



[2023] JMSC Civ. 75

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2015 HCV 04793**

**BETWEEN                      KENT PHILIP GAMMON                      CLAIMANT**

**A   N   D                      ROBERT LEICESTER RAMSEY                      DEFENDANT**

**IN CHAMBERS via Video Conference**

**Mr. Kent P. Gammon instructed by Kent P. Gammon & Associates for the Claimant**

**Mr. Stephen McCreath instructed by Zavia T. Mayne & Company for the Defendant**

**HEARD:            April 19 and 26, 2023**

**Civil Practice and Procedure – Application to Remit Matter to the Parish Court – Principles involved in Transferring a matter from the Supreme Court to the Parish Court.**

**Civil Practice and Procedure – Amendment of Pleadings After Case Management Conference – Whether or not Amendment is Valid Where Amendment Done Without Permission.**

**Civil Practice and Procedure – Application to Strike out Statement of Case.**

**STAPLE J (Ag)**

**BACKGROUND**

**[1]**     Mr. Gammon and Mr. Ramsey are Attorneys-at-Law and officers of the Court. They formerly shared office space in or around 2015. They had a falling out and it is alleged by the Claimant that the Defendant said some words that are defamatory of him [the Claimant] on several separate occasions.

- [2]** Mr. Gammon initiated these proceedings against the Defendant in 2015 to recover the sum of \$5,000,000.00 (a specified sum) and interest thereon (among other things) as Damages for Defamation.
- [3]** The Defendant filed a Defence within time and the parties attempted mediation and failed. Thereafter they attended a Case Management Conference and orders were made for the trial. The trial was set down for the 22<sup>nd</sup> and 23<sup>rd</sup> April 2020. These Case Management Orders were made as far back as the 6<sup>th</sup> October 2017.
- [4]** At the Pre-Trial Review on the 18<sup>th</sup> November 2019, the trial dates were vacated and the Pre-Trial Review was adjourned for a date to be fixed by the Registrar. It is of significance to this Court that neither party has even begun to comply with the Case Management Orders made.
- [5]** On September 27, 2019, the Claimant filed the present application for the matter to be remitted to the Parish Court for Kingston and St. Andrew.
- [6]** In his Affidavit in Support of that application filed on the 18<sup>th</sup> November 2019, the Claimant said, at paragraph 7, that since the making of the Case Management Conference orders he has not been in contact with his witnesses who now reside overseas and he has a difficulty locating them.
- [7]** He then said at paragraph 8 that they have considered the matter and wish for it to be transferred to the Parish Court.
- [8]** The Defendant filed his own Application on November 19, 2019 for the Claimant's statement of case to be struck out. It was supported by the Affidavit of Ms. Shantel Jarrett filed on the same date.
- [9]** Ms. Jarrett also filed an Affidavit in Response to that of Mr. Gammon's Affidavit in Support of his Application. This affidavit Ms. Jarrett filed on January 14, 2022.

[10] On January 17, 2022, Mr. Gammon then purported to amend his Particulars of Claim by filing an Amended Particulars of Claim on January 17, 2022. The material difference being that in the prayer for relief he claimed Damages for Libel to be assessed *at less than \$1,000,000.00* (emphasis mine). No permission was sought or granted for this amendment.

[11] He then filed a supplemental affidavit on the 17<sup>th</sup> January 2022 in support of his Application for transfer of the Claim to the Parish Court.

### **Mr. Gammon's Application**

[12] Mr. Gammon's Application will be refused. Firstly, there is no proper Amended Claim and Particulars of Claim before the Court.

[13] The Civil Procedure Rules at rule 20.4 make it clear that a statement of case can be amended **after** a case management conference only with the permission of the Court.

[14] There is absolutely no evidence that Mr. Gammon applied for permission to amend his statement of case and received such permission. The Case Management Conference had taken place a long time ago and so this amendment is invalid and of no moment.

[15] So for all intents and purposes, the statements of case of the respective parties remain the same as they were when originally filed.

[16] In that regard, the Court would not transfer this matter to the Parish Court given the fact that the sum being claimed by Mr. Gammon would exceed the monetary jurisdiction of the Common Law jurisdiction of the Parish Court as set out in section 71(a) (as amended) of the **Judicature (Parish Court) Act**.

[17] In those premises alone the Court would refuse the application. But even so, when one examines the reasons provided in Mr. Gammons' Affidavits in Support of his

application, they provide no compelling justification for remitting the matter to the Parish Court.

[18] His primary reason is that he is not able to find his witnesses or guarantee their presence and availability at the trial of the matter. This Court is uncertain how transferring the matter to the Parish Court would improve the chances of a just disposal of this Claim in light of the fact that the Claimant does not seem to be able to prove his case. It is important to note that it is not the Defendant that is alleging that the Claimant has no guarantee of evidence to support his case at trial – it is the Claimant himself.

[19] The Court does have the power to transfer a matter to the Parish Court under rule 26.1(2)(a), but in so doing the Court must bear in mind the overriding objective of dealing with the case justly. In my view, it would not be dealing with the case justly to move the matter from the Pre-Trial Review Stage (at which it is now) down to the Parish Court to join a very long queue and essentially be restarted with no certainty of witnesses being available for trial for the Claimant.

[20] Accordingly, the Claimant's Application for Transfer is refused with costs to the Defendant.

### **The Defendant's Application to Strike Out as An Abuse of Process and No Reasonable Grounds for Bringing the Claim**

[21] The Defendant has applied to strike out the Claimant's Statement of Case as being an abuse of process and that it discloses no reasonable grounds for bringing the Claim among other things.

[22] The Defendant's Attorney-at-Law submitted that the statement to the General Legal Council (GLC) in the Affidavit is subject to absolute privilege and is not actionable.

[23] I am minded to approach this application from the abuse of process aspect and the no reasonable grounds for bringing the claim allegation.

### ***Is the Maintaining of the Claim an Abuse of Process?***

[24] It is interesting to note that the Defendant's application to strike out the statement of case for abuse of process came *subsequent* to the Claimant applying to remit the case to the Parish Court. This is significant as prior to this, the Defendant had fully participated in mediation and case management without any previous application that bringing the claim, from its inception, was unmeritorious.

[25] It seems to me that it was after seeing the Claimant confessing his inability to call witnesses to support his claim, and seeking to move the matter from the Supreme Court to the Parish Court on that basis, that provoked the Defendant to apply to strike out as an abuse of process.

[26] In analysing this question, the Court begins with the observation of the Court of Appeal in the matter of ***West Indies Petroleum Ltd v Wilkinson et al***<sup>1</sup>. The Court of Appeal observed that the core function of a Court is to resolve the dispute(s) between litigants. The preferred methodology is to do this through the mechanism of a trial where all the issues can be fully ventilated. Stopping the proceedings due to procedural or technical blunders on the part of a litigant is not ideal. However, in **an appropriate** case, the will exercise its discretion to prevent its processes from being abused and it must so do.

[27] As the Court of Appeal observed, the fundamental basis for so doing is to ensure that the proceedings are conducted fairly to all participants in the litigation process. This includes not just the immediate litigants in the matter before the Court, but other litigants from other matters that might be affected by the conduct of the particular case before the Court. This is the new thrust of the concept of the overriding objective as set out in Rule 1.1 of the Civil Procedure Rules.

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<sup>1</sup> [2023] JMCA Civ 2 para 24

[28] A very powerful observation of the Court of Appeal in the *West Indies Petroleum* case<sup>2</sup> on striking out for abuse of process is found at paragraph 30. I will set it out here:

*“The circumstances in which the court may strike out a statement of case on the ground that it amounts to an abuse of the process of the court are varied. There can be no limited or fixed categories of the kinds of circumstances in which the court has a duty to exercise this salutary power since the category of cases in which it may arise is not closed.”*

[29] So the question that arises in this case is this: should a case where the Claimant, who is himself an attorney-at-law of many years’ experience at the bar, swears on oath that they are unable or unlikely to get their witnesses to prove their case be allowed to proceed to a trial? It is important to bear in mind that when this 1<sup>st</sup> Affidavit of Mr. Gammon was sworn in 2019, a trial date, that had been set from 2 years earlier, had been vacated. The Pre-Trial Review was adjourned for a date to be fixed. This statement was an unqualified statement from the Claimant. He was not hedging his bets or confining the inability to find witnesses as it relates to any particular aspect of his claim.

[30] In 2022, the Claimant then files a second affidavit in Response to one filed by the Defendant. This affidavit, sworn on the 17<sup>th</sup> January 2022, said at paragraph 3, “That the Claimant’s Witnesses no [sic] but it may be possible to locate one of the witnesses whose presence to this trial may be possible by an online platform”.

[31] He at least began to hedge his bets here. But we still do not know to which allegation this witness will speak and how their evidence is relevant to the claim. It was only when pressed at the hearing of this application that Mr. Gammon revealed the name of the witness as Ms. Hodara. What is more, what Mr. Gammon submitted is that he only spoke to her father. Indeed, we have had not even one

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<sup>2</sup> Id at para 30

witness summary filed by the Claimant. Not even the Claimant himself has filed a witness statement in support of his own case in flagrant breach of the Case Management Conference Orders. Surely, the Claimant could not be understood to be saying that he was unavailable to testify. So why hasn't he filed, at least, his own witness statement as yet after 6 years? To date the Court has no answer to this question.

[32] The Court is well aware that there is a sanction in place pursuant to rule 29.11 for the failure to file a witness statement. It is also aware of the rule against imposing a sanction for breach of a rule where there is already a sanction in place for breaching that rule.

[33] However, striking out a case for abuse of process is different from striking out a case for breach of a rule. It is akin to a homophone – they sound the same (striking out), but are different in meaning and purpose. Ultimately, in this case, the trial date has not been set and so could still be met and it would then be for the trial judge to determine if the witness could give evidence if, at the trial date, there still was no previously filed witness statement or summary<sup>3</sup>.

[34] But I would think that this case is a circumstance most unusual in that parties in this position have not before conceded that they cannot find their witness and still ask for a trial date.

**The Particulars of Claim discloses the words complained of by the Claimant. The first set are found at paragraph 6. They are as follows:**

*“I am astonished that someone with your qualifications should make such an **unethical attempt** to unilaterally abandon a 3 year lease with Property Brokers Ltd.”*

[35] The allegation is that this was sent in an email to Mr. Winston Chrichton. The document attached does not bear this out at all. In fact, when one looks at the

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<sup>3</sup> See rule 29.11(2), but note the circumstances under which this could be done.

attached document, there is no evidence of the person to whom it was sent to other than Mr. Gammon and a person identified as “Carol”. This would require evidence from someone to give evidence of publication.

**[36]** The next allegedly defamatory statement is found in paragraph 7 of the Particulars of Claim. There it is further alleged that the Defendant verbally expressed to Mr. Chrichton, for all the staff to hear, that he [the Claimant] must have bought his qualifications. The Defendant, in his Defence, denied that he made any such statement. In a Reply to Defence filed by the Claimant on the 27<sup>th</sup> November 2015, the Claimant alleged at paragraph 8 that the words were heard by a Ms. Hodara.

**[37]** What is concerning to the Court is the fact that, to date, the Claimant has not even filed a Witness Summary for Ms. Hodara to this effect. This is compounded by the fact that the Claimant has himself sworn to the fact that he could not find his witnesses at first. When pressed by the Court on this in oral arguments, Mr. Gammon pointed out that he has managed to get in touch with the father of the Witness and that she visits Jamaica occasionally. This is no real comfort to the Court given the enormous amount of time that has passed between the making of the Case Management Conference Orders in October of 2017 and today’s date.

**[38]** I asked Mr. Gammon why no witness statement was filed and he said that it was because he had anticipated that the matter would have been transferred to the Parish Court. While no application for Relief from Sanction for Failing to Comply with the Case Management Conference Orders has been filed (there is an Application for Relief from Sanction filed by the Claimant, but that had to do with responding to the Defendant’s Application filed on the 19<sup>th</sup> November 2019 and not the failure to comply with the Case Management Conference Orders), one wonders if this explanation is one that would cause any Court to grant relief after nearly 6 years.

**[39]** The Claimant himself would also have to give evidence of his reputation before the statement and the effect, if any, of the publication of the comments on his

reputation as an attorney-at-law. Surely, he must have been able to find witnesses, even himself, of these things. Yet here we are, still spinning wheels after nearly 8 years.

[40] The Claimant himself, has pleaded, that he did not hear the words complained of. He would therefore need the witnesses to establish this aspect of his claim. The absence of witnesses to date and the wanton failure to comply with the Case Management Orders for so long really does undermine the substratum of the Claimant's case in relation to establishing, as a fact, that those words were said.

[41] So in all the circumstances, I am not satisfied that continuing this case would not be an abuse of process. It has been nearly 8 years since the filing of the claim and the Claimant's conduct has not demonstrated that he is serious about the litigating of this matter. A glaring example of this would be the initial filing of a claim for \$5,000,000.00 and then a failed attempt at reducing the claim to \$1,000,000.00. There was no reason advanced for the massive drop from \$5,000,000.00 to \$1,000,000.00. So why did he file it for \$5,000,000.00 in the first place?

[42] On top of it all, the Claimant hasn't even filed one witness summary. Not even for himself. This is a case being conducted by an Attorney-at-Law of many years' experience at the bar. In all the circumstances, I am of the view that the further conduct of his case would be an abuse of the Court's process and should not continue. A litigant who has confessed to their inability to prove their case to the required standard ought not to be allowed to continue to foist it upon the other party to the suit, other litigants in the Court and to continue to take up judicial time with same.

### ***No Reasonable Grounds for Bringing the Claim***

[43] Further analysis is required with respect to 2 aspects of the Claimant's claim concerning the allegations found in paragraph 7 of the Particulars of Claim.

- [44]** When it comes to words alleged to be defamatory, context is important. What the Defendant is alleged by the Claimant to have said is that the Claimant “must have bought his qualifications”. There is no allegation that the Defendant said the Claimant “bought” the qualifications. In the Jamaican context in which this sentence was allegedly uttered, it was, in my view, a comment on the Defendant’s perception of the Claimant’s competence as an Attorney-at-Law as opposed to the Defendant saying that the Claimant engaged in the illegal act of fraudulently obtaining his qualifications as an Attorney-at-Law. That is what those words would mean, I find, in the natural and ordinary sense to the reasonable man<sup>4</sup>.
- [45]** The Court is aware that the Defendant did not make this application pursuant to rule 69.4 (as they could have). But in making the Application that the Claimant’s statement of case discloses no reasonable grounds for bringing the claim, I find that a determination under rule 69.4 could be subsumed under a general assertion that the Claimant’s statement of case discloses no reasonable grounds for bringing the Claim. This, I find is a proper use of judicial time and resources as opposed to having the Defendant file a separate application. Besides, submissions were heard from both sides on the issue and so there was no prejudice.
- [46]** So those words, I find, did not bear a defamatory meaning, but were an expression of the Defendant’s opinion of the Claimant’s abilities as an attorney-at-law.
- [47]** Finally, we come to the last allegedly defamatory statements identified at paragraphs 9(i) and (ii) of the Particulars of Claim which come from an Affidavit of the Defendant filed in response to a complaint by the Claimant against the Defendant to the Disciplinary Committee of the General Legal Council.

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<sup>4</sup> See the case of *Charleston v News Group Newspaper Ltd et al* [1995] 2 All ER 313 per Lord Bridge at 317.

[48] In this regard, the Defendant pleaded and relied on the communication in the affidavit as being protected by the principle of absolute privilege and is therefore not actionable.

[49] The circumstances under which the communication in the affidavit was given was not denied in a Reply by the Claimant. So on the face of it, the Claimant has conceded that the statements complained of in paragraphs 9(i) and (ii) of the Particulars of Claim were made in an Affidavit in Response to the Complaint made by the Claimant to the Disciplinary Committee of the General Legal Council.

### ***Proceedings Before the Disciplinary Committee of the General Legal Council***

[50] The statutory framework for proceedings before the Disciplinary Committee of the General Legal Council are set out in the **Legal Profession Act (LPA)**.

[51] The Disciplinary Committee is established under s. 11 of the LPA. Section 12 sets out the powers of the Disciplinary Committee on a hearing before them and the Rules in schedule 4 of the LPA set out the procedure to be followed in matters of complaints before the Disciplinary Committee.

[52] Of importance to this matter are rules 3 and 4. Rule 3 sets out what a person making a complaint must do in order to trigger disciplinary proceedings. Rule 4 sets out what happens when the complaint is made. It is clear that proceedings before the Disciplinary Committee are a 2 stage process.

[53] Once the complaint is made by the aggrieved party in accordance with Rule 3, then the Attorney-at-Law the subject of the complaint is given time to respond in accordance with Rule 4. If there is a Response, then the matter is considered by the Disciplinary Committee to determine whether a prima facie case has been made out. If no case has been made out, the complaint can be summarily dismissed. If a case is made out, then the Committee is to fix a date for a formal hearing at which time oral evidence is taken.

[54] It is clear to me then that even at the 1st stage, these are proceedings before a tribunal. In that event, the statements made in the Affidavit would be protected by absolute privilege

### ***The Consequences***

[55] In the case of ***Jennes Anderson v GLC***<sup>5</sup> Carr J made the point that, “There is no doubt that the Judge, jury, witnesses and attorneys participating in a judicial proceeding or in this case a disciplinary proceeding before a tribunal are protected by the defence of absolute privilege.”

[56] In this case, the statements by the Defendant in his Affidavit in Response to the Disciplinary Committee would be in the context of his mounting his defence as a witness. As such, absolute privilege would still attach.

[57] What is more, in the absence of a Reply from the Claimant to challenge the circumstances of the raising of privilege by the Defendant, the Claimant is taken to have accepted that absolute privilege would attach to those statements.

### **CONCLUSION**

[58] For the reasons set out above, the Claimant’s Application to Transfer these proceedings to the Parish Court is refused.

[59] The Defendant’s application to strike out the Claimant’s Statement of Case is granted on the basis that it is an abuse of process and in relation to two of the alleged defamatory statements, it does not disclose any reasonable grounds for bringing the Claim.

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<sup>5</sup> [2022] JMSC Civ 61 at para 24

**ORDERS:**

- 1 The Claimant's Application to transfer claim to the Parish Court filed on the 27<sup>th</sup> September 2019 is refused.
- 2 Costs to the Defendant on that Application to be taxed if not agreed.
- 3 On the Defendant's Application filed on the 19<sup>th</sup> November 2019, the Claimant's Statement of Case is Struck Out and Judgment entered for the Defendant with costs to the Defendant to be taxed if not agreed.
- 4 Defendant's Attorneys-at-Law to prepare, file and serve this Order on or before the 28<sup>th</sup> April 2023 by 3:00 pm.

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**Dale Staple**  
**Puisne Judge (Ag)**