

ST VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO 120 OF 2008

JULIAN FRANCIS

Claimant

And

[1] ELWARDO LYNCH
[2] BDS LIMITED

Defendants

Appearances:

Mr Richard Williams for the Claimant
Mr Bertram Commissiong QC, with him
Ms Mira Commissiong for the Defendants

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2011: June 2
2012: August 15
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Introductory and background

- [1] **LANNS, M:** This is an application by the Claimant for an order that words allegedly spoken by the Defendants of and concerning the Claimant during a radio talk show programme are capable of bearing the meaning attributed to them in statement of claim.
- [2] At all material times, the Claimant Julian Francis (Mr Francis) was the Minister of Housing, Informal Human Settlements, Lands and Surveys and Physical Planning, and a Government Senator in the House of Representatives.
- [3] The First Defendant Edwardo Lynch (Mr Lynch) is, or was the host of a talk show program entitled the New Times. The New Times is aired and broadcast on Nice Radio Station on the FM band 96.7 and 101.3. The talk show programme is said to be nationally aired and

deemed to be a popular programme amongst the general population of St Vincent and the Grenadines.

- [4] The Second Defendant (BDS) is a limited liability company that owns and operates a Radio Station called Nice Radio. Nice Radio broadcasts programmes for general reception by persons in St Vincent and the Grenadines and St Lucia.
- [5] On 18th April 2008, Mr Francis issued a Claim in defamation against Mr Lynch and BDS.
- [6] Mr Francis complains that on the 21st, 23rd and 24th August 2007, during the course of the New Times Radio Programme, which was broadcasted on BDS, Mr Lynch, as servant or agent of BDS falsely spoke, and maliciously published defamatory words of and concerning Mr Francis.

Words allegedly spoken of Mr Francis by Mr Lynch on New Times on 21st August 2007

- [7] At paragraph 6 of the Statement of Claim, Mr Francis sets out the words complained of. They are lengthy, consisting of 18 pages. It is impractical or unnecessary for me to reproduce the full contents of those paragraphs. Some of them do not refer to, or concern Mr Francis, but are perhaps relevant for the purposes of context. The salient portions that appear to refer to Mr Francis are considered and reproduced where necessary.
- [8] Mr Lynch seemed to have read and or repeated certain statements in an email which he apparently received from one of his listeners. That email spoke to the contents of a news article dated August 10, 2007 headed "Not my Decision" says the Prime Minister". The news article seemed to allege that during the course of his address to students studying in Taiwan, the Prime Minister told the students that while persons should not be appointed because of nepotism, they should not be discriminated against because of biological reasons.

[9] Mr Lynch then asked if it was not biological relations why the Prime Minister did not OK Camillo Gonsalves as Solicitor General. He then stated that the Prime Minister is twisting up his tongue like a dingbat saying one thing in Taiwan and coming to St Vincent and do the very opposite.

[10] Following the comments about the Prime Minister and his address to students in Taiwan, and the comments regarding Camillo's appointment as Solicitor General, Mr Lynch allegedly said:

E.G. Lynch: "Saturday night gone, a Minister of Government, a top echelon of the Police Force and a drugs man were seen at Walliabou beach, late, late, late night....What were they doing? Well, of course probably they were waiting for a shipment on Phensic or Caphanol or something like that. And well, you know, nothing wrong with that because you know in our hospital maybe we don't have those kinds of things like sticking plaster, for example and maybe they were trying to take to the hospital. You understand what I mean by that? There is nothing wrong to be on beach but the point is you are known by the company you keep and if a man rear pigs, of course at some time of the day he would smell like the scent of pig. And if you dig arrowroot, at some time when you dig arrowroot a lot of dirt will be on your feet. And that is what they must answer. They must answer that. And I ask what were you – oh sorry they were bathing, late night sea bath. I used to do that, me and my friend Jucue, Morali, all ah we. We bathe all hour ah the night in Chateaubelair, all hour of the night, especially moonlight night. So there is nothing wrong with people being on the beach late Saturday night coming to morning you know, taking a shower. Maybe the night was very hot, that's the way they could cool down. But the point is why two of the vehicles were parked down at Rose Place? That's another question. Well that's near to the hospital because that where maybe what they were looking for will go; the hospital. Yeah.

Words allegedly spoken of Mr Francis by Mr Lynch on new Times on 23rd August 2007

- [11] In the words allegedly spoken of and concerning Mr Francis on 23rd August 2007, Mr Lynch is alleged to have said that he told the Prime Minister of some names of gang leaders in St Vincent and the Grenadines, and he hoped the Prime Minister was going to speak with those persons. During the course of the programme on 23rd August 2007, in response to a comment from a caller, Mr Lynch allegedly said:

E.G. Lynch: "Let me tell the Prime Minister as you on now ... that he must also go and speak to Julian, Police Brewster and arm "Que pasa" and ask them what they were doing on the beach late, late late coming to morning, three ah them alone. And the Prime Minister must say why because they suspect; which is not so that six men in the Black Squad who saw the whole thing, they disbanded; throw away those six (6) men yesterday and brought in six (6) new men..."

E.G. Lynch: "Let the Prime Minister go and talk about that and ask them if they are leaders of any gang...They were those three (3) men were seen on a beach; a lonely beach down on the Leewards side Saturday night. Well you have to say Sunday morning really."

E.G. Lynch: "And yesterday, when I broke the news ... they are accusing Black Squad man of telling me story, and the six (6) men who were on patrol on the Leeward side when those three gentlemen were either bathing in the beach at that hour of the morning or either picking up sticks and brick and wood and maybe."

E.G. Lynch: "Let the Prime Minister go and talk to them and let the Prime Minister find out why they disbanded the thing yesterday...The other thing the Prime Minister must find out is where the vehicles of Julian Francis, and Brewster, why those vehicles were down at, in Rose Place area when

they were down Leeward on a beach. He must find out that too and they must come and tell us about gangs in the country..."

E.G. Lynch: "Why a Minister and a Senior Police Officer vehicle must be down in Kingstown park up next to one another, but they down on a beach, quite down Walliabout, and they wanted to give Lie Detector Test to some members."

E.G. Lynch: "Julian again! Julian again! ...I hope the Prime Minister will ask those persons who were on the beach what was the mission to be on that beach at that time a morning coming down from midnight coming down to morning time. ... Well maybe those guys were on the beach in a dark place waiting for maybe some friends to come in and give them what they were there for; that is my, my thing. But I want to tell all you a no police give me information and you must understand that these beaches are frequented by people living in the area at night. So I give you a score, it's when they saw you all they went and hide, two (2) a them, they went and hide. They hid themselves and watch all the movements; that is how the story broke, so don't blame no squad now. You chase them out and because they refuse to take lie detector test, oh they give E.G. information, eh. What information? And where, why? Why the vehicles were down town in the Rose Place area and you quite down a Walliabout yah under. A Minister, a Senior Police Officer and another man from Buccament. I called their names already."

Caller: A want Selwyn to do Hadley Village people ah favour. Tell him to fix the piece a road above Ms Peters place nuh, vehicle a skid dey, and they got ah church right pan top the hill up dey ...

E.G. Lynch: "Ok. You hear that Selmon? They say fix the road. I go through there every week... Julian Francis passes there every day and they wouldn't fix

the road. ... What the hell they talking about fix road when I could go on a beach all hour of night with my high folks in high places and get what I want. I don't care about people and no road. Tell me about [what] goes on in and out of beaches and tell me how to mash up the squad because they suspect the squad talk. That is what they concerned about."

E.G. Lynch: "Now the questions a lot of persons are asking is ... did those men on the beach, Walliabou or whatever it is down Leeward, with two of their vehicles down Rose Place area; a Senior Minister and a Senior Police Officer with another man from the Buccament flat area there. The question is what were they doing there on the beach at that time of day because it was after midnight and did they have police protection."

E.G. Lynch: "Why three (3) persons on a beach, dark beach not even a flash light you have to peep, go close up to peep to see who they are, you understand..."

[12] Later in the Programme, Mr Lynch re-emphasized that he did not get any information from the raiding squad and questioned whether it is a top secret in the country for raiding squad of the police force to go and protect a Minister, a top police officer and another man who is known to deal in Phensic and Panadol and drugs. Mr Lynch allegedly said that there should be an explanation as to why the three men were on the beach instead of harassing persons in the Police Force with Lie Detector test.

[13] In response to a caller who commented that there was a school of jack fish; so the three men were pulling seine, Mr Lynch allegedly replied:

E.G. Lynch: "A wonder if Julian get anymore ah them fish boy. Ah wonder if he waited until the fish came in. Did you Julian? Call me and tell me man. You know how I like my free ting and so on and so on and so on. So you better come and tell me what's really going on down there."

Words allegedly spoken of Mr Francis by Mr Lynch on New Times on 24th August 2007

- [14] In the programme aired on New Times on 24th August, Mr Lynch gave an overview of the programme of the 23rd August 2007, stressing the many meetings held with the raiding squad and the many transfers that have been made. He corrected the date when the alleged beach event took place. He said that the beach event took place on Saturday "Fourth" August 2007 and not "Eighteenth" August 2007.

Alleged natural and ordinary meaning of words

- [15] The Statement of Claim alleges that the words were meant and were understood to mean that the Claimant
- (a) was involved or suspected of being involved in a drug trafficking or drug related activity; or other related activity or other illegal operation. Alternatively, there were reasonable [grounds] for believing or suspecting that he was involved or suspected of being involved in drug trafficking or other illegal operation;
 - (b) was conspiring with others to import narcotics into St Vincent and the Grenadines or commit some other drug related or illegal activity. Alternatively, there were reasonable [grounds] for believing or suspecting that he was involved or suspected of being involved in drug trafficking or other illegal operations;
 - (c) is by his alleged conduct guilty of the offence of misbehavior in public office;
 - (d) Has used his office improperly in order to silence policemen who allegedly observed his presence and /or his actions in question. Alternatively there were reasonable [grounds] for believing or suspecting that the Claimant had so used his public office;

- (e) is in cohorts with one "Que Pasa" a person alleged to be or reputed throughout St Vincent to be a drug dealer and who has been convicted prior of offences relating to narcotics and or illegal substances.

Meaning alleged by way of Innuendo

[16] In the Particulars of Innuendo, Mr Francis states that

- (i) he repeats paragraphs 1 and 4 of the Statement of Claim;
- (ii) the words **"Well of course, probably they were waiting for a shipment on Phensic or Panadol or Caphanol or something like that"** were understood as a disguise for an illegal drug and was understood to mean that the Claimant was waiting for a shipment of drugs and other illegal substances;
- (iii) the said words in (ii) above and the following words **"and another man who we all know deals in Phensic and Panadol and those kind of thing and drugs and thing,"** and **"Que Pasa"** meant and were understood to mean that the Claimant was in the presence of a person alleged to be or reputed throughout St Vincent to be a drug dealer and therefore was involved or alternatively suspected of being involved in a drug trafficking or related activity;
- (iv) The words **"that six (6) men in the Black Squad who saw the whole thing, they disbanded; throw away those six (6) men yesterday and brought in six (6) new men"** meant and were understood to refer to members of a special Unit in the Royal St Vincent Police Force who allegedly saw the Claimant on a beach as alleged by the First Defendant.
- (v) The words **"Julian Francis passes there every day and they wouldn't fix the Road ... What the hell they talking about fix road when I could go on a beach all hour of night with my high folks in high places and get what I want"** meant and were understood to mean that the Claimant

was allegedly engaged in drug smuggling or related activities and had no interest in fixing the road as it facilitated his alleged activities.

The Application

[17] The application was filed on 29th May 2009. Mr Arthur Francis Williams swore to an Affidavit in support of the Application.

[18] The grounds of the application are stated to be 1) Pursuant to Part 69.4 of the Civil Procedure Rules 2000; and 2) This [determination of meaning] will assist the matter being dealt with expeditiously and save time and resources. The application is opposed.

Issue

[19] The issue for determination is whether the words in question are reasonably capable of bearing the meaning alleged.

Claimant's position

[20] The Claimant's position is that CPR 69.4 confers jurisdiction on the court to determine whether or not the words complained of are capable of bearing the meanings attributed to them in the statement of case. After quoting Rules 69.4(1) and 69.4 (2), Mr Williams submitted that once the court finds that the natural and ordinary meanings pleaded by the Claimant are within the range of meanings which the words complained of are reasonable capable, the court ought [not] to dismiss the Applicant's application. It is not the function at this stage to determine the actual meaning of the words complained of, submitted Mr Williams.

[21] Mr Williams next looked at the case law on the issue, and submitted that the court ought to be guided by the principles enunciated in **Skuse v Granada Television Limited** [1996] EMLR 278, and restated and applied by Alleyne JA in **Dr Ralph E. Gonsalves v Edwardo Lynch and BDS**, Claim No SVGHCV2002/406.

[22] After having quoted the applicable principles, Mr Williams contended that the words complained of are in substance and in fact allegations of fact and accusatorial. They accuse the Claimant expressly and by implication.

[23] Finally, Mr Williams submitted that on a proper application of the law, the natural and ordinary meanings pleaded at paragraph 5 (a) to (3) (should be paragraph 7 (a to e) of the Statement of Claim are well within the range of meanings of which the words complained of are reasonably capable. The words complained of clearly accuse Mr Francis of corruption and criminal misconduct, submitted Mr Williams, and thus the Applicant's application ought to be granted with costs.

Defendants' position

[24] The gist of the Defendant's position is that the Court ought not to proceed to determine at this stage of the proceedings whether the words complained of in paragraph 5 of the Statement of Claim are capable of bearing the meanings alleged in paragraphs 7 and 9, because in paragraph 7 of the Defence, the Defendants put the Claimant to proof on the accuracy of the transcripts pleaded and until the Claimant has proved to the satisfaction of the Court that what is pleaded in the Statement of Claim are the actual words alleged to have been spoken by Mr Lynch, it would be improper to determine the meaning of the words pleaded in the Statement of Claim.

[25] Mr Commissiong QC argued that the court has no evidence before it to verify the accuracy of the words allegedly spoken by Mr Lynch. Learned QC described three operators that are required to ensure the accuracy of the words spoken – 1) the person who takes the recording, 2) the person who listens to the recording and transcribes it; and 3) an independent person who checks the written version against the recording.

[26] Mr Commissiong QC next suggested the procedures to be followed in verifying the accuracy of the words allegedly spoken by Mr Lynch. Having done so, Learned QC stressed that no attempt has been made in the pleadings to verify the accuracy of the

transcriptions; so the Court has no inclination whether the procedures to verify accuracy have been followed. In the absence of evidence to verify accuracy, it would be improper for the Court to embark on the exercise of determining the meaning of words complained of, because the Court has no proper material before it for that purpose, submitted Mr Commissiong, QC.

[27] No attempt was made, and no prima facie case of originality has been made out on the material before the court, contended Mr Commissiong QC.

[28] Mr Commissiong QC then adverted to the issue of the context in which the words were spoken, submitting that the court must take into consideration not only the actual words used, but the context in which they were used. He was of the view that context can only be gathered if the entire broadcast is before the court, and, contrary to what is pleaded in paragraph 6 of the Statement of Claim, the entire broadcast is not before the court.

[29] Mr Commissiong QC then adverted to the innuendo meanings suggested by Counsel for Mr Francis. In so doing, he sought to examine selected portions of the Statement of Claim; in particular words set out on pages 11, 17 and 18 and surmised what the reasonable man could suggest those words mean. As far as Mr Commissiong QC is concerned, there may very well have been more antidotes in the broadcast, but the Court cannot know because the whole of each transcripts of the New Times Programme is not before the Court; so the court has no opportunity to assess the words complained of.

[30] Mr Commissiong QC concluded his submissions with a reference to CPR 69.4 (2) which he quoted, and then stated that while the Defendants do not concede that the Court can at this stage properly give a ruling on the meaning of the alleged words, they cannot deny that the Court has a wide discretion pursuant to CPR 69.4 (2).

[31] However, the Defendants maintain that the Court should leave it to the trial judge to determine the accuracy of the tapes because at trial, the proper safeguards for their accuracy and safekeeping could conveniently and properly be investigated. It is only after

such investigations have been carried out that the Court ought properly to address its mind to the meaning of the words, submitted Commissiong QC.

Cases referred to

[32] In the course of his submissions Learned QC referred to the following cases which I have taken account of:

- 1) **R v Maqsud Ali; R v Ashiq Hussain** (1965) All ER 464, at 469 D;
- 2) **R v Robinson; R v Harris**, (1972) @ All ER 699 at 701f-702a;
- 3) **Neville v Fine Arts Co** (1897) AC 68 at 72 and 78;
- 4) **Chalmers v Payne** (1835) 2 CrM & R at 159;
- 5) **Luis v Daily Telegraph** (1963) All ER 131 at 155 C
- 6) **Mapp & Others v News Group Newspapers Ltd & Others** (1977) WLR 260 at 265 A.

The court is of the opinion that these cases, while properly decided on their own peculiar facts, are inapplicable for the purposes of the application before the court.

The applicable law

[33] There is no question that the Court has jurisdiction and power under the Civil Procedure Rules 2000 (CPR) to determine whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case. This jurisdiction and power exists under CPR 69.4 (1) and (2):

“69.4(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 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."

The applicable principles

- [34] The principles by which a court should be guided in determining the meaning of words complained of were aptly stated by Mr Williams in his submissions made on behalf of Mr. Francis.
- [35] In **Dr Ralph E. Gonsalves v Edwardo Lynch and BDS**, Claim No SVGHCV2002/405 & 406, Alleyne, J dealt with a similar application to determine meaning. In that case, Alleyne J quotes Lord Reid in **Luis v Daily Telegraph** (supra) as saying:

"what is the sense in which any ordinary reasonable man would understand the words of the communication so as to expose the plaintiff to hatred, or contempt or ridicule ... it is not enough to say that by some person or another the words might be understood in a defamatory sense."

His Lordship continued:

"These statements of the law appear to have been generally accepted and I would not attempt to restate the general principle.

"In this case, it is, I think sufficient to put the test first in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put to the words in question.

“What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression.”

[36] In the same case, Alleyne J quotes Lord Bingham M.R in **Skuse v Granada Television Limited** (1996) EMLR 278 at 285 as saying:

- “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 watching the programme once...
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 person generally.
6. In determining the meaning of the material complained of the court is not limited by the meaning which either the plaintiff or the defendant seeks to put on 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.

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

[37] Applying the above principles to the present case, I have analyzed the words, and I have concluded that, prima facie the words complained of, in their ordinary and natural meaning are capable of bearing the meaning ascribed to them in paragraph 7 of the Statement of Claim.

[38] Ultimately, the question of what the words actually mean is a matter for the jury. It may be that the words are capable of other meanings than those pleaded by the Claimant. The jury has to decide, on the totality of the evidence, if the words are in fact defamatory. This point was succinctly made by Lord Morris of Borthy-Best in **Jones v Skelton**, [1963] 3 All ER 952 at p 958 letter e;

"It is well settled that the question whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for a decision by the court. If the words are so capable then it is a question for the jury to decide whether the words do in fact convey a defamatory meaning ... "

[39] Obviously, I am unable to agree with the submissions of Mr Commissiong QC that the court ought not to determine the meaning at this stage because there is no evidence of accuracy of the words allegedly spoken by Mr Lynch. The rules of pleading in a defamation case are set out in Part 8 and Rule 69.2 of the CPR. I can find no breach of those rules. If the Defendants believe that there is a breach of any of those rules, then the Defendants should make the relevant application (s) under the CPR.

[40] Mr Commissiong QC referred to certain averments in the Defence, and sought to put his own meaning to certain words complained of, and certain words that Mr Francis has not bothered to put a meaning to. However, based on **Skuse**, supra, the Court is not at this

stage concerned with the merits or demerits of any possible Defence, and the Court is not limited by the meaning which Claimants or Defendants seek to put on the words.

Case Management Conference not yet concluded

[41] It is important to note that this matter has only progressed to the stage of the first case management conference which has not yet been concluded. There has been no request for further information. No disclosure order has yet been made and no witness statements have been filed or exchanged. The court is required to actively manage cases; so it is incumbent on the court to give directions at the case management conference to ensure that all relevant documents are before the court to allow for the proper and speedy determination of the issues in the case.

[42] In all the circumstances of this case, I find that the meanings attributed to the words complained of are within the permissible range, and I propose to rule in favour of the Claimant. Further, I propose to order that the matter proceed to further case management conference with all convenient speed. Given the nature of the application, I do not propose to make any order as to costs.

Conclusion

[43] IT IS HEREBY ORDERED AND DECLARED that

1. Prima facie, the words complained of are capable of bearing the meaning ascribed to them in paragraph 7 of the Statement of Claim.
2. The matter is to be set down for continuation of the First Case Management Conference during the week of 24th September 2012
3. There shall be no order as to costs

[44] Last, but by no means least, I am grateful to Mr Commissiong QC and to Mr Williams for their very helpful submissions and commend them for their industry.


PEARLETTA E. LANNS
Master