[2021] JMSC Civ. 63

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019 CV 03141

BETWEEN	**GUARDIAN LIFE LIMITED**	**CLAIMANT**
AND	**CHRISTOPHER DUNKLEY**	**DEFENDANT**

IN CHAMBERS

Kevin Powell and Shanique Scott instructed by Hylton Powell, Attorneys-at-Law for the Claimant.

Abe Dabdoub, Kayola Muirhead and Tiffany Sinclair instructed by Phillipson Partners, Attorneys-at-Law for the Defendant.

Heard: 18th March and 9th April 2021

Civil Procedure - CPR Rule 69.4 - Scope of the rule - Whether the words complained of by the Claimant are capable of bearing the meanings attributed to them in the statements of case.

C. BARNABY, J

INTRODUCTION

[1] On the 18th March 2021 the Defendant's Notice of Application for Court Orders came on for hearing before and a decision thereon was reserved to today's date. It follows the issue of a substantive claim for defamation and is made pursuant to r. 69.4. The Defendant seeks the following orders.

1. *The words complained of by the Claimant are not capable of bearing the meanings attributed to them in the Claimant's Statements of Case and do not amount to defamation.*

2. *Claimant's claim be dismissed.*

3. *Cost of this application and costs be awarded to the Defendant.*

4. *There be such further and other relief as the court may deem just.*

[2] The issues which are to be determined on the application are whether the words complained of are defamatory and capable of the meanings attributed to them in the Claimant's statements of case. For reasons, which appear below, I find that both are answered in the affirmative.

BRIEF BACKGROUND TO THE SUBSTANTIVE CLAIM

[3] Guardian Life Limited (GLL) is an insurance provider and a subsidiary of Guardian Holdings Limited (GHL), a member of the Guardian Group (GG) which carried on business throughout the Caribbean, including Jamaica and the Republic of Trinidad and Tobago. It has brought an action in defamation against the Defendant, an Attorney-at Law.

[4] It is the Claimant's claim that on or about the 25th January, the 26th and 29th April 2019, the Defendant published or caused to be published and republished words defamatory to it; putting it to expense and causing it to suffer loss and damage, including to its business reputation.

[5] The progenitor of the dispute is a letter dated 25th January 2019 written by the Defendant to the Acting Inspector of Financial Institutions at the Central Bank of Trinidad and Tobago (CBTT) and copied to the Financial Services Commission (FSC) in Jamaica.

[6] The Defendant admits to writing and delivering the letter to the intended addressees who had been joined as interested parties in a claim between Mrs. Catherine Allen and GLL, following her dismissal as the latter's appointed actuary. The Defendant was among the Attorneys-at-Law representing Mrs. Allen in that claim and he contends as part of his

defence, that the letter and the words complained of were matters appearing in the affidavit evidence filed in support of that claim.

[7] It is not denied that the contents of the letter were subsequently published on a television station in Trinidad and Tobago by a reporter. The Defendant says the reporter had contacted him for confirmation of the authorship and content of the letter which she already had in her possession and had read to him verbatim. He confirmed both. He denies supplying her with the letter or authorising its reporting; that he published or caused the letter to be published or republished; or that the words in the letter are defamatory of the Claimant. He asserts, among other defences, that of absolute privilege.

APPLICABLE LAW

[8] Pursuant to r. 69.4,

> *(1) At any time after the service of the particulars of claim, either party may apply to a judge sitting in private for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statements of case.*
> *(2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statements of case, the judge may dismiss the claim or make such other order or give such judgment in the proceedings as may be just.*

[9] Although each party referred to a number of authorities during the course of submissions, for which I express my gratitude, I have only found it necessary to refer to a few of them. Many of them and certainly those which appear in these reasons for decision, were approvingly referred to by Morrison JA (as he then was) in **Deandra Chung v Future Services International Limited and Yaneek Page** [2014] JMCA Civ 21, on which

both parties relied. While that case is factually dissimilar from the instant case, the principles upon which the court proceed in determining the appeal against a decision made under rule 69.4 are equally applicable here.

[10] On the history of rule 69.4 and the role of the court on an application thereunder, Morrison JA (as he then was) stated,

> *[38] … The rule has its origin in the former RSC Ord 82, r 3A, which was introduced in England in 1995. As Hirst LJ explained in Mapp v News Group Newspapers Ltd [1995] QB 520, 524, prior to the introduction of that rule, rulings as to the meaning of the words complained of in a libel action were traditionally sought and given at the trial itself, unless tried as a preliminary issue. Any earlier interlocutory proceedings were confined to a summons to strike out under RSC Ord 18, r 19, which applied "in plain and obvious cases". After referring to Lewis and Another v Daily Telegraph Ltd and other authorities which established the principle that in actions for libel the question is what the words would convey to the ordinary man, Hirst LJ explained the purpose of the rule in this way (at page 526):* ***"In my judgment, the proper role for the judge, when adjudicating a question under Ord. 82, r. 3A, is to evaluate the words complained of and to delimit the range of meanings of which the words are reasonably capable, exercising his own judgment in the light of the principles laid down in the above authorities and without any Ord. 18, r. 19 overtones. If he decides that any pleaded meaning falls outside the permissible range, it is his duty to rule accordingly. It will, as is common ground, still be open to the plaintiff at the trial to rely on any lesser defamatory meanings within the permissible range but not on any meanings outside it. The whole purpose of the new rule is to enable the court in appropriate cases to fix***

in advance the ground rules on permissible meanings which are of such cardinal importance in defamation actions, not only for the purpose of assessing the degree of injury to the plaintiff's reputation, but also for the purpose of evaluating any defences raised, in particular, justification or fair comment. *This applies with particular force in a case like the present where there is a defence of justification of a lesser meaning than that pleaded in the statement of claim."* [**Emphasis added**]

[11] **Skuse v Granada Television Ltd** [1993] Lexis Citation 3931, [1996] EMLR 278 also provides helpful assistance to a court tasked with determining whether words are capable of a defamatory meaning in law. Sir Thomas Bingham MR stated the approach thus at pp 6-8,

> *(1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer watching the programme [or reading the letter] once...*
>
> *(2) "The hypothetical reasonable reader [or viewer] is not naive 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." (per Neill LJ, Hartt v Newspaper Publishing PLC, unreported, 26th October 1989 (Court of Appeal (Civil Division) Transcript No 1015): our addition in square brackets).*
>
> *(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… In deciding what impression the material complained of would have been*

likely to have on the hypothetical reasonable viewer [the court is] entitled (if not bound) to have regard to the impression it made on [it].

(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 (Sim v Stretch [1936] 2 All ER 1237 at 1240) or would be likely to affect a person adversely in the estimation of reasonable people generally (Duncan & Neill on Defamation, 2nd edition, paragraph 7.07 at p 32).

(6) In determining the meaning of the material complained of the court is "not limited by the meanings which either the plaintiff or the defendant seeks to place upon the words" (Lucas-Box v News Group Newspapers Ltd [1986] 1 All ER 177, [1986] 1 WLR 147 at 152H of the latter report).

(7) The defamatory meaning pleaded by a [claimant] is to be 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? (Slim v Daily Telegraph Ltd, above, at p 176.)

(8)…

(9) The court is not at this stage concerned with the merits or demerits of any possible defence to [the] claim.

[12] The foregoing dictum was summarised by Lord Nichols in **Bonnick v Morris et al** [2002] UKPC 31 who also went further to state that

[9] … The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant …

[13] This takes me to the words complained of in the Claimant's statements of case.

THE WORDS COMPLAINED OF

[14] The extract below appears at paragraphs 5 to 8 of the Claimant's Particulars of Claim.

> ***THE DEFAMATORY WORDS***
>
> *5. Sometime on or around January 25, 2019 the Defendant wrote and published and/or caused to be written and published the following words contained in a typewritten letter bearing the date January 25, 2019 ("the January 25 Letter"), which are defamatory of Guardian Life:*
>
> > ***If regulated companies could simply fire (<u>or hire</u>) their appointed actuaries for resisting (<u>or supporting</u>) creative or convenient practices based on perceived exigencies, such companies would be in serious violation of their licences for conducting their activities outside the protections contemplated by their regulators and intended by the laws which govern their industry.***
> >
> > ***Absent <u>prudent</u> actuaries or accountants, institutions at risk could simply manipulate their company's financials to mislead the regulators.***
> >
> > ***For these reasons, executive of financial institutions are also governed by both the Companies Act and all other relevant laws which regulate our institutions.***
> >
> > ***As we are now aware, internal governance failures were at the heart of the financial debacle of CLICO's collapse.***
> >
> > ***<u>Executive Action by GLL</u>***

When GLL apparently decided that it needed a dividend pay-out (mid-year) to facilitate its corporate objectives, the executives authorised a release of the policy holders' reserves at the end of the second quarter of 2018 to achieve that aim.

The objective appears to be that a dividend pay-out would improve GHL's ratings, making it correspondingly easier and cheaper to raise investment on the capital markets.

GLL took the ostensible position that Mrs. Allen was unsupportive of its President but contrary to her reporting, GLL was seeking to (sic) release of the reserves irregularly, effectively misleading the Financial Services Commission (FSC), our regulators her in Jamaica (and the CBTT) by extension).

This mid-year release of its reserves coincided with GHL's provision of the dividend pay-out, which in turn coincided with the impending sale of GHL to the National Commercial Bank (NCB).

For your information, the Chairman of GLL, and the Officer ultimately answerable in Jamaica, is also the President and CEO of GHL in Trinidad.

We trust that the foregoing will assist your mandate as regulator of financial services in the republic of Trinidad and Tobago.

We are in the preliminary stages of fully appraising our FSC on this matter and we welcome the opportunity to do the same for the CBTT, at any time convenient to your Bank. (The Defendant's underlined emphasis)

6. *The January 25 letter also quoted from an affidavit Guardian Life's former actuary Catherine Allen had sworn in support of a claim against Guardian Life and others ("the Allen Claim"), and said that the words quoted* ***"captures the events leading up to the change in reserves in [Guardian Life] …and for which Mrs. Allen was ultimately dismissed".***

7. *The words were referred to an were understood to refer to Guardian Life and its parent company, Guardian Holdings Limited.*

8. *In their natural and ordinary meaning the words meant and were understood to mean that:*

    a. *Guardian Life engaged in improper conduct and is guilty of breaching and/or disregarding the statutory, regulatory and licence obligations that apply to its actuarial reserves.*

    b. *Guardian Life deliberately misled its statutory regulator the Financial Services Commission in order to secure a benefit to Guardian Holdings Limited.*

    c. *Guardian Life colluded with Guardian Holdings Limited to fraudulently manipulate its actuarial reserves.*

    d. *Guardian Life colluded with Guardian Holdings Limited to mislead the Central Bank of Trinidad and Tobago, Guardian Holdings Limited's statutory regulator.*

    e. *Guardian Life dismissed its appointed actuary because she failed to agree with and/or support*

the illegal and/or improper practices it was undertaking.

f. Guardian Life suffers from internal governance failures and conducts its affairs in such a way so as to place the company's continued operations and its policy holders at risk.

[15] The authorities make plain that in arriving at the meaning of the words complained of, the court must read the writing as a whole and avoid over-elaborate analysis and too literal of an approach. In that regard something must be said of the words in the letter which precede the extract constituting the complaint, at least in summary.

[16] In the opening paragraphs the Defendant states that he is writing in reference to that which the Claimant has referred in its pleadings as "the Allen claim", which description I will adopt; that the claim was brought by Mrs. Catherine Allen former appointed actuary of the Claimant GLL; refers to the fact that the Claimant is a subsidiary of GHL, a company regulated by the CBTT; that an extract which appears in quotation marks in the letter was taken from the Allen claim and affidavit in support which was served on the CBTT in the previous year, which extracts are said to capture the events leading to change in reserves in GLL; that the events created a dilemma for Mrs. Allen, the Claimant's appointed actuary, for which she was ultimately dismissed; and the role of an appointed actuary, which among other things is stated as being fiduciary and that codes of conduct, ethics and good governance exists for preservation of the integrity and health of financial institutions and the financial services industry generally.

[17] The affidavit extract, which is not the subject of complaint in the Claimant's pleadings are in these terms:

"I [Catherine Allen] submitted my Actuarial Report with my normal calculated figures for month of June 2018 which reported on the reserves I calculated and submitted to Accounts Department of the Defendant.

> **This Report did not account for the JMD$545 million or the JMD$700 million which was reflected in the reconciliation of retained earnings for the month of June 2018 as these were done as manual adjustment by the Accounts Department and were not recommended by me."**
>
> ***"That I have since received a letter from the Financial Services Commission dated August 15, 2018 indicating that I should give reasons for my departure from the Defendant in accordance with section 45 of the Insurance Act, 2001. The letter also indicated that I am required to provide information as previously requested regarding the variance in net liabilities over June 2017".*** *(sic)*

[18] The words the Claimant alleges to be defamatory of it appear after the introductory paragraphs which I have previously summarised and the foregoing extract.

[19] When the letter as a whole is read, it appears to me that a reasonable reader who is neither naïve, unduly suspicious or avid for scandal, would find their ordinary and natural meanings to be that:

(i) GLL acted unlawfully and to the detriment of itself and its policy holders in changing its actuarial reserves and in making an irregular mid-year pay-out of policy holders' reserves for the benefit of its parent company GHL;

(ii) Both GLL and GHL were complicit in carrying out the unlawful and irregular actions;

(iii) GLL and GHL misled their regulators in Jamaica and in the Republic of Trinidad and Tobago; and

(iv) Mrs. Allen was dismissed as GLL's appointed actuary because she did not authorise or give support to the unlawful and irregular actions by GLL.

[20] The Claimant is an operator in the financial service industry which is heavily regulated and is unarguably dependent on being regarded as statutory and regulatory compliant. The letter when read as a whole and the words complained of would tend to lower the Claimant in the estimation of right-thinking members of society generally, or would be likely to affect an entity in the Claimant's business adversely in the estimation of reasonable people generally, and are therefore capable of defamatory meanings in law. I also find that the meanings which the Claimant has attributed to the words complained of are consistent with the defamatory meanings which I have found them capable of having on this assessment.

[21] Having so found, the power reserved to the court by r. 69.4 (2), to dismiss a defamation claim on a finding that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statements of case does not arise for exercise.

[22] Further, while the delimiting of the words complained of will be important in evaluating any defences raised in disputing the defamation claim, it is clearly demonstrated on the authorities that on an application under r. 64.9, the court is not concerned with the merits or demerits of any possible defences to the claim. That assessment is properly a matter for trial.

[23] In all the foregoing premises, I find as requested by the Claimant, that the Defendant's application should be refused.

ORDER

[24] It is ordered as follows:

1. The words complained of are capable of the meanings attributed to them by the Claimant in its statements of case.

2. The orders sought on the Defendant's Notice of Application for Court Orders filed on the 20th August 2020 are refused.

3. Costs of the application to the Claimant to be taxed if not sooner agreed.

4. The Claimant's Attorneys-at-Law are to prepare, file and serve this order.

Carole Barnaby
Puisne Judge