

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(Civil Division)

SAINT LUCIA

CLAIM NO. SLUHCv2020/0433

BETWEEN

BEVAN ARLETTE

Claimant

and

CINELLI MANGAL

Defendant

APPEARANCES: David R. Francis, Counsel for the Claimant
Michelle d'Auvergne, Counsel for the Defendant

2021: September 30; - Defendant's submissions
October 05; - Claimant's submissions
October 20. - Decision

DECISION

*(Defendants application to strike out and
Defendant's application for security for costs)*

- [1] **PARIAGSINGH, M. (Ag.):** - There are two applications before the Court, both filed on the same day by the Defendant. The first is an application to strike out parts of the Claimant's case which refers to tweets allegedly made in 2018 and the Claimant's reply in its entirety. The second application is an application for the Claimant to provide security for costs.
- [2] The application for security for costs requires *inter alia* a consideration of the merits of the Claimant's case. In my view, this can only be done after the application to

strike out is determined. This approach is also consistent with the Court of Appeal's guidance in **Darrel Monthrope v The Attorney General**¹.

APPLICATION TO STRIKE OUT:

References to the pre 2020 tweets in the Statement of Claim

- [3] The Claimant's case is that he was defamed by posts allegedly made by the Defendant on social media. The Claimant ascribes the posts made refer to him by his pseudonym "Pino_Gorgio". At paragraph 7 of the Statement of Claim all the posts ending with the last two in 2020 are set out. At paragraph 8 of the statement of case, the Claimant alleges that the words detailed in paragraph 7 (of the Statement of Case) referred to and were understood to refer to him.

- [4] Nowhere in the statement of case or the prayer does the Claimant identify which post is the subject of his claim.

- [5] At paragraph 1 of her defence the Defendant raised prescription. At paragraph 1 of his reply, the Claimant contends that all tweets outside the one year limitation provide relevant context to the 2020 tweet.

- [6] Whilst the true nature of the claim only becomes apparent in the reply, I agree with Counsel for the Claimant that the tweets themselves, even if any cause as a result of their contents are now prescribed, provide a foundation for the Claimant to lead evidence of identification and malice. It also provides context in relation to the 2020 tweets which is an add on to the previous tweets.

- [7] In the circumstances, I will not strike out references to the pre 2020 tweets in the Statement of Claim. This is of course in the context that the claim is confined to damages in relation to the 2020 posts only.

¹ Darrel Monthrope v The Attorney General, SLUHCVA201/0021

Reply

[8] The Defendant submits that the entirety of the reply is scandalous, irrelevant to the cause of action and is not in keeping with the requirements of a reply.

[9] **Blackstone's Civil Practice 2012** at paragraph 27.2 gives the following guidance on the contents of a reply:

Conventionally, a reply may respond to any matters raised in the defence **which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not properly have been dealt with in the particulars of claim, but which require a response once they have been raised in the defence.** It has always been a cardinal principle of pleading (which has certainly not been altered by the CPR) that a claim should not anticipate a potential defence (popularly known as 'jumping the stile'). Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. **The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a 'defence to the defence'.**

[10] Paragraph 1 of the reply addresses the issue of prescription raised in paragraph 1 of the defence. There is nothing objectionable about it. In fact, without that statement made in paragraph 1 of the reply, the true nature of the claim can be easily mistaken. This paragraph is allowed.

[11] Paragraph 2.1 of the reply addresses paragraph 5 of the defence. Paragraph 5 of the defence denies paragraph 4 and 5 of the statement of case. Paragraphs 4 and 5 of the statement of case assert that after the romantic relationship between the parties broke down the Defendant repeatedly asked the Claimant to reconcile which he refused. The Claimant contends that shortly thereafter the Defendant began to display feelings of spite and ill will towards the Claimant and his now wife. The Defendant denies this and contends that she accepted that the tumultuous relationship was at an end. This creates a disputed fact.

- [12] In reply to this, the Claimant sought to allege that the Defendant became violent when he insisted that the relationship came to an end. This is in answer to an issue raised by the Defendant that is that she accepted the relationship came to an end. I will therefore allow paragraph 2. 1 of the reply.
- [13] Paragraph 2.2 of the reply is in further answer to paragraph 5 of the defence. The Claimant contends in the reply that the Defendant messaged apologizing for assaulting him and claiming that she was pregnant. These statements go to the issue raised in the defence that the Defendant accepted the relationship had come to an end and the overall interaction of the parties after their relationship had ended. At the trial the state of mind of the parties may become relevant in treating with the issue of malice. I will therefore allow paragraph 2.2 of the reply.
- [14] Paragraph 2.3 of the reply similarly is in answer to the issue raised by the Defendant that she accepted that the relationship had come to end. This paragraph is allowed.
- [15] Paragraphs 3 and 4 of the reply addresses paragraph 6 of the defence. In paragraph 6 of the defence the Defendant denies that she at any time made any statements which were malicious or untrue regarding the Claimant. In paragraphs 3 and 4 of the reply, the Claimant repeats what is already in paragraph 6 of his claim and attempts to bolster his assertions. I will therefore strike out paragraphs 3 and 4 of the reply.
- [16] Paragraph 5 of the reply addresses paragraph 7 of the defence. In paragraph 7 of her defence, the Defendant contends that the words allegedly uttered were not understood to refer to the Claimant. She also asserts that the statements pertained to recent third-party posts on twitter and third party posts expressly to characters and personalities which did not include the Defendant. The Claimant in his reply, has sought to address issue of the reference in the posts to being to him. He makes statements regarding the failure to produce the alleged third party and also about

reasonable inferences that the post referred to him because of the past posts and interaction between the parties.

[17] In my respectful view, these are matters for submissions at the end of the trial. The fact that the post refer to the Claimant is already in issue, the Defendant having denied that they do. The Claimant ought not to use his reply to restate or argue his position on the issue. Paragraph 5 is therefore struck out.

[18] Paragraph 5 also refers to the tweets being brought to the Defendant's attention by other twitter uses who understood the posts to be referred to the Claimant. Again, the reply is not an opportunity to provide analysis or submissions on a disputed issue. Paragraph 5 is therefore struck out.

[19] Paragraph 6 of the reply addresses to paragraph 9 of the defence. In paragraph 9 of her defence, the Defendant contends that at the time of her posts, the Claimant, his friends and family were not in her contemplation. She also contends that at the time of her posts she had blocked a large number of the Claimant's friends, family and associates who previously followed her.

[20] In reply, the Claimant contends that the Defendant's profile is a public twitter profile which can be accessed with a simple google search. The Claimant also contends that the Defendant cannot say for certain that she blocked all of his friends, family and associates.

[21] In my view, the defence does raise the issue of the reach of the post being restricted in reach. The Claimant is entitled to reply to this as he properly done in my view. I will therefore allow paragraph 6 of the reply.

[22] For these reasons, on the application to strike out, it is hereby ordered that paragraphs 3, 4 and 5 of the reply filed on January 22, 2021 are struck out.

[23] On the issue of costs of this application there is no reason to depart from the general rule that costs follow the event. The Defendant has mounted objection to one (1) paragraph of the Statement of Claim and the thirteen (13) paragraphs of the reply (counting each sub-paragraph as they are each separately considered) I have upheld seven (7) of the objections out of the total of fourteen (14) which is 50% success on the application.

[24] I will therefore order the Claimant to pay the Defendant 50% of her costs of the application to strike out filed on June 30, 2021 to be assessed by this Court in default of agreement.

APPLICATION FOR SECURITY FOR COSTS:

[25] The test for granting an order for security for costs is a two-pronged test. The Defendant must satisfy the Court that, (1) having regard to all the circumstances of the case that it is just to make such an order and (2) one of the grounds set out in Rule 24.3 CPR apply.

[26] The guiding principle in determining this type of application was stated by the Court of Appeal in **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.**² it was stated that:

As a general rule, if the court is satisfied that there is a significant risk of a defendant suffering an injustice by having to pay to defend proceedings, with no real prospect of being able to recover costs if successful, the court may, if it is just to do so, order a claimant to put up security for the defendant's costs.

[27] In **Nasser v United Bank of Kuwait**³ it is stated that:

...the discretion has to be exercised applying the overriding objective, and by affording a proportionate protection against the difficulty identified by the ground relied upon as justifying security for costs in the case in question

² Dr. Martin Didier et al v Royal Caribbean Cruises Ltd. SLUHCVP2017/0051

³ Nasser v United Bank of Kuwait [2001] EWCA Civ 556

[28] The factors to be taken into account in determining whether it is “*just*” to order security are set out in **Pan Am World Airways Dominicana SA v Carlos Bentiez and Anor**⁴. These are:

- a) The risk of not being able to enforce a costs order, and /or the difficulty or expense of being able to enforce a costs order, if the defendant is awarded costs.
- b) The merits of the claim. This has an impact on the risk of needing to enforce a costs order against the Respondent.
- c) Whether the Defendants may be able to recover costs from someone other than the Claimant
- d) The impact on the Claimant of having to give security.
- e) Delay in making the application.

[29] In support of the application, the Defendant relies on the affidavit of a Legal Assistant in the employ of her Counsel. I attach very little to no weight to this affidavit.

[30] The deponent has not given any basis for her bare assertion that she is aware that the Defendant resides in Brooklyn, New York and has resided there for the last 8 years. I simply do not accept her evidence as she has not indicated how this alleged fact came to her knowledge.

[31] The deponent also refers to searches done in Saint Lucia at the relevant registries which have found that the Claimant has no assets within the jurisdiction. Similarly I attach no weight to this evidence. There is no indication of what registry was searched, by whom this alleged search was done, when it was done and most importantly no document or record to corroborate what is being asserted.

⁴ Pan Am World Airways Dominicana SA v Carlos Bentiez and Anor, ANUHCv2016/0131

[32] The Claimant in his affidavit in reply, which I accept, deposes that he holds dual nationality. He gives his address in Saint Lucia which is the same as stated on the claim and which I accept as his correct address. He gives details of his current employment in the USA and explains why he has not visited the jurisdiction recently on account of Covid. The Claimant gives details of his bank account number in Saint Lucia and indicates that his mother is willing to act as a surety for the payment of any costs in the event that he loses this claim. His evidence is based on his costs exposure risk of \$7,500.00.

[33] The Defendant having failed to prove one of the conditions in CPR 24.3 apply together with the lack of cogent and relevant evidence alone is sufficient to dispose of her application.

[34] In any event, a consideration of the '*just in the circumstances*' test would have led me to the same conclusion as:

- a) There is no evidence of any risk of not being able to enforce a costs order of the difficulty or expenses of being to enforce such an order.
- b) The merits of the case are not weak on paper. The Claimant's case is by no means a frivolous claim. If the Claimant is successful in proving that the tweets were made by the Defendant and that they relate to him, the allegation is extremely injurious. The allegation made against the Claimant according to him is to the effect that the Defendant has called him a rapist on twitter. The Defendant's answer to this is that if it is proven that she made those posts, they did not refer to the Claimant and they referred to third parties. This in the context of the pleadings and the documents attached to the pleadings leads to the inescapable conclusion that the Claimant's case is not unmeritorious.

- c) The Defendant may be able to recover costs from someone other than the Claimant, namely his mother having regard to the Claimant's affidavit evidence.
- d) The impact on the Claimant of having to give security does not seem to be sever. Neither is the delay. These are two factors and not determinative by themselves, more so when considered with the other factors as whole.

[35] For these reasons, the Defendant's application for security for costs is dismissed.

[36] There is again no reason to depart from the general rule that costs follow the event. The Defendant must therefore pay the Claimant's costs of her application for security for costs to be assessed by this Court in default of agreement.

ORDER:-

[37] In the circumstances, it is hereby ordered that:

- 1) Paragraphs 3,4 and 5 of the Claimant's reply filed on January 22, 2021 are struck out;
- 2) The Claimant shall file and serve a redacted Reply reflecting the order in (a) above within fourteen (14) days of today's date;
- 3) The Claimant shall pay the Defendant 50% of the cost of her application to strike out filed on June 30, 2021 to be assessed by this Court in default of agreement;
- 4) The Defendant's application for security for costs filed on June 30, 2021 is dismissed; and

- 5) The Defendant shall pay the Claimant's costs of the application for security for costs filed on June 30, 2021 to be assessed by this Court in default of agreement.

**ALVIN SHIVA PARIAGSINGH
MASTER (AG.)**

BY THE COURT

REGISTRAR