

**EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NUMBER: SVGHCV2018/0085

BETWEEN:

MICHAEL WHYLLIE

Claimant

and

**MAGAVON TOBY
DIANETTA PATRICK**

Defendant

Appearances:

Ms. Vynette Frederick of Counsel for the claimant

Ms. Jenell Gibson and Mr. Duane Daniel of Counsel for the 1st Defendant

Ms. Paula David of Counsel for the 2nd defendant

2018: October 24

2019: January 22

JUDGMENT

- [1] **MOISE, M.:** This is an application of the 1st defendant, made pursuant to rule 69.4 of the Civil Procedure Rules 2000 (CPR) seeking an order that the words complained of as set out in the claimant's statement of case are incapable of bearing the meaning or meanings ascribed to them. The 1st defendant also seeks an order, pursuant to rule 26.3(1)(C) of the CPR, striking out the claim on the basis that it is an abuse of the process of the court. The 2nd defendant has filed legal submissions in support of the 1st defendant's application. After consideration of the application, along with the affidavits and legal submissions filed in this matter, I have accepted the submissions of the defendants and granted the relief sought in the application of the 1st defendant. My reasons for doing so are outlined in the remaining paragraphs of this judgment.

The Claim

- [2] The claimant is an attorney at law admitted to practice in Saint Vincent and the Grenadines. He claims that he was retained by the 1st defendant's brother to represent him in a dispute with the 1st defendant. The 2nd defendant is a custom's broker who owns and manages a customs and shipping agency. The dispute between the 1st defendant and her brother relate to certain equipment which was imported into Saint Vincent. As far as the pleadings state, these items were cleared from the customs department by the 2nd defendant and her knowledge of what transpired in that process is relevant to the general dispute. The claimant asserts that on or about 3rd May, 2018 he received a letter from a solicitor acting on behalf of the 1st defendant which states the following:

“... I have been instructed that you personally approached Ms. Dianetta Patrick, customs broker for Reliable Construction Inc. on the street and began interrogating her about matters related to the clearing of equipment purchased by Magavon Toby of Reliable Construction Inc. Ms. Patrick has asked my client to convey the message to you that she did not like being confronted in this manner on the street by a total stranger, to be asked information which she stated is within the domain of the Customs and Excise Department. She was understandably very taken aback by your sudden approach and questioning.”

- [3] On the basis of the foregoing, the claimant filed this action for defamation and asserts that these words, allegedly made by the defendants, meant and was understood to mean that he had committed the criminal act of assault, an offence punishable by imprisonment and also caused the 2nd defendant severe emotional distress and meant further, that the claimant was involved in corrupt, unprofessional and unethical practices. It is worth noting, however, that the solicitor who drafted and caused this letter to be delivered was not added as a party to the proceedings. The claimant goes on to assert the following at paragraph 11 of the statement of claim:

(a) The words complained of were clearly designed to cause damage to the claimant's reputation and has prejudiced his prospects for future employment i.e., to attract clients;

(b) The defendants knew or ought to have known that the words complained of were defamatory but proceeded to publish these statements in print and on the internet, one of the most used and accessed modern means of communication;

(c) The defendants knew or ought to have known that their words were being streamed over the internet and that their slanderous utterances were being streamed to persons with access to the internet in Saint Vincent and the Grenadines;

(d) On May 8th, 2018, the Claimant himself wrote to the 1st defendant, denying that he knows the 2nd defendant and asserting that he had never met her. Moreover, he did not confront her in the manner she described in her letter, or not at all.

(e) On May 4th 2018 the Claimant's attorney ... wrote to the 1st defendant's solicitor refuting the words and actions attributed to the claimant. To date the defendants nor their solicitors have retracted their statement nor have they apologized in any way for their defamatory words attributed to the claimant...

- [4] Insofar as it relates to the allegation of the defendants' publication of this information via the internet, the claimant asserts at paragraph 9 of the statement of claim that this was done via email correspondence delivered to the claimant's office email address as well as to his client and the client's wife at a private email address. Indeed, the claimant attached a copy of an email dated 4th May, 2018 which corroborates this assertion.

The Application Pursuant to Rule 69.4 of the CPR2000

- [5] Having been served with the claim form and statement of claim, the 1st defendant filed her application on 18th July, 2018 pursuant to rule 69.4 of the CPR. This application was subsequently amended on 12th October, 2018. Rule 69.4 of the CPR states as follows:

(1) At any time after the service of the statement of claim, either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case.

(2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or

meanings attributed to them in the statement of case, the judge may dismiss the claim or make such other order or give such judgment in the proceedings as may be just.

[6] The court is therefore empowered to dismiss a claim if it determines that the words complained of are not capable of bearing a meaning or meanings attributed to them in the statement of case. The factors which the court ought to consider in coming to a determination have been carefully outlined in the decision of Lord Bingham in the case of ***Skuse v Granada Television Limited***¹. These are as follows:

(1) “The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable person ...

(2) The hypothetical reasonable reader (or viewer) is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.

(3) While limiting its attention to what the defendant has actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue.

(4) The court should not be too literal in its approach.

(5) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.

(6) In determining the meaning of the material complained of the court is not limited by the meanings which either the plaintiff or the defendant seeks to place upon the words.

(7) The defamatory meaning pleaded by the plaintiff is treated as the most injurious meaning the words are capable of bearing and the questions a judge sitting alone has to ask himself are, first, is the natural and ordinary meaning of the words that which is alleged in the statement of claim and, secondly, if not, what (if any) less injurious defamatory meaning do they bear.

¹ [1996] EMLR 278

(8) The court is not at this stage concerned with the merits or demerits of any possible defence.”

- [7] This decision has been cited with approval in our own jurisdiction and it is largely accepted that the test for consideration is whether the words complained of ***would tend to lower the plaintiff in the estimation of right thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.*** Whilst I am not to embark on a trial at this stage, the purpose of rule 69.4 is to enhance the court’s general case management powers and to ensure that the resources of the court and that of the parties are not wasted on cases in which words complained of are incapable of bearing the defamatory meaning attributed to them.
- [8] The first assertion of the claimant in his statement of claim is that the words complained of meant and were understood to mean that he had committed the criminal act of assault; an offence punishable by imprisonment. The 1st defendant refers the court to section 192 of the Criminal Code of Saint Vincent and the Grenadines which states that any person who unlawfully assaults another is guilty of an offence. This offence carries with it the possibility of imprisonment for 1 year. According to Blackstone’s Criminal Practice 2001 an assault takes place when ***“the accused intentionally or recklessly causes another to apprehend immediate and unlawful violence.”*** No doubt, if an individual were to publish material imputing such a criminal act on the part of the claimant he would be entitled to claim that he has been defamed. However, the question for determination is whether the content of the letter complained of by the claimant, if given its plain and ordinary meaning, can bear such a meaning at all. I am not of the view that it does.
- [9] I refer to the words of Lord Morris in the case of ***Jones v. Skelton***² where he states that ***“[i]n deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation.”*** This is perhaps because, as Lord Bingham’s describes him, the reasonable man is one who ***“is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available”***. As it relates to the current claim, I do not accept that a reasonable man of such a

²[1963] UKPC 29

temperament would interpret the content of the letter complained of by the claimant to mean that he has committed a criminal assault against the 2nd defendant. The letter simply indicates that the solicitor in question was instructed that the 2nd defendant was *interrogat[ed]... about matters related to the clearing of equipment purchased by Magavon Toby of Reliable Construction Inc.* and that she was taken aback by this approach. Certainly, if proven, the letter seeks to convey the fact that the 2nd defendant was not happy at such an “interrogation”. However, I can find nothing in this statement to conclude that the claimant was accused of assaulting the 2nd defendant in the manner pleaded in the statement of claim.

- [10] In her written submissions counsel for the claimant refers to Blackstone’s Criminal Practice 2008 where it states that *“an assault requires conduct which causes the victim to apprehend the imminent application of unlawful force upon him.”* When pressed in oral submissions, counsel for the claimant insisted that a confrontation of this nature is synonymous with such an assault. I do not agree with that submission. To suggest that someone who confronts another about an issue of this nature naturally commits an assault is a stretch of what constitutes a criminal assault in law. I therefore agree with the submissions of the 1st defendant in that regard and find that the words complained of are not capable of bearing the meaning that the claimant was guilty of a criminal assault against the 2nd defendant.
- [11] The claimant further asserts that the words complained of meant that he was involved in corrupt, unprofessional and unethical practices. This, he asserts, would work to injure him in his profession and undermine his integrity as an attorney at law. He asserts that the legal profession requires that he maintains a high level of personal and professional integrity, honesty and a reputation for unwavering ethical responsibility and trust. He further asserts that the content of the letter has caused him to feel hurt, embarrassed and ashamed, as this has thrown doubts in the minds of his staff and his clients that he possesses the professional credibility, integrity, temperament and good judgment to carry out his functions as a solicitor and barrister. However, the test set out in case law is not what the claimant’s staff or clients thought of the letter, but is an objective test of what the reasonable person would conclude. As indicated earlier, this person is not one who is *avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.*

- [12] The 1st defendant refers the court to the case of *Slim and Others v. Daily Telegraph and Another*³. In that case the claimant complained of words which were published against him which inferred that he had expressed one view on an issue when representing one client and another view when representing someone else. The court held that this was not defamatory. For my part, I am not of the view that the facts of that case are comparable to the present. However, I do note that in Salmon LJ's contribution to that judgment he accepts that the words complained of may have caused local residents to **"be a little cynical"**. He goes further to say that the words published may have even left a **"strange flavor in the mouths"** of local residents. Yet he concluded that judgment should be entered for the defendants as the publication did not **"raise a question of honour or professional propriety-only a question of taste."**
- [13] Despite the dissimilarities between the facts of that case and that of the present, I am of a similar view to those expressed by Salmon LJ. It may very well be the case that a reasonable person would consider it in poor taste for an attorney to approach an individual on the streets in the manner described in the letter written to the claimant. However, I am not satisfied that this raises a question of honour or professional propriety. In my view, the circumstances and issues arising out of this letter are important to consider. It must be observed that there was an ongoing legal dispute between the 1st defendant and her brother, who was represented by the claimant. According to the pleadings, the 2nd defendant's knowledge in relation to the clearing of the goods in question was important to the issues under consideration. The claimant asserts at paragraphs 7 and 8 of the statement of claim that he did in fact communicate with the 2nd defendant regarding these issues. His only contention is that it was done via telephone with no animosity or hostility. I note that the 2nd defendant, in her defence, accepts that the conversation took place via telephone and was cordial. She denies ever stating otherwise. However, on such an application as the present the court is not concerned with the defence and is to proceed on the assumption that the words complained of are proven. In these circumstances, taken at its highest, the content of the letter simply indicates that the 1st defendant gave instructions concerning the manner in which, according to her, the 2nd defendant was approached and requested that the 2nd defendant's disapproval be communicated to the claimant.

³ [1968] 1 All ER 497

[14] In these circumstances I accept the submissions of counsel for the 1st defendant that these words are not capable of lowering the claimant in the estimation of right thinking members of society in the manner asserted in the statement of claim. Whilst it may be true that such actions may be frowned upon, I do not accept that they **“raise a question of honour or professional propriety”**, neither would they naturally imply that the claimant was corrupt and unethical. In those circumstances I would dismiss the claim pursuant to the provisions of Rule 69.4 of the CPR as prayed for by the 1st defendant.

Application to strike out as an abuse of process

[15] In her written submissions, counsel for the 1st defendant refers to the case of ***Jameel v. Dow Jones & Co.***⁴ and, for the reasons which I will explain, I find the approach taken in this case to be particularly helpful. In that case, the English Court of Appeal came to consider the circumstances under which an action for libel ought to be struck out as an abuse of process. As the court noted at paragraph 54 of its judgment, ***“[a]n abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice.”*** At paragraph 55 of that judgment, and with specific reference to abuse of process in actions for libel, the court noted the following:

“There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more pro-active. The second is the coming into effect of the Human Rights Act. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, insofar as it is possible to do so. Keeping a proper balance between the Article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process

⁴ [2005] EWCA Civ. 75

defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."

[16] I note that freedom of expression is not necessarily relevant to the issues raised in the present application. However, I am of the view that, in keeping with the overriding objective of the CPR, the court is to take a more flexible and proactive approach in such cases. The court is therefore empowered to ***bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged."*** This does not mean that the court must be too quick to deny a litigant an opportunity for the full ventilation of the issues raised in his statement of case. However, the court on an application to strike out an action for defamation, ought to consider the circumstances of the case and, if satisfied that the proceedings do not serve the legitimate purpose of protecting the claimant's reputation, is empowered to strike it out as an abuse of process. This would include the issue of whether, even if the claimant proves his case, the damages would likely be de minimis, given the context of the words complained of and the extent of the publication in question. I am of the view that this is such a case in which this approach should be adopted and wish to highlight the following issues:

(a) It must be observed that the context of the words complained of by the claimant is such that they were contained in a letter from an instructing solicitor. Even if proven at trial, at most the statement shows that the 1st defendant may have instructed her solicitor to write to the claimant and express a particular sentiment about an event which was allegedly conveyed to her by the 2nd defendant. Apart from the fact that I have already concluded that the words are incapable of bearing the meaning attributed to them by the claimant, it is also difficult to see the circumstances under which the prosecution of the 1st defendant in these circumstances can serve the legitimate purpose of protecting the claimant's reputation.

Further, given that there was an ongoing legal dispute in which the parties were involved, and the subject of this claim is the content of a letter served on the claimant by an instructing solicitor based on the confidential instructions of the 1st defendant, I am not of the view that defamation proceedings would meet the ends of justice in this particular case. It is perhaps not

infrequent that citizens of Saint Vincent and the Grenadines would call upon their attorneys to complain about certain events which may have transpired and to give instructions to convey these sentiments to third parties based on the client's own interpretation of the events. It would not be in the interest of justice to suggest that a mere denial of the circumstances of the fact relayed in such a letter as those in the present case, should naturally give rise to an action for libel;

(b) At paragraphs 7 and 8 of his statement of claim the claimant admits that he did in fact have a conversation with the 2nd defendant regarding the issues of the clearance and registration of the goods in question with the customs and excise department. He goes as far as accepting the fact that although this conversation took place via telephone, the 2nd defendant was not in her office at the time and promised to get back to him on the issue. The difference between his version and that which was conveyed in the letter was that he denies having "interrogated" the 2nd defendant on the streets about these issues. Despite this, he claims that the content of the letter infers corrupt, unprofessional and unethical practices. Whilst it may be seen to some as unprofessional for an attorney to approach an individual on the street to confront her about such matters, the fact that the claimant admits to a conversation having taken place about the same issue, draws me to the conclusion that this case cannot serve the purpose of protecting his reputation against the notion that he is a corrupt and unethical attorney;

(c) Despite the fact that the claimant asserts that the letter was "transmitted via the internet", the claim pleaded was that the letter was forwarded via electronic mail to his office and to the email address of his client and the client's spouse. In *Jameel v. Dow Jones & Co*, the words complained of were published via an internet website. Despite this, the defendants were able to show that only 5 persons accessed the link to the publication in question. The damage done to the claimants' reputation in such circumstances may be deemed to be de minimis to the extent that the court's resources, as well as those of the parties, are not best spent on litigation; especially given the peculiar circumstances of this case.

[17] In summary, the 1st defendant asserts that ***"the case at bar is one which justifies the exercise of the court's unique jurisdiction to strike out, as an abuse of process, proceedings that do not serve the legitimate purpose of protecting the claimant's reputation, such that the costs***

of proceedings will be out of all proportion to the damages and vindication which can be achieved.”I agree with that sentiment and find that this matter ought to be struck out as an abuse of the process of the court pursuant to rule 26.3(1)(c) of the CPR.

Disposal

[18] In the circumstances I make the following orders and declarations:

- (a) The words complained of by the claimant are not capable of bearing the meaning or meanings attributed to them in the statement of case;
- (b) The claim amounts to an abuse of the process of the court;
- (c) The claim is struck out pursuant to rule 69.4(2) and 26.3(1)(c) of the Civil Procedure Rules 2000;
- (d) The claimant will pay costs to the defendants in the sum of \$1000.00 each.

**Ermin Moise
Master**

By the Court

Registrar