



[2021] JMSC Civ 206

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 04245

BETWEEN	JULIE MALCOLM	CLAIMANT/ RESPONDENT
AND	HUBERT DEVONISH	DEFENDANT/ APPLICANT

IN CHAMBERS

Ms. Julie Malcolm, the Claimant/Respondent appeared in person.

Ms. Lesley-Ann Stewart instructed by Mrs. Symone Mayhew, Q.C. for the Defendant/Applicant

Heard: May 18, 2021.

**Claim to recover damages for breach of copyright – Allegation of defamation -
Application for summary judgment/striking out**

Cor: V. SMITH, J

INTRODUCTION

[1] The claimant/respondent, Ms. Julie Malcolm, is a postgraduate student of the University of the West Indies in the Department of Language, Linguistics and Philosophy. The defendant/applicant is a research supervisor in the same department at the University of the West Indies and at all material times was the research supervisor of the claimant/respondent in relation to her proposed area of work.

- [2] The academic journey that they embarked upon should have resulted in a smooth flight destined to attain the heights of scholastic excellence. However, it was instead rocked by frequent bouts of turbulence resulting in the diversion of the flight, which up to this point, has not reached its final destination. This has culminated in both parties disembarking by virtue of the defendant/applicant writing a letter withdrawing as the claimant/respondent's research supervisor and the claimant/respondent initiating the claim herein.
- [3] By virtue of claim form filed on the 14th of December, 2017, Ms. Malcom seeks to recover damages for breach of section 31 of the Copyright Act of Jamaica (hereinafter called "the Act"). Although not mentioned in her claim form, in her particulars of claim she also claims to have been defamed by the defendant/applicant.
- [4] Professor Devonish filed a defence to the claim on the 25th of January, 2018 and by way of an Amended Notice of Application for Summary Judgment/Striking Out filed on the 17th of June, 2020, is seeking, inter alia, the following orders:
- I. That mediation be dispensed with;
 - II. That summary judgment be entered in favour of the defendant/applicant;
 - III. In the alternative, that the claimant/respondent's statement of case be struck out; and
 - IV. Costs to the defendant/applicant to be taxed if not agreed.
- [5] The court having heard submissions, ordered that summary judgment be entered in favour of the defendant/applicant and that costs be awarded to him. By way of letter dated the 19th of October, 2021, received on the 15th of November, 2021, the court was put on notice that an appeal was filed by the claimant/respondent. A request was made for a formal judgment to be submitted and I now seek to fulfil that request.

BACKGROUND

- [6] Ms. Malcolm is enrolled in the Master of Philosophy programme of the University of the West Indies, pursuing a Doctor of Philosophy in Forensic Linguistics. She has been so enrolled since September, 2014. Professor Devonish was officially appointed by the University as her research supervisor in January, 2016 and in this capacity, periodic consultations occurred between them.
- [7] Their professional relationship can be described as tumultuous as a result of differences of opinion between the two as to how the research project being undertaken should be conducted. On May 11, 2017, the defendant/applicant wrote to the Postgraduate Coordinator, Dr. Joseph Farquharson and it is the contents of this letter (hereinafter called “the letter”) which form the sole basis for the claim put forward by the claimant/respondent.
- [8] The letter outlines in some detail the difficulties between himself and Ms. Malcolm regarding how the research project should proceed. It sets out the need to have a new research supervisor appointed to oversee the project and outlines the steps to be taken to ensure that the transition is a seamless one. He concludes the letter by deeming Ms. Malcolm’s work to be important and deserving of supervisory and other support.

ISSUES TO BE DETERMINED

- [9] The issues which arise for determination are:
- i. Whether the defendant’s/applicant’s application for summary judgment should be granted?
 - ii. Whether the steps being outlined in the letter resulted in a breach of section 31 of the Act?
 - iii. Whether the contents of the letter were defamatory of the claimant/respondent?

DEFENDANT/APPLICANT'S SUBMISSIONS

- [10] Professor Devonish acknowledges that he is the author of the letter which is addressed to Dr. Joseph Farquharson, the Postgraduate Coordinator. There is no dispute that this letter forms the basis for the claim brought by Ms. Malcolm. The defendant/applicant asserts, however, that the steps outlined in the letter are steps that any competent supervisor who is familiar with the work of the claimant/respondent would have proposed. As such, he contends that they do not breach the provisions of the Act as they were stated for the purpose of criticism or review in his capacity as her outgoing supervisor. He denies that the contents of the letter were in any way defamatory of the claimant/respondent.
- [11] In support of the application, Ms. Lesley-Ann Stewart, counsel for the defendant/applicant, argues that the court is empowered to give summary judgment on a claim in circumstances where the claimant has no real prospect of succeeding on same, pursuant to Rule 15.2(a) of the Civil Procedure Rules, 2002 as amended (CPR). Counsel cites and relies on the authority of ***Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd (RBC) et al***¹ which outlines the principles the court will take into account when determining whether summary judgment should be granted.
- [12] She avers that the claimant/respondent's analytical plan does not attract copyright protection and invites the court to take note of section 6(1) of the Act, which details the types of work that enjoy copyright protection. Counsel posits that although formulated for the claimant/respondent's research topic, the steps outlined in the analytical plan are general methods of research that would be employed by the reasonable and practical researcher. She also refers the court to section 6(2) of the Act which states that copyright protection does not extend to an idea, concept, process, principle, procedure, system or discovery or things of a similar nature.

¹ [2015] JMCC Comm 22

Ms. Stewart thus invites the court to find that the claimant/respondent's analytical plan constitutes no more than general principles or ideas and that as such it does not attract copyright protection. In support of this position, she relies on the American authority of ***Borden v General Motors Corp.***²

[13] Counsel argues further that in the alternative, even if Ms. Malcolm's analytical plan is capable of attracting copyright protection, the letter sent by Professor Devonish in his capacity as research supervisor would not cause him to run afoul of the Act as he provided sufficient acknowledgment of the claimant/respondent's work and would therefore be in a position to avail himself of the fair dealing defence pursuant to sections 52 to 54 of the Act.

[14] With respect to the allegation of defamation, counsel posits that the cause of action was not included in the Claim Form and is therefore not properly before the court. She invites the court to examine paragraph 5 of the Particulars of Claim where the issue is mentioned. Paragraph 5 states as follows:

"That the Defendant has sought to discredit the analytical ability of the Claimant by deceiving the University and in effect defamed the Claimant's character in the eyes of the University and other professionals within the academic sphere."

[15] Counsel therefore suggests that this paragraph should be struck out for failing to comply with Rule 8.9(1) of the CPR and argues further that the claimant/respondent has failed to comply with Rule 69.2 of the CPR which requires her to give sufficient particulars of the publications in respect of which the claim for defamation is being brought. Reliance was therefore placed by counsel on the case of ***McPhilemy v Times Newspapers Ltd and others***³, which states that

² 28 F. Supp 330

³ [1999] 3 All ER 775

pleadings are required to identify the parameters of the case that is put forward, with such pleadings making clear the general nature of the case of the pleader.

- [16] The defendant/applicant's counsel also cites the authority of ***Honourable Gordon Stewart v John Issa, Raymond Clough and anor***⁴ in which the court ruled that a claim may amount to an abuse of process where the publication is minimal. Ms. Stewart contends that the Particulars of Claim filed on December 14, 2017 makes no reference to the instances in which the defendant/applicant sought to defame the claimant/respondent and that her exhibits also do not make this clear. Counsel further submits that even if the alleged instances of publication were properly pleaded, the extent of the publication would have been limited to only the persons who were privy to the process of changing supervisors, the likely maximum number being two. Ms Stewart therefore surmises that even if the instances of publication were defamatory, the minimal publication would only entitle the claimant/respondent to nominal damages and as such this claim would amount to an abuse of the court's process.

CLAIMANT/RESPONDENT'S SUBMISSIONS:

- [17] By way of affidavit filed on June 23, 2020, Ms. Malcolm alleges that since the appointment of Professor Devonish as her research supervisor, their academic relationship was characterised by abuse, discourtesy and unprofessionalism. This, she contends, culminated in her decision to seek another supervisor which decision she communicated to the defendant/applicant on May 10, 2017. At paragraph 6 of the said affidavit the claimant/respondent states:

"6. Whereas Professor Hubert Devonish had no problems with the duties I performed as Research Assistant and Departmental Awardee, in his capacity as supervisor for my personal research, Professor Hubert Devonish was consistently discourteous and unprofessional, so I took

⁴ HCV 2328/2008

steps to end the relationship and he responded with vengeance to tarnish my reputation, claim my research, and further sabotage my research...”

- [18] By her written submissions, she asserts that whilst the defendant/applicant praised her work via a University Progress Report dated May 10, 2017, he thereafter sought to separate her from her research, declaring it excellent and impressive, but falsely claiming it as his own by way of the letter and neither acknowledging nor crediting her for her intellectual property as it related to the core analytical component of the research.
- [19] The claimant/respondent maintains that her analytical plan, consisting of 28 pages, is not merely a list of generally popular steps or instructions but is the complete methods chapter of her Master of Philosophy/Doctor of Philosophy (MPhil/PhD) dissertation. Therefore, having regard to the Act, she contends that an analysis of her work shows that it qualifies for copyright protection and submits that the letter contains false information which would therefore not be covered by the fair dealing exceptions under the Act.
- [20] She suggests further that the issue of defamation has been properly pleaded as from the inception of the matter, she clearly identified the letter as the source of the defamatory statements. She contends that the defendant/applicant declared a statement of intent to write a similar letter to the Campus Coordinator of Graduate Studies and Research for the University of the West Indies and that this allowed him to provide his defamatory statements to third and/or additional parties.
- [21] She refers to the case of ***Keith Gardner v Christopher Ogunsalu***⁵, which she cites as a case on defamation in which statements made about the claimant by the defendant in an email were found to be defamatory and had the effect of lowering the reputation of the claimant in the eyes of right thinking persons in the University Community and other parties privy to the email.

⁵ [2020] JMSC Civ 8

[22] She therefore invites the court to find that there is a matter to be argued at trial and concludes by suggesting that her prospects of succeeding are good.

DISCUSSION AND ANALYSIS

[23] Prior to proceeding, I wish to thank Ms. Malcolm and Counsel, Ms Stewart, for their submissions and supporting authorities. They have been of assistance in resolving the issues that fall to be determined.

[24] The application being considered is one brought by the defendant/applicant for, inter alia, summary judgment. A judge's power to grant summary judgment can be an effective tool, which when properly utilised by the court, will serve to enhance court efficiency and enable the court to achieve the overriding objective of dealing with cases justly. The benefits to be derived by the proper exercise of a court's power in this manner can be gleaned from the judgment of Lord Woolfe in **Swain v Hillman**⁶. Lord Woolfe stated at page 94 of his judgment that:

“It is important that a judge in appropriate cases should make use of the powers...In doing so he or she gives effect to the overriding objectives ...It saves expense; it achieves expedition; it avoids the courts resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interest of justice. If a claimant has a case which is bound to fail, then it is in the claimants interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible.”

[25] The rules governing Summary Judgment are found in Part 15 of the CPR. In particular, rule 15.2 provides that:

“The court may give summary judgment on the claim or on a particular issue if it considers that –

⁶ [2001] 1 All ER 91

- (a) *the claimant has no real prospect of succeeding on the claim or the issue; or*
- (b) *the defendant has no real prospect of successfully defending the claim or the issue.*

[26] As a consequence, in order to determine whether to grant the defendant/applicant's application, the court must consider whether the claimant/respondent has a real prospect of succeeding on the claim.

[27] Counsel for the defendant cited the authority of ***Ocean Chimo Ltd v Royal Bank (Jamaica) Ltd (RBC) et al*** (supra) in which Edwards J summarized the principles the court will take into account when considering summary judgment. It may be helpful to reproduce his summary at this point:

"[52] The principles that I have applied in making my determination on whether summary judgment should be considered in a case such as this may be summarized as follows:

- (i) *Defendants may apply for summary judgment in cases where the claimant's case is obviously and patently weak. It may also be used to cull issues in a complex case and simplify the trial.*
- (ii) *The court may grant summary judgment to a defendant where the claimant's case has no real prospect of succeeding on the claim or issue.*
- (iii) *On an application by a defendant, that defendant must show why he considered that the claimant's case had no real prospect of success.*
- (iv) *Once the applicant has asserted and shown that there are grounds to believe that the respondents case has no reasonable prospect of success, the respondent is then required to show that he has a case which is more than merely arguable and which has a realistic as opposed to a fanciful prospect of success.*

- (v) *The test of whether the case has any real prospect of success must be applied having regard to the overriding objective of dealing with the cases justly.*
- (vi) *In order to have a real prospect of success the case must carry some degree of conviction and be better than merely arguable.*
- (vii) *The court must be cautious in granting summary judgment in certain types of cases, especially those where there are conflicts of facts on the relevant issues which have to be resolved before any judgment can be given.*
- (viii) *Where a clear-cut point of law or construction is raised by the applicant in support of the application the court should decide the issue, even if it appears complex and requires full argument.*
- (ix) *The court hearing the application must be cognizant of the fact that merely because an application takes days to argue with the submission of several cases does not necessarily means it is not an appropriate case for summary judgment.”*

Does the claimant/respondent’s case have a real prospect of succeeding on the claim?

[28] The claimant/respondent, by way of claim form filed on December 14, 2017 seeks to recover damages for breach of section 31 of the Act. She alleges that by way of the letter, the defendant/applicant, unlawfully and without due authorisation, copied and attributed literary work belonging to her and published same as his own work causing her to suffer loss. She identifies this literary work as being her Analytical Plan for her proposed MPhil/PhD in Linguistics and indicates that at the time of the alleged infringement the defendant/applicant was her Research Supervisor.

[29] In furtherance of her studies, Ms. Malcolm seeks to research the attitude of members of the Jamaica Constabulary Force towards the use of Jamaican ‘Patois’ during the process of statement taking. To this end, she developed the document which she refers to as her analytical plan which is comprised of, inter alia, her

reason or basis for undertaking the research, the methods she plans to utilise in order to gather data relevant to the research as well as some of the initial findings of that research. She describes the data compiled therein as the foundation and identity of her research which is capable of copyright protection.

[30] In order to determine whether the analytical plan attracts copyright protection, an examination of the relevant provisions of the Act is in order.

[31] Section 2(1) of the Act provides as follows:

“2. (1) In this Act-

...literary work means any work other than a dramatic or musical work which is written, spoken or sung and accordingly includes-

(a) a written table or compilation;

(b) a computer programme,

and for the purpose of paragraph (a) of this definition, “compilation” means a collection of works, data or other material, whether in machine-readable form or any other form, which constitutes an intellectual creation, by reason of the selection or arrangement of the works, data or other material comprised in it;”

[32] The defendant/applicant suggests that the steps outlined in the analytical plan are general methods of research which would be employed by the reasonable and practical researcher and therefore are not capable of copyright protection. Counsel placed reliance on section 6 of the Act to ground this position.

[33] Excerpts of Section 6 state as follows:

“6. (1) Copyright is a property right which, subject to the provisions of this section, may subsist in the following categories of work-

(a) original literary, dramatic, musical or artistic works;

(b) *sound recordings, films, broadcasts or cable programme;*

(c) *typographical arrangements of published editions,*

and copyright may subsist in a work irrespective of its quality or the purpose for which it was created.

...

6. (8) Copyright protection does not extend to an idea, concept, process, principle, procedure, system or discovery or things of a similar nature.”

[34] The court cannot agree with the defendant/applicant’s view that the analytical plan constitutes no more than general principles or ideas which are not capable of copyright protection. To do so, would seemingly equate the steps comprised within the analytical plan to the plan in its entirety.

[35] Having regard to the definition of literary work as stated in the Act therefore, the court is inclined to accept the claimant/respondent’s position that her analytical plan falls within the definition of a literary work which is capable of copyright protection.

[36] Having found that the analytical plan is a literary work capable of attracting copyright protection, in order to determine whether the claim has a real prospect of success, the court now needs to examine whether the letter infringes the copyright protection afforded to the claimant/respondent’s analytical plan.

[37] As mentioned previously, the claim form filed by Ms. Malcolm seeks to recover damages for breach of section 31 of the Act. Section 31. (1) provides:

“31. (1) The copyright in a work is infringed by any person who, without the licence of the copyright owner, does in relation to that work, any of the acts which the copyright owner has the exclusive right to do pursuant to section 9“.

[38] In this regard, section 9. (1) stipulates that the owner of the copyright in a work shall have the exclusive right to copy the work or to authorise other persons to copy the work, amongst other things.

[39] In seeking to substantiate her claim, Ms. Malcolm asserts that the letter outlines four analytical steps that are identical to those contained in her analytical plan. She also contends that Professor Devonish claimed ownership of the approaches laid out in the plan without acknowledging or crediting her for her intellectual property as it relates to the core analytical components of her research.

[40] By virtue of section 53. (1) of the Act, which is subject to section 54, it is provided that fair dealing with a protected work for the purposes of criticism or review does not infringe copyright in the work provided that it is accompanied by a sufficient acknowledgement.

[41] In this regard, section 51 of the Act defines sufficient acknowledgement. It states:

“51. For the purposes of this part “sufficient acknowledgement” means an acknowledgement identifying the work in question by its title or other description and identifying the author, unless-

(a) in the case of a published work, it is published anonymously or the author has agreed or required that no acknowledgement of his name should be made;

(b) in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry.”

[42] Further, section 54 states:

54. For the purpose of determining whether an act done in relation to a work constitutes fair dealing, the court determining the question shall take account of all factors which appear to it to be relevant, including-

(a) the nature of the work in question;

- (b) *the extent and substantiality of that part of the work affected by the act in relation to the whole of the work;*
- (c) *the purpose and character of the use; and*
- (d) *the effect of the act upon the potential market for, or the commercial value of, the work.*

[43] Having reviewed the letter, in particular the four steps proposed therein, vis-a-vis the analytical plan, the court is not in a position to agree with the claimant/respondent that the steps set out in the letter are identical to the methodology contained in her plan. In addition, even though the analytical plan as a whole is subject to copyright protection, it includes procedures and processes, which are part of general research methodology.

[44] The steps outlined in the letter, although referable to the claimant/respondent's research, also constitute procedures and processes. As such, even if these steps were taken from the analytical plan, they would not be afforded copyright protection as stipulated in section 6(8) of the Act and the court thus finds favour with the submissions made by the defendant/applicant's counsel in this regard.

[45] The court is also of the view that even if it was determined that the steps in the letter formed part of the claimant/respondent's intellectual property and were capable of attracting protection under the Act, the issue as to whether the defendant could avail himself of the fair dealing defence would then arise.

[46] Having regard to the considerations set out in section 54 of the Act, in view of the academic relationship between the parties, the fact that the steps outlined in the letter stemmed from his review and critique of her work and the fact that the steps were provided for the purpose of ensuring that the transition to another supervisor would proceed seamlessly, the court finds that the defendant/applicant would be entitled to avail himself of the fair dealings defence provided for in section 54.

[47] The court finds that throughout the letter Professor Devonish made reference to the research work undertaken by Ms. Malcolm and detailed the interactions between them regarding same. There is no doubt therefore that the letter acknowledges that the author of the research is Ms. Malcolm and credits her for same. This is especially so when one considers that the defendant/applicant ended his letter by specifically stating that “Ms. Malcolm’s work is important and is deserving of all the supervisory and other support she can get.” This, in the court’s view, is sufficient acknowledgment of the claimant/respondent as the author of the work and therefore satisfies section 53. (1) of the Act.

[48] It is prudent at this point to make mention of the fact that the claim form filed by the claimant/respondent seeks damages solely for breach of the Act. However, by way of her particulars of claim, Ms. Malcolm raises the issue of defamation and in response to this issue, the defendant/applicant seeks in the alternative to have paragraph 5 of her particulars of claim struck out as it does not comply with rules 8.9(1) and 69.2 of the CPR.

[49] The court is mindful of the fact that, as stipulated in rule 15.3(d)(iii), it is not empowered to give summary judgment in proceedings for defamation. In light of the submissions, the court examined the issue of defamation, in particular, rule 69 of the CPR which states:

“69.2 The particulars of claim (or counter claim) in a defamation claim must in addition to the matters set out in part 8-

(a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; and

(b) where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, give particulars of the facts and matters relied on in support of such sense; and

(c) where the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation.”

- [50] In this regard, rule 8.9(1) provides that the claimant must include, in the claim form or in the particulars of claim, a statement of all the facts on which he or she intends to rely.
- [51] Having thoroughly reviewed the claimant/respondent’s particulars of claim and supporting documents relied on by her, the court finds that she has failed to give sufficient particulars of any defamatory publication as stated in her particulars of claim. Consequently, she has not complied with rules 8.9(1) or 69.2.
- [52] In seeking to make out her claim for defamation, Ms. Malcolm asks the court to take into account matters which are extraneous to the defendant/respondent’s letter which she suggests provide a basis for inferring that the letter is defamatory. The court has read the authority, ***Keith Gardner v Christopher Ogunsalu (supra)*** which is relied on by the claimant/respondent, but finds that it offers her no assistance.
- [53] At paragraph 50, Hutchinson, J. (Ag.), as she then was, refers to the case of ***Deandra Chung v Future Services International Limited et al***⁷, in which she states:

“50. ... in examining the question of whether the words used in that matter were capable of bearing a defamatory meaning it was stated by Morrison JA as follows;

*I take as a starting point ***Bonnick v Morris et al*** [2002] UKPC 31, in which Lord Nicholls explained (at para. 9) the correct approach to determining whether a statement can bear or is capable of bearing the defamatory meaning alleged:*

*“As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in *Skuse v Granada Television Limited* [1996] EMLR 278, 285-287. In short,*

⁷ [2014] JMCA Civ 21

the court should give the article, the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the [newspaper], reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too liberal an approach. The intention of the publisher is not relevant. An appellate court should not disturb the trial judge's conclusion unless satisfied that he was wrong." [emphasis supplied]"

Mindful of this, the court has carefully examined the defendant/respondent's letter in its entirety and is unable to identify any words or phrases used by the defendant/applicant which are defamatory of the claimant/respondent. It is therefore this court's considered view that there is no basis to support Ms. Malcolm's assertion that she was defamed by Professor Devonish.

CONCLUSION

[54] Taking into account all of the above, the Court finds that the claimant/respondent has no real prospect of succeeding in respect of the claim for breach of the Act and as such, the defendant/applicant's application for summary judgment is granted in respect thereof. Additionally, the court finds that the claim for defamation is unsustainable.

DISPOSITION and ORDERS:

1. Summary Judgment be entered in favour of the Defendant against the Claimant.
2. Costs to the Defendant to be taxed if not agreed.
3. Counsel for the Defendant to prepare, file and serve order herein.