oppose an extension of time for service of particulars of claim until 14 days after receipt of the Court of Appeal's decision on your permission application, assuming the Master is minded to agree that course. However, if you are granted permission by the Court of Appeal then the continuation of the stay would still need to be reviewed having regard to the terms of that permission. (2) Our clients would not be precluded from referring to and relying on your delay in progressing your claim more generally (and you would similarly be entitled to argue your own position in this regard). (3) Costs: our client does not agree to pay your costs of the application. Those costs should be reserved and can be dealt with in due course. In any event, we consider that a matter such as this would require the attendance of the parties before the Master in any event; we do not consider that this is a matter which should be dealt with by way of a consent order."

25. There was then a further email exchange later than afternoon. The claimant said:

"As regards point 1. I am in agreement in principle to point 1 subject to the wording. <u>You now use the words 'stay' and 'extension' interchangeably whereas, unless mistaken, even if the relief in this case would be tantamount to the same thing – a stay freezes time, whereas an extension obviously extends time. Therefore as my application is for a stay, I would look for the wording to be incorporative of that as opposed to an extension.</u> As regards point 2, you again

> say, that you reserve the right to refer to your [my] delay. But I haven't delayed. However, as long as that isn't part of the Order then that isn't relevant in any event is it? As regards costs. And this is now the real stumbling block to a consent Order. I am unwilling to accept that costs should be reserved… Accordingly, it is in the interest of justice that my cost are allowed. So back over to you." (underlining added)

26. Therefore, in response to the two elements of the defendants' proposal (the relevant parts of which I have underlined):

    a. the claimant wanted the time for service of his particulars of claim to be extended until 21 days after receipt of the PTA decision (whether that was expressed by a stay or an extension of time), and

    b. the claimant did not have any issue with the defendants' proposal that, in the event the PTA decision was in his favour, "the question of the stay" or "the continuation of the stay" would be revisited or reviewed in the light of the PTA decision.

27. That, therefore, was the state of play before the parties attended before Master Thornett on the afternoon of 5 June 2018.

28. In these circumstances it was common ground between the parties that, subject to the approval of the Master:

    a. there should be a stay of the defamation proceedings until the receipt of the Court of Appeal's decision on the PTA application;

    b. the claimant would not have to serve his particulars of claim in the meantime;

    c. if the claimant was granted permission to appeal by the Court of Appeal then the continuation of the stay would still need to be reviewed having regard to the terms of that permission; and

    d. the flip-side of (c) was that, if the claimant was not granted permission to appeal, then the stay would expire, as there would be no point in any review in relation to the continuation of the stay.

    The date the stay would expire was not agreed (ie whether it was 14 or 21 days after receipt of the PTA decision), and there was no agreement between the parties in relation to the costs of the claimant's application for a stay.

29. The issues before the Master were therefore whether:

    a. he should approve the consensus agreed between the parties that the proceedings should be stayed;

b. the term of the agreed stay;

c. what should happen in relation to the claimant's application for a stay, once the outcome of the PTA decision was known; and

d. costs of the claimant's application.

The hearing before Master Thornett on 5 June 2018

30. The hearing proceeded on the basis that the Master wished to understand why the claimant wanted a stay, and the extent to which the parties had reached agreement. The Master made decisions during the hearing and, based on his dialogue with the parties, identified the order to be made, which he asked the defendants' counsel to draw up.

31. I have been provided with a full transcript of the hearing before Master Thornett. There are a number of points to note.

32. First, the Master asked the claimant at the outset of the hearing the following question: "What I want to know is what is it that you are appealing, the consequence of which is so relevant to your preparation of particulars of claim and that justifies a stay or an extension" (page 2E). The Master then listened to the claimant's responses and observed "So, lurking within quite a long skeleton argument with some stuff that is not really relevant, you do then start to introduce the point raised by the defendant recently that they would concede to – whether you call it stay, whether you call it extension, to a period following that permission hearing". The claimant accepted this, and told the Master that he wanted 21 days, rather than 14 days (page 4B).

33. Second, the Master declined to hear the claimant's application for a stay as he could not see the point of doing so "if the defendant concedes at least a short extension" (page 7F) and "both sides are conceding that there could be a pivotal result at the permission hearing. It is just pointless for me to try and grapple with the merits of the application for a stay" (page 10D).

34. Third, the Master explained the following to the claimant (pages 13B-F):

> "Let me be quite clear. If your application for permission fails, this application fails and the only direction should be the date by which you serve the particulars of claim, if so advised. And it seems to me costs would follow in the case, effectively, upon failure, failure of the application. However, if permission is granted, it strikes me … it would be better that the application returns because I do not think I am in a position to assess what sort of directions can be given. That's because I cannot know now on what basis permission might be given… There indeed could be variations. It could be, for example, that you get permission but the permission is on a limited basis that it does not preclude the defendants' point that you are still able to plead your case. So, your

application is not yet in a position to be fully considered and so I decide it should not be heard today. There is no point. I cannot see that I can invent a suitable direction that covers all eventualities. The only known certainty is if permission is not given it will have to fail, because there would be no point to it. And throughout all of that analysis, at no stage are the defendants conceding anything but for the postponement or an adjournment of the application. They are also saying costs should be reserved as well. (underlining added)"

35. Fourth, pages 18D to 20G of the transcript the following discussion took place between Master, the claimant and the defendants' junior counsel (Mr Hirst):

"THE MASTER: So, from the defendants' viewpoint, is there anything that you would want to see in an order that you think is capable of objective clarification as of today? I mean, for example, is it fair to say that in the event permission is not granted the application shall stand as dismissed and costs in the defendants' favour?
MR HIRST: No, I think it is-- I mean, my instructions are that it should be capable of the parties reaching further agreement as and when events are known.
THE MASTER: So, it is simply adjourned for that to be----
MR HIRST: Yes, yes, I think that provides for it.
THE MASTER: Okay. Well, you have got an answer there, have you? You do not need to be troubled with any further clarification. We are not arguing about any further clarification. It is adjourned to a date. And the only thing that was moot is whether it is 14 or 21. I mean, it seems to me----
MR SARAYIAH: I am going to ask for 21, Master.
THE MASTER: Yes…
THE MASTER: But if you wait until the permission date itself you are not going to get a hearing in 14-- you will not get a hearing in 21 days.
MR HIRST: It might be dealt with on paper without a hearing. The stay being lifted three weeks after the reference point of the decision on permission simply means, then, that if the application does need to come back on it can be-- we can apply to do so in that window.
THE MASTER: So, what, specifically, is it that it is going to happen after whatever period of time, 14 or 21 days? A listed hearing or the list being subject to listing?
MR HIRST: Well, presumably the stay needs to-- the stay would lift, would it not, automatically, if it is three weeks after the decision date. So, that is the reference point is the permission disposal. Then three weeks afterwards. The reason I think three weeks is being suggested is that it gives-- the pre-action protocol has not been complied with, because the letter was sent immediately before the claim form, which was immediately before the application to stay. So, three weeks as a backstop up to the permission is sensible for the parties to take stock, see what the claim looks like. I mean, Mr Sarayiah may well want to address points in a second protocol letter for the defendant to respond. And then if there is a question of a stay, we do not know what the terms are, then the parties can apply----
THE MASTER: So, what we could say a stay is lifted after a period of 21 days following permission and 21-- so it is a two-point order. Stay lifted after 28 (sic) days.

Secondly, 21 days after the permission hearing takes place, either party has permission to apply to have the application dated 23 May relisted before a master. So you've still got a current application for a stay, but the stay has been lifted. You do not have the benefit of a stay after 21 days.
MR SARAYIAH: Sure.
THE MASTER: So time is starting to run.
MR SARAYIAH: Yes.
THE MASTER: But you will have known that from the day you attended the permission hearing if time is going to start----
MR SARAYIAH: If there is a permission hearing or if it is dealt with on paper?
THE MASTER: Well, from the time you are informed of permission.
MR SARAYIAH: Yes.
THE MASTER: The 21 days is to run from the decision as to permission.
MR SARAYIAH: Yes.
THE MASTER: So if there is a hearing it is clearly a known day, if it is a paper decision then it is a receipt of a copy notification. If I refer to it as "the decision" that caters for either eventuality, does it not?
MR SARAYIAH: Master, can I just say that is why I did not try to do a draft after because I thought about doing a draft order, I wanted to, but I found it really complex in terms of the wording and I didn't know how to do I, so that's why I didn't do a draft order and left it for the court to decide.
THE MASTER: Okay.
MR SARAYIAH: I just wanted to point that out.
THE MASTER: Where we were a moment ago is the defendant is not seeking that we set out consequences thereafter, it is simply stay lifted, stay lifted, permission to resume application.
MR SARAYIAH: Yes.
THE MASTER: And I think we agree that that covers all reasonable eventualities because if permission is not granted, stay lifted, over to you.
MR SARAYIAH: Yes.
THE MASTER: If permission is granted, review, take stock, maybe no application to resume.
…
THE MASTER: All I am saying is this is an ongoing application, it is clearly subject to not only current arguments but unknown future arguments, depending on the decision of the Court of Appeal.
MR SARAYIAH: Yes.
THE MASTER: And for all those reasons, costs should be reserved. Okay. Mr Hirst, could you draw up an order?
MR HIRST: Yes, I could, Master…" (underlining added)

36. It is quite clear from this exchange that it was the intention of the Court, which was understood by parties, that:

a. pending the determination of the PTA application by the Court of Appeal there would be a stay of the defamation proceedings;

b. the stay would be "lifted" or come to an end 21 days after the claimant had been informed of the Court of Appeal's decision on the PTA application (transcript at 19D);

c. once the stay was "lifted" time was running against the claimant in relation to the service of his particulars of claim (transcript at 19E-F; 20B-C); and

d. if the Court of Appeal granted the claimant's application for permission to appeal, then the claimant could apply to the Court to resume his application for a stay, which the Master regarded as an "ongoing application" (transcript at 20B, 20D, 20F).

37. Further, it was not intended by the Court, nor was it understood by the parties, that the stay of the defamation proceedings which the parties had agreed as appropriate in the light of the PTA application should continue for an indefinite period of time. Rather, the Court intended that:

a. the stay would continue for a defined period until after the PTA decision, which the Court determined as 21 days;

b. for the stay to continue beyond that date, once the outcome of the PTA application was known, the claimant's "on-going" application for a stay had to be brought back before the court for determination on its merits; and

c. this was the relief to be granted to the claimant on his second application dated 23 May 2018.

38. The relief had to be recorded in the order, which the Master asked junior counsel to draw up.

The order made on 5 June 2018

39. The order was sealed on 7 June 2018 and recorded the outcome of the hearing in the following terms:

> "UPON READING the Application dated 23 May 2018 and the witness statement of the Claimant served in support
>
> AND UPON READING the letters from the Defendant's solicitor dated 1 and 4 June 2018
>
> AND UPON HEARING the Applicant in person and junior Counsel for the Defendants at the hearing on 5 June 2018

AND UPON the Claimant undertaking from the date of this order to effect future service of all documents and direct all routine correspondence in the proceedings to the Defendants' law firm's designated solicitor with conduct of the litigation, Alex Keenlyside

IT IS ORDERED THAT:

(1) The application dated 23 May 2018 to stay the proceedings is adjourned until 21 days after the decision of the Court of Appeal disposing of the application for permission to appeal in appeal in proceedings IHQ17/0424.

(2) Once the stay is lifted pursuant to paragraph 1, either party has permission to apply to have the Application dated 23 May 2018 relisted before the Assigned Master.

(3) The costs of the claimant's application dated 23 May 2018 are reserved.

(4) …

Dated this 5th day of June 2018."

40. On the face of it, and without regard to the circumstances in which the order was made, the terms of this order are problematic for two main reasons. First, paragraph (2) refers to "the stay" being "lifted pursuant to paragraph 1", but the order does not in terms stay the defamation proceedings. In particular, paragraph (1) simply adjourns the claimant's application for a stay under 21 days after the decision of the Court of Appeal on the PTA Application. Second, given that Master Thornett decided to adjourn the claimant's application for a stay, the order fails to address, in terms, what was to happen to Master Davison's order of 23 May 2019 which provided that "time for service of particulars of claim extended until the application is determined". There are other points on the order as well, but it is these particular issues which have given rise to this dispute between the parties as to when the date for service of the particulars of claim in the defamation proceedings expired.

41. Before I turn to the parties' submissions and what the order means, I need to set out the events after the hearing on 5 June 2018 (although these are not relevant to the interpretation of the order).

Events after 5 June 2018

42. In the NP proceedings the PTA decision granted the claimant permission to appeal on two of his 21 grounds of appeal ("**the PTA decision**"). The order was sealed by the Court of Appeal on 20 December 2018.

43. The claimant was aware of the PTA decision by 24 December 2018, as he told Master Thornett in the defamation proceedings that he had heard from the Court of Appeal "just before Xmas". The claimant's email to Master Thornett, which was sent on 6 January 2019 and was not copied to the defendants' solicitors, was in the following terms:

> "You may remember that in June there was a hearing on the application to stay the defamation claim pending my application for permission to appeal to the Court of Appeal re the Judgement of Eady J and that within three weeks of the Order from the Court of Appeal either party could come back to you to have my application for a stay determined.
>
> I heard just before Xmas, that permission to appeal to the Court of Appeal has been granted. It has been granted on the supplementary application to disapply the limitation period so that, if successful, other members of staff at Durham Uni who have defamed me and colluded with the First and Second Defendant to do so will be added to the claim. Currently in the claim form they are identified as persons unknown.
>
> Accordingly, the application for a stay should be allowed, as if successful, then the particulars of claim will be drafted to include the other parties and who are intricately involved along with the Uni of Durham and Mr Williams. However, in regards the Order from the Court of Appeal, I have written to the judge pointing out some errors in his Order and asking him to relook at the rule PD81, 16.2 as his decision is in conflict with other rules and case law. He has also failed to deal with grounds 22-25 of my permission to appeal on costs so am awaiting a response.
>
> …
>
> Just so you are aware, I have not yet been able to take legal advice on the Order of the Court of Appeal due to the festive period and I also have a strict deadline to prepare a bundle index for the Court of Appeal by 11 Jan and shortly after have to file amended grounds of appeal and skeleton, but have asked for more time until 14 Feb 2019 (awaiting a response). I am asking for any hearing with yourself to be after 11 Jan and preferably after the 18 Jan and just for your information, I also have another deadline on 1 Feb on another matter so am under a lot of time pressure".

44. The Masters Listing Clerk responded to the claimant, copying in the defendants' solicitors, on 8 January 2019 stating: "Master Thornett has noted your e-mail but has no need to engage in general correspondence when the terms of the 5/06/2018 Order are clear as to (a) the duration of the adjourned application (b) the basis on which it might be restored". The email from the Masters Listing Clerk therefore made it clear that the Master did not accept the claimant's email as an application to have his application for stay dated 23 May 2018 re-listed for hearing. Nevertheless, notwithstanding the terms of that email, the claimant did not apply to the Court under the terms of the order dated 5 June 2018 for his application for a stay dated 23 May 2018 to be re-listed before Master Thornett, and the claimant never

obtained a further hearing date before Master Thornett for this purpose. On 23 January 2019 Floyd LJ corrected his order dated 17 December 2020 under the slip-rule in order to take account of the points made by the claimant in an email dated 27 December 2018.

45. In my view the date of the PTA decision runs from the 23 January 2019, being the date the order was corrected by Floyd LJ under the slip rule. That is the approach which is most favourable to the claimant and, if that is right, then the defendants maintain that the 21 days provided for in paragraph (1) of Master Thornett's order dated 5 June 2018 expired on 14 February 2019 (give or take a day or two for notice of the corrected PTA decision to be received by the claimant).

46. On 30 January 2019 the defendants applied to the Court of Appeal in the NP proceedings for an order requiring the claimant to give security for the defendants' costs of the appeal and on 20 March 2019 Floyd LJ gave directions in relation to the hearing of this application.

47. On 29 March 2019 the defendants' solicitors wrote to the claimant in connection with the directions made by Floyd LJ and, amongst other things, explained to the claimant:

> "We questioned above whether the Court would in fact allow your defamation action to proceed… The stay granted to you by Master Thornett on 5 June 2018 was to expire 21 days after the decision of the Court of Appeal on your permission to appeal, following which time would begin to run again. That meant that your particulars of claim had to be served immediately upon the expiry of the stay (see CPR 7.4(2)). You did not then serve, and have not since served, your particulars of claim and you do not have the benefit of a stay of proceedings. Your default and the fact that you cannot pursue your action unless the Court directs otherwise is another reason why your appeal to the Court of Appeal is, as things stand, entirely academic. The offer contained in this letter for the disposal of your appeal is made without prejudice to our clients' right to oppose any direction by the Court enabling your action to proceed and also take any point on the effectiveness of the Claim Form to disclose causes of action…"

48. The claimant responded by emailing the Civil Appeals Office on 29 March 2019 stating: "… I am not in default from filing my particulars of claim and I actually tried to get a hearing with Master Thornett after the Court of Appeal decision, but he said it was not necessary at this stage." In support of this assertion, the only document the claimant appears to rely on is the email from the Masters Listing Clerk dated 8 January 2019. However, in that email the Listings Clerk does not say, on behalf of Master Thornett, that it was "not necessary at this stage" to restore the claimant's application for a stay for hearing.

49. On 11 June 2019 Floyd LJ ordered the claimant in the NP proceedings to give security for the defendants' costs of the appeal, staying all proceedings in the meantime. Thereafter the claimant defaulted in lodging security, and the Court of Appeal dismissed the claimant's appeal with costs on 1 August 2019.

Service of the particulars of claim

50. On 2 July 2019 the claimant served his particulars of claim in the defamation proceedings by email, and by post on 3 July 2019.

51. The particulars of claim contain 163 paragraphs, 25 pages and are verified by a statement of truth signed by the claimant. Paragraphs 2 and 3 explain:

> "[2.] These particulars of claim will be sought to be amended if necessary and during the preparation of these, my laptop unfortunately suffered catastrophic failure which caused days of delay. I commenced preparation of these particulars of claim following the D's successful application and hearing at the Court of Appeal on 11 June 2019, which meant that my appeal, scheduled for 23 July 2019, could no longer go ahead. This meant, if I am reading the Order of Master Thornett dated 5 June 2018 correctly, I then had 3 weeks to file these Particulars of Claim or seek another extension/stay. Thus, these are rushed and I have had not legal help in preparing them.
>
> [3.] I decided to file the Particulars as best I could then seek further applications such as to disapply the limitation period after."

52. By a letter dated 4 July 2019 the defendants' solicitors informed the claimant that his particulars of claim in the defamation proceedings had been served out of time. The claimant disagreed and, in an email of the same day, responded stating:

> "Actually, no. My application in front of Master Thornett was never determined and the Order of Master Davison which extended my time for filing the particulars of claim until my application for a stay was determined takes precedence.
>
> In any event, the Order of Master Thornett is actually not very clear as when I tried to get a hearing in January he said it wasn't necessary. But the Order of Master Thornett doesn't determine my application – it simply adjourns it until either party applies for its determination. You did not do this and now the Particulars have been served. The Particulars are in time!
>
> Therefore, I suggest either file your response within 14 days or an acknowledgement of service."

The defendants' application for default judgment

53. On 19 July 2019 the defendants made an application in the defamation proceedings seeking the following order:

> "(1) The claim form in these proceedings is struck out: (1.1) pursuant to CPR r.3.4(2)(b) as an abuse of process; and/or (1.2) pursuant to 3.4(2)(c) for failure to comply with a rule, practice direction or court order, by reason of the claimant's failure

> to serve the particulars of claim within the time prescribed by CPR 7.4(2), as varied by the order of Master Thornett of 5 June 2018. (2) Judgment to be entered for the Defendants on the claim with costs reserved by Master Thornett's order of 5 June 2018, such costs to be the subject of detailed assessment if not agreed. (3) The claimant shall make an interim payment on account of the defendants' costs in the amount of [xx], within [14] days of the date of his order."

54. The application was supported by the evidence in box 10 of the application notice. The application was issued by the Court on 29 July 2019 and was initially listed for hearing before Master Thornett on 2 October 2019 with a time estimate of 1 hour.

The claimant's strike out application

55. In the meantime on 17 July 2019 the claimant issued an application seeking the following order without a hearing and on an *ex parte* basis:

> "For default judgement in accordance with CPR 12.3. The POC was deemed served on 2 July 2019. The D's have not filed an acknowledgment of service and or defence within the 14 days of service of the Particulars of Claim (by 16 July 2019). This application is made without notice under CPR 12.11(4)(b)".

56. This application came before Master Thornett on 9 August 2019. The Master dismissed the claimant's application in so far as it sought to enter judgment in default of acknowledgment of service, and gave directions for the claimant to serve his application on the defendants if he intended to proceed for his application for judgment in default of defence.

57. Master Thornett's reasons for the order made on 9 August 2019 included the following:

> "[4.] By the claimant's application dated 23 May 2018 ["the Stay Application"], he sought a stay of proceedings and an extension of time to serve his particulars of claim. Master Davison extended time for service of the particulars of claim until the determination of the Stay Application. Master Thornett, by way of Order sealed on 7 June 2018, then adjourned the stay application until 21 days after the decision of the Court of Appeal in response to the Claimant's appeal in proceedings IHQl7/0424. [5.] Regardless of the decision of the Court of Appeal (which the daimant does not mention in this application), the Stay Application has remained as a live but adjourned application unless and until the Claimant unequivocally withdrew [or withdraws] the same. [6.] The Defendants issued their application on 29 July 2019. [7.] The court will need to hear further evidence and submissions from the parties as to the chronology and significance of events following the order sealed on 7 June 2018 and the claimant's asserted service of particulars of claim.
>
> DATED this 9 day of August 2019".

58. The claimant, unsurprisingly, relies on the observations Master Thornett made at paragraph 5 of his reasons. However, those observations (as the Master recognised at paragraph 7) were made without the benefit of the evidence before me, or indeed the detailed submissions that I have now heard in relation to the circumstances surrounding the making of the order dated 5 June 2018 (sealed on 7 June 2018).

59. The defendants were unaware of the claimant's application notice dated 17 July 2019, or the order of Master Thornett dated 9 August 2019, until these documents were served on them on 23 August 2019, together with a bundle of additional documentation.

60. The defendants' application issued on 29 July 2019, together with the claimant's application issued on 17 July 2019, were adjourned by Master Thornett to be heard by a judge of the Media and Communications list. On 12 June 2020 the hearing was fixed for 8 October 2020.

The parties' submissions

61. I received detailed skeleton arguments from the claimant and from Miss Page QC, together with oral argument at the hearing. The claimant also sent in further submissions by email to my clerk after the hearing in relation to his application for judgment in default of defence, which I have also read.

62. On the defendants' case, the practical effect of the 5 June 2018 order was to extend time for particulars of claim until 21 days after PTA decision, unless the Court was to order otherwise upon the claimant's stay application being restored before Master Thornett after PTA decision. The stay application was never restored and, on the defendants' calculation, the latest date for service of the Particulars of Claim was on or around 14 February 2019 (which is 21 days after the Court of Appeal issued its amended PTA decision).

63. The claimant has advanced a number of arguments (which the defendants maintain are inconsistent) as to why the service of his particulars of claim on 2 July 2019 was not out of time.

    a. First, on 6 January 2019 it was the claimant's position that the effect of the order of 5 June 2018 was that he had 21 days after the PTA decision to restore his application for a stay of the defamation proceedings before Master Thornett, if he wanted any further stay of the proceedings, including further time for service of particulars of claim (see the email to Master Thornett dated 6 January 2019 (at paragraph 43. above). The defendants maintain therefore that, at this point, the claimant's understanding of the effect of the order of 5 June 2018 accorded with the defendants' own understanding of its effect.

    b. Second, on 8 April 2019 the claimant claimed that Master Thornett had said, after the Court of Appeal's decision on permission to appeal, that it was not necessary for the claimant to restore his stay application.

c. Third, on 2 July 2019 the claimant's position appeared to be that the 21-day stay granted by the order of 5 June 2018 ran from 23 July 2019, the date his appeal was scheduled for hearing but "could no longer go ahead" (see paragraph 51 above).

d. Fourth, since 4 July 2019, it has been the Claimant's position that the earlier order of Master Davison made on 23 May 2018 extending time for particulars of claim until determination of his stay application "takes precedence" over the order made by Master Thornett on 5 June 2018, and that Master Davison's order "kept me in time as at no point in time has the application [for stay dated 23 May 2018] been determined" (see paragraph 52 above; paragraph 14 of the claimant's skeleton argument).

Interpretation of the order dated 5 June 2018

64. The construction of Master Thornett's order made on 5 June 2018 "depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties". The circumstances in which the Court made the order are set out in length above.

65. The crucial point is that there is, and was, no dispute that the defamation proceedings would be stayed following the hearing before Master Thornett on 5 June 2018. The only issues were when that stay would end (ie whether it would be 14 or 21 days after the PTA decision), what should happen to the claimant's "on-going" application for a stay and costs. This was recognised in the defendants' solicitors' correspondence before hearing, and the defendants' solicitors' letters dated 1 and 4 June 2018 are expressly referred to in the second recital to the order as having been read.

66. The stay referred to in paragraph (2) of the order is, and must be, the stay agreed by the parties, and approved by the Court on 5 June 2018, that the defamation proceedings be stayed pending the PTA decision. That stay was "lifted" or came to an end in accordance with the timetable set out in paragraph (1) of the order. Given the intention of paragraph (1) is to identify the date as to when the stay is lifted, that date is and must be 21 days after the PTA decision.

67. However, if, in the light of the PTA decision, the claimant wanted the stay to continue for a longer period then he had permission to apply for his stay application to be re-listed before Master Thornett. Likewise, paragraph (2) of the order enabled the defendants to restore the claimant's stay application if, for example, the PTA decision had been in their favour and they wished to seek an order that the application be dismissed with costs.

68. Further, in my view it is clear that the order made by Master Thornett on 5 June 2018 superseded Master Davison's order of 23 May 2018 which had extended time for the service of the particulars of claim until "this application [ie the claimant's application for a stay] is determined". This is because the order made by Master Thornett is a different order

as (i) there is a stay of the defamation proceedings for a specified period of time, and (ii) when that time expires the claimant had permission to apply to restore his application for stay, so that the stay could be continued going forward, and if the claimant did that then, at that point in time, his application for a stay would be determined on the merits. However, if he failed to restore his application, then time would run against him in relation to the service of his particulars of claim. This, therefore, is a very different order to that made by Master Davison on 23 May 2018, which is not surprising given that the purpose of Master Davison's order was to "hold the ring" until the claimant's application for a stay could come before the court on an *inter partes* basis. Further, in the circumstances in which the order of 5 June 2018 was made it is clear that it is this order, and not the earlier order of Master Davison, that the parties, and the court, intended to regulate the position in the defamation proceedings pending the outcome of the PTA application.

Consequences

69. Taking the approach most favourable to the claimant, the PTA decision was received on 23 January 2019 (see paragraph 45 above). This meant that the time for service of the particulars of claim expired 21 days later on 14 February 2019. Thereafter the claimant failed to make any application at any time to restore his application for a stay of the defamation proceedings and his particulars of claim were not served until 2 July 2019. The claimant therefore failed to serve his particulars of claim within the time prescribed by CPR 7.4(2) as extended by the order of Master Thornett made on 5 June 2018 and, as a result, has failed to comply with a rule and court order. In these circumstances, the court has an unqualified discretion to strike out the claim form under CPR Part 3.4(2)(c) and the "ultimate question for the court in deciding whether to impose the sanction of strike-out … [is] the proportionality of the sanction itself …" (see *Walsham Chalet Park Limited (t/a The Dream Lodge Group) v Tallington Lakes Ltd* [2014] EWCA Civ 1607 at [44], per Richards LJ; *Civil Procedure* (2020) Vol 1 at para 3.4.4 (p. 100)).

70. In relation to proportionality there are a number of important points:

    a. The claimant may be acting in person, but he is well-versed in litigation and the rules of procedure.

    b. The particulars of claim were served over four months out of time. This is significantly late.

    c. There is no evidence whatsoever to support the claimant's contention that Master Thornett told the claimant, whether by the Masters Listing Clerk's email of 8 January 2019 or otherwise, that after he became aware of the PTA decision a hearing was "not necessary at this stage" (see paragraph 48 above).

    d. The claimant knew in January 2019 that "within three weeks of the order from the Court of Appeal either party could come back to [Master Thornett] to have [his] application for a stay determined": see the claimant's email to Master Thornett

dated 6 January 2019. The claimant had, by that time, received the PTA decision (before it was corrected under the slip rule in January 2019), and also knew that, in order to stop time running in relation to the service of his particulars of claim "the application for a stay should be allowed, as if successful, the particulars of claim will be drafted to include the other parties and who are intricately involved along with the Uni of Durham and Mr Williams".

e. The claimant has not explained why, once he had received the PTA decision, he did not restore his application for stay of the defamation proceedings and obtain a further hearing before Master Thornett whether in January 2019 or at any time thereafter.

f. The defendants' solicitors put the claimant on notice in their letter dated 29 March 2019 that he had failed to serve his particulars of claim in time (see paragraph 47 above).

g. The claimant has never applied, with evidence in support, for a retrospective extension of time to serve his particulars of claim (alternatively for relief from sanctions). He has had ample opportunity to do so, given that he has been aware of the defendants' position for almost 18 months. Rather, he made a last gasp attempt to do so by way of an *ex parte* oral application at the end of his submissions at the hearing, an application I refused.

71. In these circumstances, I am quite satisfied that, as a matter of my discretion, striking out the claim form is a proportionate response to the claimant's failure to serve his particulars of claim in time in accordance with the time prescribed in CPR Rule 7.4(2), as extended by the order made by Master Thornett on 5 June 2018. Judgment will therefore be entered for the defendants.

Claimant's application against the defendants for judgment in default of defence

72. In the light of my conclusion on the defendants' application, the claimant's application for judgment in default of defence falls to be dismissed. In these circumstances, I do not need to deal with the various procedural issues raised by the defendants in relation to this application and, in particular, that a claimant may not obtain a default judgment if the defendant has applied to have the claimant's statement of case struck out under CPR Rule 3.4, and the application has not been disposed of, which is the situation in this case (although the claimant's application was issued 12 days before the defendants' application): see CPR Rule 12.3(3)(a)).

Claimant's application against the fourth defendant made without notice after the hearing

73. The claim form also named as the fourth defendant: "4) Persons Unknown All c/o the University Secretary, University of Durham, The Palatine Centre, Stockton Road, Durham, DH1 3LE".

74. The defendants' solicitors made it clear to the claimant that they were not authorised to accept service on behalf of anyone other than the defendants. They were not authorised to accept service on behalf of the fourth defendant, and that had been explained to the claimant in correspondence.

75. The claimant had, at the date of the hearing before me on 8 October 2020, failed to serve the claim form on the alleged persons unknown.

76. In these circumstances on 12 October 2020 the claimant issued an *ex parte* application asking the court "to authorise alternative service retrospectively CPR 6.15, 6.27 and PD 6 (9.2) and or to dispense with service against the persons unknown D's under CPR 6.16 & 6.28. Service of claim form was effected on 23 May 2018 and POC 2nd July 2018 (extension of time to serve POC was granted). *Ex parte* application". The claimant asked for his application to be determined without a hearing.

77. This application by the claimant is hopeless. The time for service of the claim form on the fourth defendant has long since expired. It expired on 24 May 2019. In these circumstances, there is no basis for the court to make the orders sought by the claimant in his application notice. This application is also dismissed and I shall certify it as totally without merit.