

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

ANTIGUA AND BARBUDA

ANUHCVP2020/0015

BETWEEN:

CLIFF WILLIAMS

Appellant

and

MARY JOHN

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Trevor Ward
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Sylvester Carrott for the Appellant.
Mr. Rushaine Cunningham for the Respondent.

2022: October 17;
2023: February 23.

Civil appeal – Defamation – Libel - Effect of a failure to file witness statements – Discretion of trial judge to limit cross examination - Rule 29.11 of the Civil Procedure Rules 2000 – Whether learned judge erred in confining the scope of the appellant’s cross-examination to matters contained in the respondent’s witness statement

The respondent, Mary John is a self-described social and political activist whose path to public advocacy was inspired by her personal experience with the disease of drug addiction. The respondent commenced her public advocacy by first publicly acknowledging her past by placing a public service announcement with ABS Radio in which she detailed her prior use of cocaine including the fact that she sold her body to obtain drugs.

The respondent engaged the public on social issues via her page on the social media platform Facebook, which she maintained for several years. One of the respondent’s followers on the platform was the appellant, Cliff Williams. The appellant was a businessman

and, in 2015, was the chairman of Antigua's Festival Commission. Both parties had been acquainted with each other for about seven years.

On 27th July 2015, the respondent posted certain comments on her Facebook page in an effort to air her concern about the presence of Jamaican dancehall artistes during Antigua Carnival. The appellant among others, took issue with the comments and the appellant and the respondent exchanged comments. During the exchange, the appellant commented on the respondent's cocaine use and mentioned "You on the other hand was heavily promote and using Columbia product and was running a sex trade for it as you said publicly in a commercial format." The respondent took issue with the words "running a sex trade" and by letter dated 14th September 2015, inquired whether the appellant was prepared to apologise, retract the statement and give an undertaking not to repeat the publication or similar statements and requested a reply within seven days.

No apology was forthcoming from the appellant and on 11th July 2016, the respondent filed a claim seeking damages for libel. The pleadings alleged that the statement made by the appellant was defamatory in that the words "running a sex trade" meant and were understood to mean that the respondent: a) was involved in sex trafficking, and b) was involved in trading humans for the purpose of sexual slavery. In his defence, the appellant pleaded *inter alia* that the statement made by him viewed in its proper context and in the context of local dialect, referred to the respondent selling her body or granting sexual favours in exchange for crack cocaine. He also pleaded that those familiar and unfamiliar with the respondent's public announcement would have understood the words to mean that the respondent traded sex for drugs, and that this statement was true. The appellant also pleaded that the respondent's reputation could not have been reduced any lower than by the revelations made by the respondent herself during her public service announcement and that the respondent generally had a poor reputation.

At the trial, the learned judge firstly dealt with the consequences of a previous ruling that the appellant would not be permitted to file any witness statements as he had failed to meet the deadline for so doing. After hearing submissions from counsel on both sides, the learned judge delivered a short oral ruling in which she held that "if the court were to give consideration at trial and on writing judgment to pleadings which are not supported by a witness statement and so in effect evidence, then it is in effect allowing such a party who has no evidence before the court in through the back door." Accordingly, the learned judge limited the appellant's cross examination to the evidence which was contained in the respondent's duly filed witness statement.

The learned judge then found that the words were defamatory of the respondent.

Dissatisfied with the decision of the learned judge, the appellant appealed. The main issues on appeal are: (i) whether the judge erred in confining the scope of the appellant's cross-examination to matters contained in the respondent's witness statement; and (ii) whether the judge erred in her determination of the natural and ordinary meaning of the words "running a sex trade."

Held: allowing the appeal on ground 1 and setting aside the decision of the learned judge in its entirety, remitting the claim to be retried by a different judge of the High Court and

awarding prescribed costs in the court below and two thirds of those costs on appeal in accordance with rules 65.5 and 65.13 of the CPR, that:

1. Rule 29.11 of the Civil Procedure Rules 2000 ("CPR") merely provides that if a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits. Such permission may not be granted at the trial unless the party seeking permission has a good reason for not previously seeking relief under rule 26.8. CPR 29.11 does not provide any warrant for limiting the cross-examination of the party in default. Further, a judge purporting to exercise their discretion under CPR 39.2 to limit cross-examination, must exercise such discretion judicially. The judge can be expected to articulate the reason why a particular line of cross-examination is being curtailed.

Rules 29.11 and 39.2 of the **Civil Procedure Rules 2000** applied.

2. In this case, the learned judge made no reference to rule 39.2 in her ruling. The sole discernible reason given by the judge is that 'it is the law' that where a party is 'without his witness statement at trial' he is limited to cross-examination on the evidence contained in the witness statement of the other party. The flaw in the learned judge's reasoning is in thinking that to permit the appellant to put suggestions to the respondent based on matters contained in his defence would have the effect of permitting him to give evidence through the back door. Indeed, what is put in cross-examination is not evidence in the case. The evidence is the witness' answer. Accordingly, whatever the appellant may have put to the respondent could not become evidence in the case unless the respondent accepted the suggestions. Notwithstanding that the appellant was prevented from adducing evidence, he was still entitled to probe the respondent on any issue, provided it was relevant. Additionally, the learned judge's decision not to consider the defence at trial and when writing her judgment was also wrong in law in the circumstances where the appellant's defence had not been struck out. Indeed, the pleadings define the issues in dispute between the parties. This is different from weighing and assessing the evidence to be accepted. To review pleadings with a view to identifying the issues in dispute does not have the effect of allowing evidence through the backdoor.
3. For the foregoing reasons, the Court was of the view that the learned judge erred in law in holding that because the appellant was prevented from calling evidence, the scope of the appellant's cross-examination of the respondent was necessarily limited to matters contained in the respondent's witness statement. Such a ruling undoubtedly led to a procedural irregularity which produced unfairness to the appellant, who was restricted in the scope and extent of probing that he might otherwise have deployed in cross-examination.

JUDGMENT

- [1] **WARD JA:** The claim giving rise to this appeal arose from the publication of a Facebook post by the appellant, Cliff Williams (“the appellant” or “Mr. Williams”), in relation to the respondent, Mary John (“the respondent” or “Ms. John”). Ms. John is a middle-aged businesswoman who describes herself as a social and political activist. The key motivating factor leading her to this path of public advocacy was her personal experience with the disease of drug addiction which had afflicted her for approximately eighteen years. She was able to overcome it and has abstained from drug use for approximately fourteen years. Ms. John committed herself to help others avoid the same mistakes that she had made. She commenced her public advocacy by first publicly acknowledging her past by placing a public service announcement with ABS Radio in the following terms:

“I took my first hit of cocaine in 1986. It was the most amazing feeling of my life. I spent the next 18 years chasing the feeling I got from that first hit. During my addiction, I became a thief, a liar, a con-artist, and I even sold my body to obtain drugs. I was hospitalized and institutionalized on many occasions. I even survived two suicide attempts. Youth of Antigua and Barbuda, experimenting with drugs is not worth the consequences. Choose life. Do not take that first hit.”

- [2] As part of her mission, Ms. John worked with young people in Antigua and Barbuda for over ten years, educating them about the ills of drugs and drug addiction. Another way in which she engaged the public on social issues was via her page on the popular social media platform Facebook, which she has maintained for several years.
- [3] One of her Facebook followers was the appellant, who also maintained a page on Facebook. The appellant was a businessman who owned and operated a music sound system business and, in 2015, was the chairman of the Antigua and Barbuda Festival Commission. The parties had been acquainted with each other for about seven years. Ms. John first met the appellant in 2010 when she collaborated with him to assist a local artiste in having his music produced. From time to time, she expressed her concern to the appellant about the growing practice of bringing

Jamaican Dancehall artistes to perform during Antigua's Carnival. The appellant saw nothing wrong with the practice. It was their disagreement on this issue that would eventually lead to the publication that is the subject of this appeal.

- [4] With the approach of Carnival 2015, Ms. John took to Facebook to air her concern about the presence of Jamaican dancehall artistes during Antigua's Carnival. On 27th July 2015, she posted the following comments to her page, which drew a response from the appellant and other Facebook users. Only the comments of Ms. John and the appellant's responses are set out below:

"Mary John

July 27th at 1.29a.m – Edited

So there is a concert on July 28th titled "ESCAPE" featuring Jamaican artiste Beenie Man and so kina Dexta Daps

A few things.

I thought us caring patriotic Antiguan made it clear that we do not want any other type of 'music' coming to our shores during our Carnival celebration.

I thought the decision makers understood the disrespect to our Culture and our Indigenous Music, Calypso and Soca.

I thought they understood its not about THE ALMIGHTY DOLLAR but about promoting OUR OWN during this, our Biggest Cultural Festival.

So to the lady who said "LETS WAIT AND SEE" when I spoke about Cliff's association not only with promoting all Jamaican artistes but his sound system being used when they perform here, by their insistence, what do you have to say now?

Wha dancehall singer Beenie man and dis person Daps ah do yah during our Carnival Celebrations?

Can an Indigenous Antiguan go to Jamaica and sing Calypso or Soca while they promote their Reggae Festival?

All about the damn money.

No damn respect for Local talent and our Culture.

....

Mary John I edited post Charlene Brown-Reid cause me so vex when me see Beenie man me na min see some kina Daps person. It is my opinion that it's Cliff Williams who is solely responsible for this. Jamaican to sing 3

reggae song at Queen of Carnival and now two more Jamaican to perform at his concert. Cliff Williams you and I have had countless debates about this. You make it clear that you are very much involved in promoting Jamaican artistes and you said that they insist that only Stone Wall to be used when they perform here. You are head of Festivals Committee and I predicted this would happen. You and your brother operated a dancehall bram session for YEARS in Shanty Town, yards away from ARG where our Carnival Shows take place and you said you saw nothing wrong, because you were offering an alternative for those who don't like Carnival. I was appalled and told you, "no you were not, you were offering an alternative for your pocket!!!" E.P. Chet Greene, why are you allowing this? I am serious like the cancer that killed my Nanny. What the hell are you doing E.P. Chet Greene? I publicly requested an appointment with yourself and Cliff. You hear about all my posts and your read them. So why have you not granted me the appointment?

....

Cliff Williams Why you use cocaine from Columbia and herb grow here. Crack heads.

Smh.

Mary John Cliff Williams are you referring to the cocaine that people said you were importing? You know I never wanted to believe that. Is it true?

....

Cliff Williams I am not frustrated or any of that kind. All I did was identifying the person. I guess you guys trying to fool yourselves that the description doesn't fit her.

....

Mary John at 2: 33 a.m. Cliff Williams, Chairman of our Festival Committee is upset that I speak my mind in the interest of my Country, culture, local artistes so he get personal and insulting.

....

Cliff Williams Caribbean integration exist between all Caribbean Countries and I am great enough to promote that. ***You on the other hand was heavily promote and using Columbia product and was running a sex trade for it as you said publicly in a commercial format. Now you done off all the coke you now remember your country.***

Cliff Williams PS. I am not upset, I was just acknowledging the big up you give me on my claim to fame and I was just giving you your big up in return on your claim to fame. Crack cocaine, \$10 sex etc..."

- [5] Ms. John took particular issue with the words "... running a sex trade ...". As a result of the said statements, she engaged counsel who wrote to the appellant by letter dated 14th September 2015 inquiring whether the appellant was prepared to retract the statement, apologize and give an undertaking not to repeat the publication or similar statements and to pay damages for defaming the respondent's reputation and further requesting a response to the letter within seven (7) days.

The pleadings

- [6] No apology was forthcoming from the appellant. Thus, on 11th July 2016, Ms. John filed a claim seeking damages, including aggravated damages, for libel. The pleadings alleged that the statement made by Mr. Williams was defamatory in that the words "running a sex trade" meant and were understood to mean that she: (a) was involved in sex trafficking, and (b) was involved in trading humans for the purpose of sexual slavery.
- [7] By way of defence, the appellant pleaded that the statement made by him, viewed in its proper context as a whole and in the context of local dialect, referred to the respondent selling her body or granting sexual favours in exchange for crack cocaine. Further, those familiar with the respondent's public service announcement would have so understood the term 'sex trade', and those not familiar with her public service announcement would have understood the words to mean that the respondent in the past used sex to obtain illicit drugs. The appellant pleaded that the meaning of the words used by him in their proper context and properly understood, is simply that the respondent traded sex for drugs, and that this statement is true. The appellant further pleaded that the respondent's character, credibility and reputation could not have been reduced any lower than by the revelations made by the respondent herself during her public service announcement, and that the respondent's general reputation is that she is a person who is held in poor regard, and who intentionally insults and embarrasses other persons on social media.

The High Court proceedings

- [8] At the trial, the first order of business which the learned judge dealt with related to the consequences of a previous ruling that the appellant would not be permitted to file any witness statements since he had failed to meet the deadline for so doing. Counsel for the appellant raised the issue with the judge as he was concerned to know that the scope of his cross-examination would not be limited as a result of that ruling. After hearing submissions from counsel on both sides, the learned judge delivered a short oral ruling in the following terms:

“The Court’s view is that:

1. Pleadings set out the case which the other party is alluded (sic) that he has to meet.
First
2. The party's pleading are -- pleadings are also a precursor of the evidence that a party is likely to bring to the trial. It is the law that where a party is without his witness statement at trial that he is limited to cross-examination of the other party and clearly being without his evidence it is to be limited to cross-examination on the evidence already before the Court from the party who duly filed his witness statement.

The Court believes that if it were to give consideration at trial and on writing judgment to pleadings which are not supported by a witness statement and so in effect evidence, then it is in effect allowing such party who has no evidence before the Court in through the back door.

While the Court may not have struck out the defence per se such was not the application before the Court on 19th November 2018. The Court is clear in its mind that any consideration of a defence which is unsupported by evidence on a witness statement would be tantamount to allowing the defendant in through the back door to put his case -- to put his case in the pleaded defence.

The Court will not allow (sic):

Court's order: The point raised in limine is re -- is rejected. There shall be no reference to the defence.”

- [9] Thereafter, the trial proceeded. The judge delivered her judgment on 5th March 2020. She held that the words of the first publication were defamatory of the respondent. Her reasoning is set out at paragraphs 42 - 49 of the judgment:

[42] This brings the Court to its first consideration of whether the words “was running a sex trade” are capable of defamatory meaning. The Court believes that the 2 words in issue which are at the heart of the claim are “running” and “trade”. The authorities cited make it abundantly clear that the words are to be given their natural and ordinary meaning and that the Court should be slow to rule out pleaded meanings and the words must take their colour from their context.

[43] The word ‘running’ is a verb and according to Collins English Dictionary 2nd edition it is indicative of the occurrence or performance of an action, the existence of a state or condition. The Court believes that it would not be too far off to say that when one speaks colloquially of for example “‘running’ a business” that it is usually understood as “operating a business” commercially. So that takes care of defining the word “running” in the context. (My emphasis)

[44] The word “trade” as defined in Collins English Dictionary 2nd edition is a noun and means 1. the act or an instance of buying and selling goods and services either on the domestic (wholesale and retail) markets or on the international (import, export and entrepôt) markets, 2. A personal occupation, esp. a craft requiring a skill, 3. The people and practices of an industry, craft or business, 4... 5... 6...7 a specified market or business: the tailoring trade(My emphasis)

[45] Given the meanings of the words “running” and “trade”, the Court believes that those words in effect suggest that Ms. John was operating commercially a sex services business.

[46] The second consideration for the Court is whether the words in fact defamed Ms. John and this necessarily ask (sic) the Court to consider whether the words would cause right-thinking members of the society at Antigua and Barbuda on reading or hearing the statement “was running a sex trade” to think less of Ms. John, shun Ms. John, avoid Ms. John, treat Ms. John as a person to be made fun of or as an object of ridicule. The Court’s answer is definitely the words would defame Ms. John.

[47] The reason for the Court’s position is (i) the “running a sex trade” as defined by the Court above, would necessarily involve persons other than Ms. John; (ii) once additional persons are involved, then the issue of sexual exploitation, sexual slavery and trafficking of persons all arise. The trafficking of persons at Antigua and Barbuda is a crime pursuant to The Trafficking in Persons (Prevention) Act. At a minimum, Mr. Williams has accused Ms. John of a crime without proof.

[48] Locally, it is understood, that “a pimp” or “a john” is usually involved with “running a sex trade”. Since Mr. Williams states that Ms. John was “running a sex trade” then she in effect was a “pimp” or “john” holding power.

[49] The Court bearing in mind **Gatley** paragraph 30.7 that the Court should be slow to rule out the pleaded meanings, would have to agree that at a minimum, the statement “was running a sex trade” could be understood to mean that Ms. John was (i) involved in sex trafficking, and (ii) involved in the trading of humans for the purpose of sexual slavery.” (Original emphasis)

Grounds of appeal

[10] On 12th May 2020, the appellant filed a Notice of Appeal which advanced six grounds of appeal. Ground one complains that the trial was procedurally unfair because the learned Judge refused to allow the appellant to cross examine the respondent on anything other than that which was contained in the respondent’s witness statement, and, more particularly, refused to allow the appellant to put to the respondent any factual assertions that were contained in the appellant’s defence. It is said that the learned judge ought to have held that, notwithstanding that the appellant was precluded from giving evidence, he was not debarred from defending the case and, therefore, cross examination still remained at large. The appellant contends that had he been able to cross examine the respondent on the matters set out in his defence he would have been able to demonstrate: (1) the respondent was not defamed and did not believe she had been defamed; (2) was not a social media activist but in fact a cyber bully, and; (3) suffered no loss in her reputation because she is generally reviled by members of the public by reason of the fact that she was a crack cocaine addict who has resorted to prostitution in order to feed her habit, and is known for being a bully.

[11] Grounds 2, 3, 4 and 5 may be taken together. In summary, at the core of each of these grounds is the complaint that the learned judge erred in law in holding that the words sex trade, in the context written by the appellant, were capable of meaning that the respondent had engaged in human trafficking. The appellant contends that the judge erred in failing to have regard to their natural and ordinary meaning, which he submitted is ‘the business of prostitution’ as defined in the Oxford English Dictionary. The learned judge further erred in holding that the words were capable of meaning that the respondent was engaged in human trafficking because one

person had referred to human trafficking in a Facebook comment made several days after the appellant's post. The learned judge erred further in attaching weight to the evidence of Mr. Paul Quinn, whose evidence was that he understood the words to be a reference to human trafficking but conceded during cross examination that he had not read all of the publication and admitted that if he was to form a proper view of the same he would first have to have read the whole publication.

- [12] Ground 6 contended that the award of \$140,000 by way of general and aggravated damages was manifestly excessive.

The issues

- [13] The issues on appeal really come down to: (i) whether the judge erred in confining the scope of the appellant's cross-examination to matters contained in the respondent's witness statement; and (ii) whether the judge erred in her determination of the natural and ordinary meaning of the words "running a sex trade."

The appellant's submissions

- [14] Learned counsel for the appellant, Mr. Sylvester Carrott, in his written submissions contended that the trial was procedurally unfair because: (1) the appellant's counsel was wrongly prevented from cross examining on matters other than those contained in the respondent's witness statement and was not allowed to cross examine on any matters contained in the defence; (2) the trial judge refused to look at the appellant's defence; and (3) the learned judge failed to have regard to matters submitted by the appellant in his closing submissions. In oral submissions, Mr. Carrott amplified these submissions by arguing that there is no authority for the proposition that because a witness is prevented from calling evidence, he is prevented from cross-examining at large. Mr. Carrott submitted that where a defence has not been struck out a defendant is entitled to put his case and cross-examine the claimant as to credit, notwithstanding that he is not allowed to give evidence. Mr. Carrott complained that the judge's ruling prevented counsel for the appellant from putting matters to the

respondent which did not arise from her witness statement, and, in so confining counsel, matters which had the potential to undermine the respondent's case could not be elicited. While Mr. Carrott accepted that the judge had a discretion under rule 39.2 of the Civil Procedure Rules 2000 ("CPR") to limit cross-examination, this, he submitted, does not permit the court to prevent a defendant from putting his pleaded case. Mr. Carrott also submitted that further irregularity occurred, and unfairness caused, by the learned judge's failure to look at the defence and to consider the matters raised in the appellant's written closing submissions, which are not addressed in her judgment. This submitted, Mr. Carrott, was an error of law, as a judgment is required to demonstrate that the essential issues that have been raised by the parties have been addressed and must make plain how they have been resolved. **Harb v Aziz**¹ and **Uriel Caleb v The Attorney General of Antigua and Barbuda**² are cited in support of this proposition.

- [15] Secondly, Mr. Carrott submitted that the learned trial judge fell into error in two ways in her treatment of the evidence of Mr. Paul Quinn. First, she wrongly ascribed weight to his evidence although he admitted that he had not read the whole publication. Secondly, since the respondent's case was put on the basis of the plain and ordinary meaning of the words, the judge was not entitled to look to evidence to support such meaning.
- [16] Thirdly, Mr. Carrott submitted that the judge was wrong to hold that the words published were defamatory because the words complained of were not capable of bearing the meaning that the learned judge ascribed to them. Mr. Carrott submitted that the words 'sex trade' mean the business of prostitution and not sex trafficking or human trafficking, which bear their own very distinct meaning. Since the respondent had admitted to resorting to prostitution over a period of eighteen years in order to support her crack cocaine habit, the comment made by the appellant was therefore honest, true and not defamatory of the respondent.

¹ [2016] EWCA Civ 556.

² ANUHCVP2017/0012 (delivered 14th March 2019, unreported).

The respondent's submissions

- [17] On behalf of the respondent, Mr. Rushaine Cunningham, addressing the complaint of procedural irregularity and unfairness, submitted that, having failed to file his witness statement, the appellant was properly barred from introducing any evidence in cross-examination which went beyond the scope of the evidence contained in the witness statements supporting the respondent's case. He submitted that rule 29.11(1) of the CPR permitted the trial judge to prevent the appellant giving evidence at trial. Mr. Cunningham further submitted that rule 39.2 empowers the court to limit examination, cross-examination or re-examination of any witness and that in exercising that discretionary power, the court must have regard to the overriding objective of the CPR.
- [18] In oral submissions, Mr. Cunningham posited that the exercise of that discretion is governed by a two-stage test. The first stage asks whether the evidence sought to be elicited is relevant; the second asks whether there are good grounds for limiting cross-examination. In exercising the discretion, the court must assess whether the probative value of the evidence outweighs its prejudicial value. Mr. Cunningham submitted that the decision of the learned trial judge to limit counsel's cross-examination of the respondent to those matters which were contained in her witness statements, was in furtherance of the overriding objective by preventing the appellant from intentionally subverting the very objective of rule 29.11 and to ensure compliance with the rules of court.
- [19] Mr. Cunningham submitted that the learned judge properly exercised her discretion under rule 39.2 because factual assertions, unsubstantiated by evidence, do not assist the court in resolving the legal issues in dispute and where, by his own noncompliance with the CPR, a defendant is prohibited from giving evidence at trial, his cross-examination of the claimant's case must properly be restricted to prevent – through skilful advocacy or otherwise – evidence being admitted in support of the defendant's case that otherwise has been rendered inadmissible because of the defendant's failure to serve a witness statement within the stipulated time. Mr.

Cunningham lastly submitted on this point that trial by ambush – introducing evidence for the first time at trial – is also inimical to the sound administration of justice as the respondent would have been deprived of a fair opportunity to probe and scrutinize the evidence adduced if the appellant was permitted to cross-examine at large. Cross-examination must be based on the evidence adduced before the court. The pleaded case is not the evidence, and the appellant therefore had no independent evidence before the court on which he could have relied in putting his case to the respondent, submitted Mr. Cunningham.

[20] An alternative submission advanced by Mr. Cunningham during the course of oral arguments was that on a perusal of the record, it would be evident that the judge's ruling did not cause any prejudice to the appellant since there was in fact extensive cross-examination on matters relating to credit, bad reputation, past drug addiction and every theme covered in the filed defence. However, the judge simply found that the respondent had not been shaken in cross-examination. Mr. Cunningham further submitted in oral argument that it was not true that the judge did not have regard to the appellant's closing submissions. While conceding that the judge made no express reference to those submissions in her written judgment, Mr. Cunningham invited the Court to infer that she did consider them based on certain marginal notes and highlighted portions endorsed on the said submissions appearing at page 102 of the record of appeal which are attributed to the learned judge. Mr. Cunningham asked the court to note that the judgment does not make reference to the closing submissions of the respondent either, and, in any event, it is not an error of law for a judge not to refer to the closing submissions of the parties in her judgment.

[21] As it relates to grounds 2 and 3, Mr. Cunningham submitted that they are misleading in that the impugned words in respect of which the cause of action was pleaded are, 'running a sex trade'. These words, it is said, are markedly different from the appellant's limited emphasis in this appeal on the words sex trade. Counsel submitted that the learned trial judge properly directed herself on the approach to be adopted by the court in determining the meaning of the impugned words, 'running

a sex trade', and rightly relied on relevant legal principles and pursued a logical line of thinking. In so doing, the judge did not put a strained or unlikely construction upon the words complained of. Having ruled that the words were reasonably capable of bearing a meaning defamatory of the respondent, the judge rightly decided that the words did in fact suggest to ordinary, right-thinking members of society, that the respondent was involved in sex trafficking and the trading of humans for the purpose of sexual slavery. Mr. Cunningham urged the Court to exercise restraint in substituting its own view of the meaning of the words for that of the judge, if this Court were inclined to a different view. The cases of **Bonnick v. Morris and Others**,³ and **Vaughn Lewis v. Kenny D. Anthony**⁴ were cited in support of this argument.

[22] As it relates to the complaint in ground 4 relating to the judge's treatment of the evidence of the subsequent comments of a Facebook poster, Ms. Tamika Camacho, Mr. Cunningham submitted that the learned trial judge did not hold that because one person several days later raised the issue of human trafficking in a Facebook comment, that the words complained of were capable of meaning human trafficking. The judge undertook a detailed analysis to determine the meaning of the defamatory statement, and after accepting that the words complained of were capable of the pleaded meaning, it was only then did the judge, at paragraph 52 of her judgment, address the posting of Ms. Tamika Camacho, which tended to directly support the judge's finding.

[23] Mr. Cunningham's response to the complainant made in ground 5 that the judge attached too much weight to the evidence of Mr. Quinn, was that there is no evidence from the learned judge's findings and analysis as contained in paragraphs 37 - 63 of the judgment, to suggest that the court placed any weight whatsoever on the evidence of Mr. Quinn. Mr. Cunningham submitted that the judge's only

³ (2002) 61 WIR 358 at [9].

⁴ Saint Lucia Civil Appeal No. 2 of 2006 (delivered 14th May 2006, unreported) at [11].

reference to his evidence is contained in paragraphs 24 - 27 of the judgment, where the judge merely summarised the evidence of Mr. Quinn.

- [24] As it relates to ground 6, which complains about the quantum of damages awarded, Mr. Cunningham argued that an appellate court should only interfere with an award of damages in a defamation case if it is so large or so small as to be irrational, in the sense that it is incapable of having been arrived at by a process of reason and was therefore necessarily arrived at through emotion, prejudice, caprice or stupidity or simply on a wrong basis. Mr. Cunningham cited **Lewis v. Anthony** as authority for this proposition. Mr. Cunningham submitted that no such criticism could be made in the case at bar. He pointed to paragraph 56 of the judgment, which he argued, demonstrates that the learned trial judge correctly informed herself of the applicable principles and relevant factors for an award of damages, including: the manner of publication, i.e. Facebook, which is a forum with limitless reach, making the publication one to the whole world; the appellant's lack of apology and clear defiance as posted on Facebook; the gravity of the statement with its allegation of criminal conduct on the part of the respondent, which was not true. Mr. Cunningham drew attention to paragraph 62 of the judgment which reflected the authorities relied on by the judge in arriving at an award and demonstrated that she recognized the need to bring the respondent's award in line with current value. The judge's approach was therefore on an entirely rational footing and the award should be upheld.

Discussion

- [25] The main contention advanced by the appellant on this appeal is that the trial process was fundamentally irregular and unfair because of the limitations placed on the ambit of the appellant's cross-examination of the respondent, which was confined to matters raised in the respondent's witness statement. Mr. Cunningham seeks to support the judge's decision by invoking CPR 29.11. This rule provides that if a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits. Such permission may not be granted at the trial unless the party

seeking permission has a good reason for not previously seeking relief under rule 26.8. Notably, the judge does not make any overt reference to this rule. What she does say is that if the court were to give consideration at trial and on writing judgment to pleadings which are not supported by a witness statement and so in effect constitute evidence, then it is in effect allowing such party who has no evidence before the court in through the back door.

[26] In so far as this statement could be read as saying that the court would not consider or treat the defence as evidence in the case because it was not supported by evidence, the learned judge is correct: pleadings do not stand as evidence. However, to the extent that the learned judge went further and held that the appellant's cross-examination of the respondent was, as a matter of law, to be limited to matters raised in the respondent's witness statement and that she would not permit any reference to the defence or consider it in her deliberations, we are of the respectful view that the judge erred.

[27] The argument that CPR 29.11 and CPR 39.2 together support such a contention lacks force and cogency. CPR 29.11 merely provides that if a witness statement or witness summary is not served within the time specified by the court, the witness may not be called unless the court permits. That rule provides no warrant for limiting the cross-examination of the party in default. Counsel for the respondent also sought to justify the judge's ruling by invoking rule 39.2. It is accepted that CPR 39.2 gives the judge the discretion to limit cross-examination. However, as with the grant of any discretion, it must be exercised judicially. A judge purporting to exercise the discretion granted by rule 39.2 to limit cross-examination can be expected to articulate the reason why a particular line of cross-examination is being curtailed. Notably, the learned judge made no reference to rule 39.2 in her ruling, and it is doubtful whether she had this rule in mind at all. The sole discernible reason given by the judge is that 'it is the law' that where a party is 'without his witness statement at trial' he is limited to cross-examination on the evidence contained in the witness statement of the other party. The learned judge did not cite the law to which she

referred as authority for that proposition, nor did counsel for the respondent refer us to any authority to that effect.

[28] Respectfully, the flaw in the learned judge's reasoning is in thinking that to permit the appellant to put suggestions to the respondent based on matters contained in his defence would have the effect of permitting him to give evidence through the back door. The error in this line of reasoning becomes readily apparent as soon as it is recalled that what is 'put' in cross-examination is not evidence in the case. The evidence is the witness' answer. Accordingly, whatever the appellant may have put to the respondent could not become evidence in the case unless the respondent accepted the suggestions. Notwithstanding that the appellant was prevented from adducing evidence, he was still entitled to probe the respondent on any issue, provided it was relevant.

[29] The learned judge's decision not to consider the defence at trial and when writing her judgment was also wrong in law. The appellant's defence had not been struck out. The pleadings define the issues in the case and a judge is required to have regard to them in seeking to identify the issues in dispute between the parties. This is a different exercise from weighing and assessing the evidence in the case and determining what evidence is to be accepted. To review pleadings with a view to identifying the issues in dispute does not have the effect of allowing evidence through the backdoor. The judge was wrong to conclude that to even consider the appellant's defence would produce that result.

[30] For the foregoing reasons, we are of the view that the learned trial judge erred in law in holding that because the appellant was prevented from calling evidence, the scope of the appellant's cross-examination of the respondent was necessarily limited to matters contained in the respondent's witness statement. Such a ruling undoubtedly led to a procedural irregularity which produced unfairness to the appellant, who was restricted in the scope and extent of probing that he might otherwise have deployed in cross-examination: he could only cross-examine on

those matters that were raised in the respondent's witness statement. Mr. Cunningham's argument that an examination of the transcript would show that the cross-examination of the respondent was extensive, does nothing to assuage the concern that the appellant was impermissibly inhibited in the conduct of his cross-examination of the respondent.

[31] In our view, the finding that the trial was irregular and procedurally unfair vitiates the entire proceedings. The interest of justice calls for the proper ventilation of the substantive issues before the court. In these circumstances, it would be imprudent for this court to comment further on the merits or otherwise of the other substantive grounds relating to the natural and ordinary meaning of the words "running a sex trade". That is best left to the trial judge, to whom the case must be remitted to hear the matter afresh.

[32] Accordingly, we order that the appeal is allowed on ground 1. The decision of the judge is set aside in its entirety. We remit the claim to be retried by a different judge of the High Court.

[33] The appellant is awarded prescribed costs in the court below and two thirds of those costs on appeal, in accordance with Rules 65.5 and 65.13 of the CPR.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar