

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO DOMHCV2008/0436

BETWEEN:

1. LENNOX LINTON
2. EDISON JAMES

Claimants

AND

1. ANTHONY W. ASTAPHAN
2. FRANKIE BELLOT
3. ISLAND COMMUNICATIONS LTD
4. MERVIN PAUL
5. THE ATTORNEY GENERAL OF DOMINICA

Defendants

Appearances:

Mr B. McDonald Christopher for Claimants
Mrs Heather Felix-Evans for the Defendants

.....
2009: January 19
September 26
2010: June 4
.....

Decision

- [1] **LANNS, MASTER:** In this case, the Claimants have sued the Defendants for damages for defamation based on certain words, statements and questions which the Claimants allege the First Defendant published over Kairi FM and Q95 FM Radio Stations, in The Sun newspaper and via the Internet; and which the Second and Fourth Defendants allegedly published over Kairi FM Radio Station. Defences and Reply to Defences have

been filed but there has been no case management conference, no discovery, and no request for further information.

[2] Pending before the court are three applications:-

(i) Application by First Defendant

By an amended Notice of Application filed 5th January 2009, the First Defendant applies to the court for orders striking out numerous parts of the Claimants' Statement of Claim as well as the Claimants' Reply on grounds that they are bad in law; that they disclose no reasonable grounds for bringing the claim; and that they constitute an abuse of the process of the court. In relation to the Reply, the First Defendant say that it is prolix, does not comply with Parts 8 or 10 of the CPR 2000 and, or is an abuse of the process of the court.

(ii) Application by Second and Fourth Defendants

By an amended Notice of Application filed on 5th January 2009, the Second and Fourth Defendants apply to the court for orders striking out portions of the Statement of Claim and the entire Reply on the grounds that

In relation to the Statement of Claim

- a. It discloses no reasonable case against them; and or
- b. It is an abuse of process; and or
- c. It is not capable of defamatory meanings about the Claimants or either of them;
- d. It contains irrelevant and inappropriate material;
- e. The Claimants' case discloses no reasonable case against the Second and and/or Fourth Defendants for punitive, aggravated or exemplary damages;
- f. The grounds of their application raise questions of law and not questions of fact.

In relation to the Reply the 2nd and Fourth Defendants say that

- a. It contains mere emotive and pejorative argument and or invective against the First Defendant
- b. It does not contain any material or a summary of material facts relevant to the issues in dispute or raised by the Defendants in their Defence.
- b. It is an abuse of process and/or is likely to obstruct the just disposal of the proceedings.
- c. It is prolix and fails to comply with the requirements of Part 8 and /or 10 of the CPR 2000.

(iii) Application by Claimants

By a Notice of Application, filed 30th December, 2008, and supported by affidavit, the Claimants apply to the court for an order that

- (1) The [original] Notice of Application filed by the First, Second and Fourth Defendants on 10th December 2008 be dismissed;
- (2) The Defences of each of the Defendants be struck out in their entirety and judgement be entered for Claimants; and
- (3) Directions be given for assessment of damages.

The grounds of the Claimant's application are that:

In relation to the Claimants' application to strike out the Defendants' applications to strike:

- (1) The Claimants filed a Reply on 30th December 2008 which have fairly amended and cured any deficiencies in the originally filed Statement of Claim.

In relation to the Claimants' application to strike out the Defendants' Defences:

- (1) The Defences are replete with accusations against the Claimants which are irrelevant and unconnected with the issues in the action.
- (2) The Defences of Fair Comment, Justification and Qualified Privilege cannot be sustained. The Defendants imputed something disgraceful, did not act in good faith and did not honestly believe the information obtained from a confidential source.
- (3) The Defendants pleaded that they spoke on the radio but could not admit, pending disclosure of the tape of the entire broadcast. The Defendants have custody of the original audio tape and had adequate time to check and monitor what words they spoke.
- (4) The Defendants have not set out all the facts on which they rely to dispute the claim, contrary to CPR Parts 10.5 (1) and (5) by annexing to the defences the document which they claim to have and which are material to their defamatory imputations against the Claimant.
- (5) In the premises, the Defendants published false information with malice and without awful excuse. The Defences are frivolous, vexatious and an abuse of process.
- (6) At paragraph 41.1 and 44.14 of the Defence of the 2nd and 4th Defendants, it is admitted that the defamation originated from the 1st Defendant; the 2nd and 4th Defendants decided to publish the imputations which were false and published them in furtherance of a conspiracy.
- (7) The Court must exercise its coercive power to strike out under CPR PART 26.
(2) (i) and under its inherent jurisdiction by reason that the defences disclose

no reasonable defence and are otherwise an abuse of the process of the Court.

- [3] All applications were heard together. All parties filed written submissions and addressed the court.
- [4] For the reasons given below I propose to strike out the claim in its entirety and grant leave to the Claimants to file and serve a fresh Statement of Claim in accordance with the reasons given. I do not think it would be necessary to consider the application to strike out the Defendants' Defence since they will need to file fresh Defences. Further, I propose to strike out the Reply in its entirety, because whatever deficiencies in the Defence the Reply is intended to cure, could and should be addressed in the fresh Statement of Claim. The Claimants will have an opportunity to reply to the fresh Defence of each Defendant. Some of the objections appear to me to be well- founded, and certain of the paragraphs appear to be inter-related. To strike parts of them would not be satisfactory because of the effect this would have on other parts of the pleading. Moreover, the pleadings appear to be confusing in its unfocussed and overlapping concepts and causes of action and their failure to identify clearly and precisely the material facts relevant to each. The following criticism and conclusion of Low J in **Lysco v Bradley** [2004] O.J. No. 4727 (SCJ) is, in my opinion equally applicable to the Statement of Claim and Reply in this case.

"The pleading in its present form is monstrously unwieldy and does not coherently set out the case the Defendants have to meet. It does not properly serve the purpose of a pleading.

In light of the foregoing, I am of the view that the most appropriate disposition of the motion is to strike the pleading in its entirety and grant leave to the plaintiff to deliver a fresh statement of claim in accordance with these reasons (66-67)."

The parties

- [4] The First Claimant is a public media person.
- [5] The Second Claimant is the President of the Opposition United Workers Party (the UWP) and former Prime Minister of Dominica.
- [6] The First Defendant is an Attorney-at-Law and a Member of the Inner Bar of the Eastern Caribbean Supreme Court.
- [7] The Second Defendant is a business man and a radio talk show host.
- [8] The Fourth Defendant is a radio talk show host

The Statement of Claim

- [9] The Statement of Claim is lengthy. In addition to its 20 paragraphs extending over 31 pages, it incorporates three Appendices consisting of 8 pages. It pleads a claim for aggravated, exemplary, and punitive damages for libel. It appears that further claims are pleaded. These include, "misdemeanour of misinformation", "dishonest fabrication", "conspiracy" and "forgery" with a clear intention to defame".

The court's power to strike

- [10] A statement of case that fails to comply with rule 8.7 or 10.5 is liable to be struck out under rule 26.3(1) (b) (c) and (d). Rule 26.3 states:

"26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case it appears to the court that –

- (a) There has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;
- (b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim;
- (c) The statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) The statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

The Test on an application to strike

[11] Striking out is a jurisdiction which is to be exercised sparingly. In the words of Sir Dennis Byron in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al** (Civil Appeal No 20A of 1997), "this summary procedure should only be used in clear and obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court." The reason for proceeding cautiously is that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. (See **Hector v. Joseph** - Dominica Civil Appeal No 6 of 2003). The court must therefore be persuaded that a party is unable to prove allegations made against a party or that the statement of case is incurably bad; that it discloses no reasonable ground for bringing or defending a case, and has no real prospects of succeeding at trial.

[12] **CPR 8.7 (1)** requires a party to plead "all the facts" upon which he relies in his statement of case. In other words a party may not plead law, comment or argument in a statement of case. To establish reasonable grounds for bringing a claim in defamation, a claimant must plead a cause of action known to the law of defamation; he must plead material facts and or particulars which are capable of disclosing reasonable grounds for bringing a claim for damage in defamation; he must plead publication and meanings which show that the

words complained of are reasonable capable of bearing a defamatory meaning of the Claimant.

- [13] The material facts to allege a complete cause of action for defamation include the identity of the parties; the words complained of; the meaning of those words; that the words refer to the Claimant; that they were published to third parties – (CPR 69. 2).
- [14] To determine the natural and ordinary meaning of words, it is necessary to take into account the context in which the words were made and the mode of publication.
- [15] The natural and ordinary meaning of words is to be determined according to the fair and natural meaning in which reasonable persons with ordinary person's general knowledge and experiences of worldly affairs would likely to understand them in the context in which they were used.
- [16] The test to be applied by the court is whether the words complained of in their natural and ordinary meaning, determined in accordance with the principles stated above, may tend to lower the claimant in the estimation of reasonable persons or to expose the claimant to hatred, contempt or ridicule.

The paragraphs under attack

- [17] The First Defendant seeks to strike out the following paragraphs of the Statement of Claim 8D (iv), 8E(ii), 8E(iii), 8E(iv), 8H (i), 8H(iii), 8H(iv), 8H(v), 8H(vi), 9, 13(iv), 14(v), 15, 15(b), 15(e), 15(g), 15(f), 19, 19(i), (ii), (iii), (iv), and (vi).
- [18] The Second and Fourth Defendants seek to strike out the following paragraphs of the statement of Claim: F (ii), G (ii), (iii), and part of (iv), 9, 13 (iv), 14(v), 19, 19(1), (iii), (viii), (ix), (xi), (xii), and (xiii).

First Defendant's objections

- [19] In considering the Defendants' objections to paragraphs in the statement of claim, I propose to follow the order in which they are set out in the submissions used at the hearing.

Sub-paragraph 8D (iv)

- [20] This sub-paragraph alleges that

“ordinarily and naturally these words also mean that by his own admission, Anthony Astaphan raised questions about the financial affairs of Edison James and Lennox Linton for the specific purpose of establishing defamatory inferences about him in the public domain, and he did so because he claims to believe that fees paid to him from the public purse for public business is equivalent to private transactions that have no connection to state resources”.

- [20] Mrs Felix-Evans submitted that sub-paragraph 8D(iv) has no place in the Statement of Claim and should be struck out as an abuse of process especially since it appears to have been included for an ulterior motive to attack the First Defendant under the cloak of privilege in what is essentially a political dispute.

- [21] Relying on **CPR69.4 and Mapp v News Group Newspapers** [1998] QB 520, Mrs Felix-Evans further submitted that any meaning that is set out must be capable of being defamatory of the Claimant. If it is not then it must be struck out.

- [22] She also relied on the words of Neil LJ in **Berkoff v Burchill** [1996] 4 All ER 1008 at 1018 that it is trite law that in determining the meaning of words the intention and knowledge of the publisher is immaterial.

- [23] In my judgment, in light of **CPR 64.4, Mapp's case and Berkoff's case**, the pleaded meaning in sub-paragraph 8D (iv) falls outside the permissible range. I would therefore strike out sub-paragraph 8D(iv).

Sub paragraph 8E (ii) and (iii)

[24] Sub-paragraph 8E (ii) reads:

"The question for Edison James and Lennox Linton (see Appendix 1 and 2) from a senior lawyer with more than two decades standing at the bar represent nothing but malicious premeditated plan to misinform without taking responsibility for the false assertion of fact deliberately engaged to defame."

And sub-paragraph 8E (iii) reads

"In both cases, Mr Astaphan's list of questions closes with a most instructive confirmation of reckless dissemination of false information:

"If you deny all of these questions, will you give written authorisation for the bank to release all of your bank statements including prior to and for the year 2007, to the leaders of the three political parties?"

[25] Mrs Felix-Evans relied on a passage from **Bullen & Leake on Pleadings and Precedents** wherein it is stated at 1-25 that

"Every pleading must contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statements must be as brief as the nature of the case admits'.

[26] Mrs Felix-Evans submits that the assertions in sub-paragraphs 8E (ii) and (iii) are otiose, improper and unnecessary, have no place in the pleadings and should be struck out. I agree entirely with this submission. The assertions in issue are:

a) "...nothing but a malicious, premeditated plan to misinform without taking legal responsibility for the false assertions of fact deliberately engaged to defame".

- b) "... a most instructive confirmation of reckless dissemination of false information".

[27] To my mind, based on **(CPR62.2)**, sub paragraphs 8E (ii) and (iii) are not facts material to the cause of action; and must be struck.

Sub-paragraph 8E (iv)

[28] Sub-paragraph 8E (iv) states

"In their natural and ordinary meaning, these words tell us that Anthony Astaphan who masterminded the attack on the reputations of the Claimants, has absolutely no authentic and/or truthful information about their financial affairs, and as a Senior officer of the Court, he merely indulged in vicious gossip mongering for which he knows there is no public interest right to broadcast.

[29] In my view the same observations I made in respect of sub-paragraph 8D (iv) must be said of, or apply to sub paragraph 8E (iv). This sub paragraph must be struck. The meaning attributed to the words fall outside the permissible range.

Sub-paragraphs 8H (i), 15(f), and 19(vi)

[30] Sub-paragraph 8H (i) reads thus:

"On November 6th 2008, after the Claimants, in a letter from their attorney dated October 24th 2008, and in statements on Q95 FM on October 25th 2008, denied the accusations and imputations of wrongdoing in the questions crafted by the 1st Defendant for publication in The Sun newspaper, the 1st Defendant caused the questions to be circulated via the internet in reckless disregard of the fact that the claimants had already dismissed the broad premise of the questions as patently false."

[31] The Claimants do not set out the specific words alleged to have been published on the internet, at what address, when they were published, and the basis on which it can be said that the first Defendant caused the words to be published. It is not sufficient to plead that the First Defendant caused the information to be circulated on the internet. I find and hold that this sub-paragraph does not set out material facts and that it offends the requirements of CPR 69.2.

[32] 15(f) reads:

"Claimants in writing and orally, contradicted and explained the imputations contained in the defamation, but on 27th October 2008, the 4th Defendant on radio announced that "Don Christopher writing letter that is laughable". That was a letter before action sent by Claimants solicitor. After he received that letter, the 1st Defendant caused to be circulated via the internet on November 6th 2008, the list of questions to the Claimants that are used as a key feature of the defendants smear campaign against the Claimants."

[33] This sub-paragraph identifies the first Defendant, and sets out a date when the "list of questions" was allegedly circulated by him via the internet, but it does not set out the words alleged to have been circulated. Nor does it state how, or the manner in which the First Defendant published the words on the internet. This sub-paragraph is therefore struck out for the same reason I struck out sub-paragraph 8H (i).

[34] Paragraph 19 (vi) is one of six matters relied on to support the claim for aggravated, exemplary or punitive damages. It alleges that

"19(vi) On November 6th, 2008, the 1st Defendant caused to be circulated via the internet his list of smear campaign questions to the Claimant, notwithstanding the fact that the 1st Defendant was aware of the truthful responses by the Claimants to his allegations on Q95 FM on October 25th, 2008 and had received a letter from

the Claimants attorney dated October 24th 2008 categorically denying the accusations and imputations of wrongdoing against them.”

[35] . **Rookes v Barnard (no1) [1964] AC 1129** is authority for the proposition that exemplary damages are not available as a matter of law unless a party pleads that the Defendant was a public official who acted oppressively. The first Defendant is not a public official. It is noted that the Claimants have mentioned a specific date, but they have not pleaded facts upon which to base a claim for exemplary damage against the First Defendant. Accordingly, so much of sub-paragraph (vi) as refer to exemplary damages against the First defendant must be struck.

[36] Those sub-paragraphs seem to concern accusations that the First Defendant is responsible for circulating questions on the internet.

Sub-paragraphs 8H (iii), 8H(iv), 8H(v) and 8H(vi)

[37] 8H (iii) reads:

“In their natural and ordinary meaning these words indicate that the 1st Defendant has decided to deliberately ignore the October 24th 2008 affirmation of the Claimants in the letter from their attorney that contrary to the accusations of the defendants both by assertion of fact and innuendo, they categorically deny any knowledge of, or involvement in, any arrangement in which funds amounting to \$537,660.13 allegedly provided in 2005 for the preparations of the United Workers Party were allegedly misappropriated by Edison James who is alleged to have made nine transfers totalling \$113,500.00 from his St Kitts and /or Antigua account to the St Kitts account of Lennox Linton between August 22nd 2007 and August 18, 2008.”

[38] 8H(iv) reads:

"Naturally and ordinarily, the words mean that the 1st Defendant is satisfied that there is just cause of action available to the claimants in the event that the defendants made unfounded accusation of "illegality and criminality".

[39] And 8H(v) reads:

"The words also mean that while the 1st Defendant has no documentary evidence to justify the false, defamatory information, publicised by the defendants about the Claimants, he is prepared to team up with the 2nd Defendant to ridicule the attempts of the Claimants to seek justice."

[40] And 8H (vi) reads:

"Additionally the words mean that the 1st Defendant is of the view that hiding behind the explanation that he only "asked question" is sufficient to exonerate him from legal responsibility for his untruthful statements and the negative inferences, doubts and smears he expected would emerge as consequences of the questions asked."

[41] Those subparagraphs purport to further set out the natural and ordinary meaning of the words complained of.

[42] To determine the natural and ordinary meaning of words, it is necessary to take into account the context in which the words were made and the mode of publication.

[43] The natural and ordinary meaning of words is to be determined according to the fair and natural meaning in which reasonable persons with ordinary person's general knowledge and experiences of worldly affairs would likely to understand them in the context in which they were used.

[44] The test to be applied by the court is whether the words complained of in their natural and ordinary meaning, determined in accordance with the principles stated above, may tend to lower the claimant in the estimation of reasonable persons or to expose the claimant to

hatred, contempt or ridicule. I accept the submission by Mrs Felix-Evans that any meaning must be defamatory of the Claimant.

- [45] I am of the view that the meanings set forth in sub-paragraphs 8H (iii), 8H(iv), 8H(v) and 8H(vi) fall woefully short of being defamatory of the claimants. I am of the view that the words are not capable of having the meaning attributed to them by the Claimants in sub-paragraphs 8H (iii), (iv) (v) and (vi). They are impermissible. They are prolix, scandalous an abuse of process. They must be struck.

Paragraphs 9, 13(iv), 14(v)

- [46] Paragraph 9 alleges

“9. Overall, the words complained of are untrue in substance and in fact; they were not spoken in the context of, or on an occasion of qualified privilege; they do not represent fair comment on any matter of public interest; they were spoken with malice aforethought; they deliberately misled the public into believing that the allegations were based on legally obtained confidential banking information; and they introduced the misdemeanour of misinformation; dishonest fabrication, conspiracy and forgery with a clear intention to defame.”

- [47] The First Defendant's objection is that paragraph 9 of the Statement of Claim appears to be trying to plead that each defendant is responsible for having committed a series or other torts, in addition to libel – “misdemeanours of “misinformation”; “forgery”; “conspiracy” “dishonest fabrication”. She submitted that if these allegations are to remain, the Claimants should explain the legal basis and then identify each element of the offence in relation to each Defendant separately. I agree. This is a case for damages for defamation and nothing else. No factual or legal basis is pleaded for the allegations of misinformation, forgery conspiracy or dishonest fabrication. Material facts must be pleaded to support each element of each tort. As presently framed, paragraphs 9 is not sufficiently clear to

enable each Defendant to plead to them. Further, I take the view that the allegations as pleaded are scandalous and vexatious and an abuse of process and they lack particularity. They must be struck out.

[48] Subparagraph 13(iv) provides in part:

“13(iv) ...were communicated to the public for the dominant Anthony Astaphan purpose of bringing Edison James and Lennox Linton into public odium and disrepute because they had commented publicly on fees of \$95,091.00 paid by the State to the 1st Defendant for what the 1st Defendant claimed was representation of the State in the British Virgin Islands in “two major matters” - the liquidation of Shangri La International Holding Limited and the rectification of the share register of the Shangri La International Holding Limited – when in fact the government is only a party in the share rectification case.

[49] The First Defendant's objection to this sub paragraph is that there is no such thing in law as “the dominant Anthony Astaphan purpose”. Of that sub-paragraph I would strike only the words “dominant Anthony Astaphan” I would also strike the words following the word “disrepute” in line 3 thereof. I do not see any irrelevancy in the other words.

[50] Subparagraph 14(v) states as follows:

“14(v) The words complained of were brought to public attention as a result of a personal Anthony Astaphan vendetta against Edison James and Lennox Linton arising out of Mr Astaphan's discomfort with legitimate and so far unanswered questions from both gentlemen about discrepancies in the justification for his fee of \$95,091.00 charged to the public purse for representing government in a share rectification matter in the British Virgin Islands.

[51] The First Defendant's objection to this subparagraph was that this pleading must be struck for failure to properly plead it. What in law is a "personal Anthony Astaphan vendetta?" Mrs Felix-Evans questioned.

[52] According to the Concise Oxford Dictionary 10th ed. the word "vendetta" means

- "1. a blood feud in which the family of a murdered person seeks vengeance on the murderer or the murderer's family.
2. a prolonged bitter quarrel with or campaign against someone."

In the present case, it seems clear from the context that the Claimants have used the word "vendetta" in the sense of a prolonged bitter campaign against the Claimants.

[53] What sub-paragraph 14(v) seems to be saying is that all of the Defendants are engaged in a vendetta to damage the reputation of the Claimants because of Mr Astaphan's discomfort with legitimate and so far unanswered questions from both Claimants about fees charged to government. There are no particulars as to how the second and fourth Defendants agreed to carry out the vendetta. The failure on the part of the Claimants to give any particulars in respect of this "pejorative" and "unparticularised" allegation offends the rule requiring particularization. In **Spencer v Attorney General of Antigua** (supra) the Court of Appeal made it clear that mere invective or pejorative allegations are impermissible. On this basis, subparagraph 14(v) is struck.

Paragraph 15, 15(b), (e), (f), (g)

Allegations of Malice

[54] Paragraph 15 and its subparagraphs allege in part:

"15. The Defendants were malicious.

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(a) ...

(b) Statements made by Defendants not in anger but made in the knowledge that the information published was false.

(c)....

(d)...

(e) Before commencement of this action an opportunity was given, but the Defendants made no retraction and ignored the opportunity to apologise. Further the fourth Defendant continued to propagate false charges against the Claimants that "when we talk about tax evasion...we need to find out whether Claimants are being paid in St Kitts."

(f) "Claimants in writing and orally, contradicted and explained the imputations contained in the defamation, but on 27th October 2008, the 4th Defendant on radio announced that "Don Christopher writing letter that is laughable". That was a letter before action sent by Claimants solicitor. After he received that letter, the 1st Defendant caused to be circulated via the internet on November 6th 2008, the list of questions to the Claimants that are used as a key feature of the defendants smear campaign against the Claimants."

(g) The Defendants relied on false information which originated from the 1st Defendant; but after having been warned the 1st and 4th Defendants went on to re-publish the defamation by repetition that was not innocent.

[55] Mrs Felix-Evans submitted that in order to discharge the burden of proving a malicious state of mind on the part of the First Defendant, the Claimants must adduce evidence that is probative of malice and not merely equally consistent with its existence or non existence. She submits further that none of these subparagraphs do so, and if they are struck out together with sub-paragraph (f) there is no case of malice against the First Defendant.

[56] I am in agreement with Mrs Felix-Evans' submission that the Claimants have offered no evidence to support the allegation of malice. Rule 69.2 (c) specifically provides:

"If the claimant alleges that the defendant maliciously published the words or matters –give particulars in support of the allegations."

[57] At paragraph 15, the Claimants have pleaded general allegations of malice against all the Defendants. There is an implied reference to bad faith in sub-paragraph 15(a) – "malice inferred from publication of false statements not in good faith but for purpose of injuring the Claimants' reputation."

[58] At paragraph 15(d) general allegations of hostility are pleaded against all Defendants.

[59] At paragraph 15(e) no evidence or explanation is given as to how the opportunity was given. In the circumstances these sub-paragraphs must be struck out or particularised.

Paragraph 19

[60] This paragraph states:

"19. The Claimants will rely on the following facts and matters to support their claim for aggravated, exemplary or punitive damages.

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(i) All Defendants knew and ought to know that the allegations were untrue.

(ii) The 1st Defendant is a Senior Lawyer (Senior Counsel) of the Inner Bar and had a duty not to stir up strife, but to maintain integrity, honour and dignity of the legal profession. Since July 25, 2008, the said 1st Defendant issued an e-mail to all members of the Bar asserting that he will never permit persons to use his status as a Senior Counsel "as an insidious

means of silencing" him on radio or otherwise. He relied on the provision of free speech under the Constitution.

- (iii) The defamatory statements were concocted and publicised by the 1st Defendant a Senior Counsel with more than 20 years standing at the Bar, who conspired with 2nd and 4th Defendants in behaviour unbecoming of an officer of the Court.
- (iv) Based on his own public record statements, (see appendix 3) the Defendant is aware of the importance of an individual's reputation and the public interest requirement that reputation should not be debased falsely. He has purported to be a strong advocate of the moral and legal standard that "there is no public interest value in false statements of fact" and no public right to misinformation.
- (v) ...
- (vi) On November 6th, 2008, the 1st Defendant caused to be circulated via the internet his list of smear campaign questions to the Claimant, notwithstanding the fact that the 1st Defendant was aware of the truthful responses by the Claimants to his allegations on Q95 FM on October 25th, 2008 and had received a letter from the Claimants attorney dated October 24th 2008 categorically denying the accusations and imputations of wrongdoing against them".

[61] The main argument advanced by Mrs Felix-Evans under paragraph 19 was that a claim for exemplary damages must satisfy the requirements set out by Lord Devlin in **Rookes v Bernard** (no1) [1964] AC 1129 and **Broome v Castle** (no1)[1972] AC 1027; and **Vaughn Lewis v Dr Kenny Anthony** St Lucia Civil Appeal No 2 of 2006. She argued that the first Defendant is not a public official or a servant of the government and was not acting in an official government capacity and that the Claimants do not plead that he was so doing. The objection is that there is no plea that the First Defendant was acting for economic advantage and that paragraph 19 and its subparagraphs do not contain a properly pleaded

case against the First Defendant and should be struck out in so far as it relates to the First Defendant.

- [62] I can see nothing in the subparagraphs (i); (ii); (iv) or (v) which show that the First Defendant knew that the allegations were untrue. **Lewis v Anthony**, (supra), is authority for the proposition that ignorance of the untruth is no basis for a plea of exemplary damages. I agree that these purported particulars must be struck. Particular (iii) does not include any particular as to how the statement were concocted by the first Defendant; how he 'conspired' with others and why he published statements he knew to be untrue. In consequence, this subparagraph must be struck.

The Reply: First Defendant's Objections

- [63] The objections that the First Defendant has levelled at the Claimants' Reply are that under the guise of a Reply the Claimants have improperly

- "47.1 Pleded prolix and new allegations which are irrelevant to the First Defendant.
- 47.2 Pleded wholly immaterial and unparticularised allegations particularly in emotive and pejorative terms;
- 47.3 Sought to cure deficiencies in their Statement of Claim...
- 47.4 Pleded allegations which confuse the issue between the issue of whether or not a publication was privileged, and malice;
- 47.5 Pleded allegations which cannot, and are equivocal and/or wholly insufficient to establish malice;
- 47.6 Pleded what purports to be "legal arguments" an impermissible purpose of a statement of case...
- 47.7 Failed to plead material and relevant facts and particulars in answer to the First Defendant's Defence.

- [64] Before the court Mrs Felix-Evans submitted that in view of paragraphs 47.1 to 47.7 above the Claimants' Reply filed on 29th December is improper and a manifest abuse of the process of the court and ought to be struck out in its entirety.
- [65] Mr Christopher on the other hand contends that the Reply does not contain anything new but amplified facts and set up an affirmative case in answer to the Defence. He concluded his submissions by urging the court to dismiss the applications to strike out parts of the claim and the Reply because "the defamation of the Claimants was done in furtherance of a conspiracy which the First Defendant was the principal conspirator..."
- [66] CPR 2000 does not deal with the pleading requirements of a Reply except the time for filing and service of the reply. Additionally CPR mandates that the reply be verified by a certificate of truth. That being the case one must rely on the law and practice in England by virtue of s11 of the Eastern Supreme Court (Dominica) Act, Ch 4:02, referred to as "the reception provision".
- [67] A Reply should respond to matters put forward in the Defence. It is optional and need only be served if the Claimant wishes to allege facts in answer to the Defence which were not included in the particulars of claim. A Reply must not be inconsistent with matters set out in the particulars of claim, nor must it seek to introduce new types of claim.
- [68] In **Blackstone's Civil Practice, 2006**, at paragraph 27.2 the authors describe the contents of a reply in this way:

"CONTENTS OF A REPLY

Conventionally a reply may respond to any matter 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 requires 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 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 should it be drafted a defence to a defence."

Where the defence takes issue with a fact set out in the particulars of the claim, and the claimant accepts that the fact is incorrect, the proper course should be for the claimant to seek to amend his statement of case accordingly ... and not to deal with the matter in the reply. Thus where for example, the particulars of claim contain an error as to the quantity of goods ordered, and the correct quantity is set out in the defence, the error should be corrected by way of amendment, rather than reply."

- [69] In light of the quotation from **Blackstone's Civil Practice**, the question then becomes whether or not the Reply is so defective so as to warrant striking it out in its entirety.
- [70] The Reply in this case is lengthy. It contains 60 paragraphs consisting of 18 pages. It is noted that the Claimants preface their Reply to the Defences put forward by the First, Second and Fourth Defendants by stating among other things that the Reply is "an amplification of Statement of Claim," and that "any deficiency in the Statement of Claim is cured by the ... Reply." In other words the purpose of the Reply is to amplify and cure deficiencies in the Statement of Claim. I would have thought that deficiencies in the Statement of Claim would be cured either by an amended Statement of Claim or perhaps by witness statements and disclosure or by the provision of further information upon request.
- [71] In paragraph 1 of the Reply the Claimants join issue with each of the Defendants on their defences save in so far as they consist of admissions.

- [72] Paragraph 2 informs of the purpose of the Reply. I adverted to the purposes of a Reply above.
- [73] In paragraph 3 to 4 the Claimants set out the matters they consider should be struck from each Defendant's Defence.
- [74] Paragraphs 5 to 9 discuss matters the defendants seek to strike out. Then, particulars of those matters are given in paragraphs 10 to 15.
- [75] Paragraph 16 purports to deal with malice and purports to answer paragraph 5 of the First Defendant's Defence and paragraph 11 of the Second and Fourth Defendants' joint Defence. In this paragraph the Claimants purport to give "FURTHER PARTICULARS OF MALICE-RADIO"
- [76] Paragraphs 17 to 23 fall under the heading "DISCLOSURE & STRIKING OUT DEFENCES". Those paragraphs purport to answer paragraph 6 of the Defence of the First Defendant and paragraphs 13, 15, 21, 25, 27 of the defence of the Second and Fourth Defendants. They are defensive and argumentative.
- [77] Paragraphs 24 to 26 fall under the caption "QUESTIONS SENT FOR PUBLISHERS". These paragraphs purport to answer paragraph 10.1 and 10.2 of the First Defendant's Defence. After attacking the relevancy of the pleading contained therein, the Claimants went on to repeat that the words and matters complained of were published maliciously. There then follow PARTICULARS of the malicious publication. Paragraphs 27 to 32 are devoted to these particulars which the Claimants aver are extrinsic facts and circumstances from which inferences may be drawn.
- [78] Paragraphs 32 (a) to 35 fall under the heading "PARTICULARS OF MALICE-PUBLISHED QUESTIONS and seek to answer paragraph 21.7 of the First Defendant's Defence. In paragraph 32 (b) the Claimants claim that "the First Defendant without reasonable cause, brought before the Public, accusations of discreditable conduct and imputations of

corruption and dishonest conduct against the Claimants, with a desire for vengeance to protect the political Party the Defendants support and which party is in government." In my opinion, the First Defendant should be allowed to respond to this most serious allegation introduced for the first time.

- [79] Paragraphs 36 to 39 deal with aggravated and exemplary damages. It seeks to answer paragraphs 10.6, 10.7, 26 and 21.7 of the First Defendant's Defence and paragraph 45 of the Second and fourth Defendants' Defence. Reference is made to the Code of Ethics of Barristers.
- [80] Paragraph 40 (a) to (f) respond to [First] Defendants' pleading in paragraphs 1.5, 23.8, 25.10 and 25.11 that the First Defendant relied on information which he believed was true. It also seeks to respond to the pleadings of the Second and Fourth Defendants in paragraphs 31, 38.4, 38.6 and 40.4 that the Second and fourth Defendants relied on information given to the First Defendant in confidence which they believed to be true. The Claimants, after concluding that the Defendants have no defence to honestly believe the false information was true, proceeded to give PARTICULARS which to my mind are editorial.
- [81] Paragraphs 41 to 60 is captioned "ATTORNEY GENERAL'S VICARIOUS LIABILITY FOR 4TH DEFENDANT". These paragraphs purport to respond to paragraphs 23, 24, and 25 of the First Defendant's Defence; and paragraphs 10, 42, 43, 44 and 45.2 of the Second and Fourth defendants' Defence. In paragraph 43 the Claimants allege that "The 1st, 2nd and 4th Defendants in the joint publications of the defamatory words, independently and individually acted with malice. There then follows "FURTHER PARTICULARS OF EXPRESS MALICE" followed by a discourse as to why the Defences are not maintainable followed by "PARTICULARS" which speak to the reasons why the Claimants say that the defences of Justification, fair comment qualified privilege are not maintainable and therefore "fails".

[82] Having considered the oral and written submissions of learned counsel for the respective parties, and having read the Reply, I am satisfied that it is plain and obvious that the Claimants' Reply is a confusing document. It makes new allegations against the defendants. It repeats many of the paragraphs of the Defence. It contains irrelevances such as references to the Code of Ethics. It purports to give particulars in relation to "matters Defendants seek to strike out"; particulars of malice on the radio and in relation to published questions; questions sent for publication.

[83] Amendments will be required to properly deal with issues raised in the Defence. The matters which the Claimants have included in the Reply with a view to curing the defects in the Defences will be better addressed in the Statement of Claim. It is not an appropriate way to set out a Reply. The Claimants Reply must be and is hereby struck out in its entirety.

[84] Summary of the Order in relation to the Applications by the Defendants

- (1) The application by the First Defendant to strike out portions of the Claimants' claim is granted.
- (2) The Claimants' Claim is struck out in its entirety.
- (3) The Claimants' Reply is struck out in its entirety.

[85] In light of my rulings above, it may not be necessary to consider the application by the Second and Fourth Defendants for an Order striking out portions of the Statement of Claim. Nor is it necessary to consider the application by the Claimants to strike out the Defendants' Defences. Certainly, it is not necessary to consider the application by the Claimants to enter judgement for the Claimants and to give directions for assessment of damages.

[86] In case I am wrong, and for the sake of completeness, I go on to consider the application by the second and fourth defendants to strike out paragraph F(ii), G(ii),(iii), and part of (iv). 9, 13 (iv), 14(v), 19, 19(i), (iii), (ix), (xi), (xii) and (xiii) of the Statement of Claim. I do not

reconsider paragraphs 9, 13 (iv), 14(v), 19, 19(i), (iii), (ix), (xi), (xii) and (xiii) since they have already been considered above and the observations made in paragraphs 46, 48, 50 and 60 above apply with equal force to the application to strike by the 2nd and fourth Defendants.

Consideration of the application by the second and fourth Defendants to strike out paragraphs F(ii), G(ii),(iii), and part of (iv).

[87] It is noteworthy that the words complained of are set out in 8 F (i), whilst the meaning is in F(ii). I think it is convenient to restate the words in 8F (i)

[88] **Paragraph 8 F (i) alleges:**

“On October 24th 2008, as Host of Kairi FM's Heng programme, the 2nd Defendant made the following statements in an exchange with political activist Leonard Pappy Baptiste – a caller to the programme:

“FRANKIE BELLOT: “If the account thing not true then we need to find out who is that account? Where that money is ... who have that mo0ney spreading? I mean, so you telling me Tony Astaphan with the knowledge of what he has ... He is a lawyer; he is a professional I should say ... You know what I mean ? He is not an idiot ...”

“LEONARD PAPPY BAPTISTE: “Astaphan is not an idiot he do his homework before he come on that radio.”

“FRANKIE BELLOT: “I mean I would say that Tony Astaphan would come out with information knowing well that it's not real, it's a bogus and this and that and he doesn't know nothing about money ... I mean ... a lot of people might not like Tony Astaphan personally but I mean professionally you cannot ...”

"LEONARD PAPPY BAPTISTE: "You can't touch him on that line."

'FRANKIE BELLOTT: "I mean the man is a professional lawyer so obviously he should know that if he comes out spreading rumours on people he will be sued."

"LEONARD PAPPY BAPTISTE: "Exactly."

"FRANKIE BELLOTT: "You understand what I am saying? And when all you ready to sue him don't put me in it ... We asking questions after Astaphan ask ... After Astaphan ask some questions we asking questions too. Who is that money? Where it come out? Because we know all you was brokes ... Because the reason why they lost the election they didn't have as much money as Skerritt ... And again ... because according to Astaphan notes and the information that we received that it still have about a hundred thousand still inside the account as of August 2008 .. two months ago, it still have a hundred thousand in that account."

Paragraph 8 F(ii)

[89] This paragraph allege that

"In their natural and ordinary meaning these words [in 8F(i)] indicate that the statements in question about the Claimants were broadcast on Kairi FM's Heng Programme on October 21 and 22 2008 based on information and or advice received from Anthony Astaphan who, as a Senior Officer of the Court was not expected to be involved in fabrication and/or dissemination of false, defamatory information."

[90] It is evident that the meaning at F(ii) does not relate to the second and fourth Defendants. It is at best a comment about the First Defendant, and an allegation about statements

aired on Kairi FM based on information received from the First Defendant. Clearly, this purported meaning is not properly pleaded. As it stands, this meaning is outside of the permissible range. It is frivolous and vexatious; contain irrelevances and fail to comply with the rules of pleading. I am in agreement with the submission by Mrs Felix Evans that the words contained there have no place in a Statement of Claim and must therefore be struck.

Paragraph 8G (ii) (iii) and (iv)

[91] In paragraph 8 G (i) the Claimants set out the words complained of and in subparagraph (ii) the Claimants set out the meaning which they ascribe to those words. It is instructive to reproduce the words and their meaning ascribed to them:

"(i) After receiving a letter on October 24th 2008, from Attorney B McDonald Christopher categorically denying the accusations and requesting From the Defendants on behalf of Edison James and Lennox Linton, a retraction of the defamatory statements and an apology; and after listening to the claimant's response to the accusations against them on Q 95 FM on Saturday 25th October 2008, the 4th Defendant used his position as Host of Kairi FM's Heng Programme on October 27th 2008 to further ridicule the claimants and aggravate the defamation:

"The issue of nine transfers and Mr Linton and all of that is really irrelevant as it relates to the amount of transfers. Between August 2007 and August 18th 2008 you simply need to tell the public whether there were transfers of monies done.

"And I listened very carefully and the gentlemen did not deny the fact that he has an account in St Kitts and so once you are admitting that you have an account in St Kitts then that is the beginning of where questions are going to be asked... Mr Linton and Mr Jones ... tried to stick to the figures and maybe sought to distort the figures ... And when we talk about tax evasions and all of that maybe just maybe

we need to find out whether you are being paid in St Kitts or whether you are being paid in Dominica.

"Mr Christopher again in his letter spoke about fictitious dates and imaginary transfers, unnamed banks and non existent bank accounts ... this thing you know you just must laugh because ... broad statements, and in this same letter talking about defamatory ... what did we say that was defamatory? ... So is it unfair to ask about an account in St Kitts and monies being moved ...?"

"And you have Don Christopher writing a letter that is laughable ..."

"(ii) In their natural and ordinary meaning, these words assert that the nine transfers which the defendants alleged were made to the account of Lennox Linton by Edison James are "irrelevant" and Mr Paul is incapable of defending the premise on which the public was misinformed with blatant lies about the snob-existent transfers."

"(iii) Even so, in the words complained of Mr Paul trashed the denial of Edison James and Lennox Linton that they have any knowledge of or involvement in any arrangement in which funds amounting to \$537,660.13 allegedly provided in 2005 for the operations of the United workers party were allegedly misappropriated by Edison James who is alleged to have made nine transfers totalling \$113,500.00 from his St Kitts and /or Antigua account to the St Kitts account of Lennox Linton between August 22, 2007 and August 18 2008."

"(iv) "The words of the 4th Defendant alleged that the Claimants are tax evaders. The words also ridiculed as "laughable" the responses of the claimants to the brutal attack on their characters."

[92] In her written submissions, Mrs Felix Evans submitted that the words in 8G(i) do not relate to the Claimants at all but are comments about the fourth Defendant and his ability to

defend his statements. Therefore, she submitted, they are not capable of defamatory meanings about the Claimants; they have no place in the Statement of Claim and can only have been included for an improper motive.

[93] I am inclined to agree with these submissions. I am of the view that the pleadings in the foregoing paragraphs are improperly pleaded. Aspects of the paragraphs under review might survive if properly pleaded. As they stand, they appear to serve an improper purpose, contain insinuations; are frivolous and vexatious do not comply with the rules of pleadings in a defamation action. Any meaning must be defamatory of the Claimants. The words set forth in 8 G (i) do not and cannot reasonably be capable of bearing the meaning pleaded by the Claimants in 8G (ii) (iii) and (iv). They are therefore struck.

Conclusion

[94] In the result therefore

IT IS HEREBY ORDERED that

- [1] The statement of Claim be and the same is hereby struck out in its entirety.
- [2] The Reply be and the same is hereby struck out in its entirety.
- [3] The Claimants are granted leave to file and serve a fresh statement of claim in accordance with these reasons.
- [4] All further proceedings thereafter will be in accordance with the Civil Procedure Rules 2000.
- [5] Costs to the Defendants to be assessed if not agreed.

[95] I am grateful to learned counsel for their very helpful submissions and authorities.



PEARLETTA E. LANNIS
Master