



[2024] JMSC Civ 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV01062

BETWEEN ARETHA DOWNIE 1ST CLAIMANT

A N D KENROY DOWNIE 2ND CLAIMANT

A N D HOME & THINGS LIMITED DEFENDANT

IN CHAMBERS VIA VIDEO CONFERENCE

Ms. Tamiko Smith and Ms. Zoya Edwards instructed by Messrs Smith, Afflick, Robertson & Partners for the Claimants

Mrs. Jacqueline Samuels Brown KC for the Defendant

HEARD: January 22, 2024 and February 2, 2024

Civil Practice and Procedure – Court Making Order of its own Initiative – Court proposing to make order to Strike Out Cause of Action – Whether Claimant’s Claim discloses no reasonable ground for bringing the claim for Defamation

Tort – Defamation – Defamation Act - Whether Claimants allegation that the Defendant’s conduct and words alleging criminal conduct without specificity are actionable.

D. STAPLE J

BACKGROUND

[1] The Claimants are quite upset. An afternoon’s shopping in the Defendant’s store turned into quite an ordeal for them. On their case, they were examining some bathroom fixtures and the 1st Claimant admitted to being in one of the display tubs.

- [2] She was instructed to remove from the tub and in the process of so doing, one of the pipe fixtures was allegedly damaged.
- [3] The Claimants' claim that the employees of the Defendant very zealously pursued recompense for the item that was allegedly damaged and in the process prevented them from leaving the property and used words that imputed criminal conduct on the part of the Claimants. The Claimants were eventually allowed to leave after 2 hours, but the Claimant contend that their reputation was damaged.
- [4] Accordingly, the Claimants have filed the instant claim to recover Damages for False Imprisonment and Defamation under the Defamation Act.
- [5] The Defendant has filed a defence denying the claims raised by the Claimants and counterclaimed for the damage to the display fixture. When the matter came before me for Case Management Conference, I examined the Amended Particulars of Claim filed on the 28TH July 2023 and raised the question of whether or not the claim for defamation was properly pleaded. I invited submissions from the parties on whether or not the claim for defamation should not be struck out as disclosing no reasonable grounds for being brought.
- [6] I am grateful to both parties for their submissions and I have read and considered them as well as the accompanying authorities.

POWER OF THE COURT TO MAKE ORDERS OF ITS OWN INITIATIVE

- [7] The Civil Procedure Rules empower a judicial officer to make orders of their own initiative in order to further the overriding objective. Pursuant to rule 26.2(1) the Court may exercise its powers on an application or on its own initiative unless a rule, enactment or practice direction says otherwise.
- [8] Rule 26.2 further requires that if the Court proposes to make such orders on its own initiative, it must notify the parties and give the party or parties likely to be affected by the order sufficient time to make representations in writing or otherwise.

[9] Rule 26.3(1)(c) allows a Court to strike out a party's statement of case in whole or in part if it discloses no reasonable grounds for bringing or defending a claim. This rule does not say that this power can only be exercised on an application by a party. In other words, the Judicial Officer may exercise this power on his/her own initiative pursuant to Rule 26.2.

[10] This position is in good sense as it gives to the Court more control over the pace of litigation. It enables the Court to fulfil its mandate under the overriding objective to deal with cases justly by dealing with it expeditiously and fairly. If a judicial officer is of the view that an aspect of the case can be resolved early, then the rule allows for that to be done so as to save the resources of the Court, the particular parties before the Court as well as other litigants in other matters.

THE ISSUES

[11] The Claimant was directed to show cause why the Claimants claims should not be struck out as disclosing no reasonable grounds for bringing the claim.

[12] So this is the fundamental question that must be answered; do the Amended Pleadings disclose a cause of action in defamation against the Defendant for the Claimants?

[13] Now striking out is one of the most draconian actions a court may take in relation to the statement of case of a party to a claim. It should therefore be used sparingly and only in the most obvious of cases.

[14] Borrowing from the dicta of my sister judge Jackson-Haisley J in the case of ***Lozane v Beckford***,¹

“[30] ... in *S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance SCCA 112/04* delivered 31st

¹ [2020] JMSC Civ 106 at paras 30 and 31

July, 2007, in which Harris, J.A. stated at page 29: - “The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases.”

[31] Similarly, in the case of *Drummond Jackson v British Medical Association and Others* [1970] 1 WLR 688, Lord Pearson opined at page 695 that: - “Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.” [my emphasis]”

[15] In deciding whether to strike out a statement of case on the basis that it discloses no reasonable ground for bringing a claim, the court must consider whether or not the Claimant has pleaded facts supportive of the cause of action he seeks to establish. So it is not enough for the Claimant to plead the cause of action, there must be a factual basis established on the face of the pleaded case to support the cause of action. There must be a factual basis for going to trial.

[16] I agree with the authority of *City Properties Limited v New Era Finance Limited*² and the statement of the principle of Batts J at paragraphs 9-11 of the judgment.

[17] As Batts J said, what is required is an examination of the statements of case to ensure that the facts as alleged support the cause of action the Claimant seeks to establish.

² [2013] JMSC Civ 23

Striking Out in the Context of a Defamation Claim

- [18] Mrs. Samuels-Brown KC made extensive submissions on rule 69 of the Civil Procedure Rules which treats with defamation claims and how they are to be dealt with by the Court.
- [19] Counsel is correct that it is for the Court to determine whether or not the words complained of are capable of bearing a defamatory meaning. If it passes this legal threshold, it would then be for the tribunal of fact to determine whether the words were defamatory as a matter of fact. This was long ago confirmed by the Court of Appeal in ***Television Jamaica Limited v Wright-Anderson Const.***³ If the words are incapable of bearing a defamatory meaning, then there is no issue to be left to the jury (or the jury mind of the judge sitting alone).
- [20] In my view, whilst not expressly invoked, dealing with the Claim as a striking out under rule 26.3(1)(c) or under rule 69 would result in the same thing.
- [21] Counsel for the Claimant argued, correctly, that the **Defamation Act** makes it that gestures can amount to defamation⁴. Section 5(2) preserves the operation of the common law in relation to defamation claims. So if the defamatory matter concerns what would traditionally be considered libellous matter, then the pleading and practice remains the same as it would have been for libel; the same applies for slanderous matter.
- [22] Counsel for the Claimant submitted the authority of ***Charmaine Taylor v Branch Developments Limited T/A Iberostar Rose Hall Resort***⁵ as authority for the principle that conduct can amount to defamation. In that case, an employee of the Defendant company was dismissed on the basis that she was suspected of being

³ (Unreported) SCCA 76/2008, June 19 2009.

⁴ See section 2(e) Defamation Act where “matter” is defined to include a word, gesture or oral utterance.

⁵ [2015] JMSC Civ 176

involved in theft of company property. Her claim for wrongful dismissal was upheld and she was awarded damages for same. But her claim in defamation was dismissed.

[23] The Claimant's claim for defamation was based on the fact that she had been escorted off the premises by the defendant's employees sometime after herself and others were interrogated in a room on the Defendant's property. Lindo J relied on the principle as set out in the noted treatise on defamation, *Gatley on Libel and Slander*, that, "sometimes a mere act may convey a defamatory imputation, if it would be so understood by reason of a conventional meaning."⁶

[24] Lindo J also relied on an authority from the United States *Phelan v They May Department Stores Co. Ltd. et al*⁷ for the principle that "unless the message communicated by physical conduct is unambiguous, proof of publication must include direct evidence that a defamatory message was understood by onlookers."

[25] Counsel for the Claimant must therefore establish that the claim as presently pleaded reveals words and gestures capable of bearing a defamatory meaning.

WHAT WERE THE PARTICULARS OF DEFAMATION AS PLEADED

[26] Here I will set out the Claimant's currently pleaded case.

⁶ Id at para 45

⁷ 60 Mass App Ct. 843 (2004)

PARTICULARS OF DEFAMATION

- a. The Defendant's agent/employee made loud accusations against the Claimant, claiming that Claimants caused damage to the internal metal threading component of the free standing metal faucet.
- b. The Defendant's agent/employee loudly accused the Claimant of criminal behaviour in the presence and hearing of other persons in the store and their church sisters.
- c. The Defendant's agent/employee threatened to call the police on the Claimants
- d. The Defendant's agents/employees prevented the Claimant from leaving the store before security personnel arrived.
- e. All other persons permitted to leave the premises except the Claimants and their church sisters.
- f. The conduct of the Defendant's agents/employees suggest by way of innuendo led the public to believe that the Claimants were involved criminal activity.

[27] So the conduct was:

- a) Loud accusations against the Claimant;
- b) The threat to call the police;
- c) Preventing the Claimants from leaving the store.
- d) Allowing other persons to leave the store.

[28] The words were the loud accusations of the Claimants causing damage to the faucet and "criminal behaviour".

DO THE WORDS AND CONDUCT AS PLEADED DISCLOSE REASONABLE GROUNDS FOR BRINGING THE CLAIM? ARE THEY CAPABLE OF BEARING A DEFAMATORY MEANING?

[29] In my view, the answer to the above question is no. The words and conduct as pleaded, whether taken separately or as a whole in context, are incapable of bearing a defamatory meaning.

- [30] According to **Gatley on Libel & Slander**⁸, when considering words imputing criminal conduct, the exact criminal offence need not be specified. Words involving a general charge of criminality will suffice, **provided they impute some offence for which the plaintiff can be made to suffer corporally (involving the body or bodily) by way of punishment** (emphasis mine).
- [31] The authors give as an illustration the words, “You have committed an act for which I can have you put in prison”. This was taken from the case of ***Curtis v Curtis***⁹. In this ancient case, a letter was written by an unknown person purporting to have information against the Defendant that would cause the Defendant to be “transported” (back in the day one of the meanings of transportation was penal transportation as in, to a penal colony such as Australia). The Defendant accused the Plaintiff of being the author and publisher of the letter. The Plaintiff sued. The Plaintiff succeeded. Tindal CJ in handing down the judgment of the Court said, “We must understand words in their ordinary sense. I cannot see how anyone who had heard that the Defendant was able to transport the Plaintiff, could form any other supposition than that the Plaintiff had been guilty of a crime.¹⁰”
- [32] What is clear then is that even if you wish to use general words to impute criminality, the criminal conduct imputed must be such that it would cause the subject to be liable to some form of physical punishment such as imprisonment or even flogging.
- [33] Thus simply saying criminal conduct, without stating whether the criminal conduct would have opened the Claimants up to punishment by imprisonment or some other bodily punishment, would not be a sufficient pleading. This is why the precise

⁸ 9 ed. Sweet & Maxwell p. 107

⁹ {1834} 130 ER 980

¹⁰ Id at p 980-981

words spoken are critical in a case of defamation as it is those words that inform whether or not there is a cause of action.

[34] Indeed, the authors of **Gatley** go on to state that where the action is for slander (or in the case of our Defamation Act where the matter is akin to a slander as it is in this case) the Claimant must show (in the pleadings) either that it was actionable per se (i.e. without proof of actual damage) or that special damage flowed from it¹¹. If he wishes to plead that the words complained of impute a criminal offence punishable corporally, he should **say so expressly and set out the common law or statutory offence which he contends is imputed.**

[35] The conduct of the Defendant's employees, as pleaded, does not clearly and unambiguously convey any defamatory meaning. Indeed, at paragraph 8 of the pleadings, the reason for the employee's alleged action of preventing the Claimants from leaving is actually pleaded. The pleading is that the employee wanted to prevent them from leaving without paying for the alleged damage. Everyone would have, on the Claimant's own pleaded case, understood that that was why they were being prevented from leaving.

[36] Such action could be characterised as unfortunate and would cause embarrassment, but to my mind, it is not capable of being defamatory.

CONCLUSION

[37] In my view, the events of the day in question were most unfortunate. However, I do not find that the Claimants pleadings have disclosed a reasonable ground for bringing the claim for defamation.

¹¹ n. 8 at p 666.

- [38] The specific words spoken by the Defendant's employees are not pleaded; there are no words to impute that the criminal conduct of the Claimants would result in corporal punishment to render them actionable; nor is the special damage suffered by the Claimants pleaded.
- [39] The conduct of the Defendant's employees, as pleaded, were not clearly and unambiguously defamatory.
- [40] Finally, we cannot properly assess the context as, again, the specific words utilized were not pleaded.
- [41] In the circumstances therefore, I do not find that reasonable grounds for bringing the claim for defamation have been raised in the pleadings.

DISPOSITION

- 1 The Claimants' claims for defamation are struck out as disclosing no reasonable grounds for being brought.**
- 2 Leave to appeal granted.**
- 3 Costs to the Defendant to be taxed if not agreed on this ruling.**
- 4 Case Management Conference is further adjourned to the 8th March 2024 at 10:00 am before Staple J pending settlement.**
- 5 Claimants' Attorneys-at-Law to prepare, file and serve this Order on or before the 9th February 2024 by 4:00 pm.**

.....

D. Staple, J