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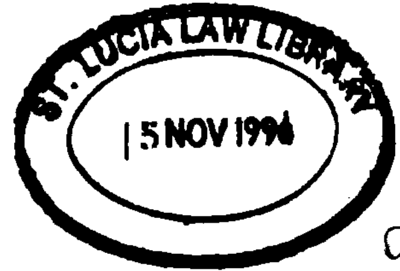

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

Suit No. 62 of 1990

BETWEEN:

OLIVIER GARON

Plaintiff

and

1. JEAN EBRARD
2. RADIO CARIBBEAN (1982) LTD.

Defendants

Mrs. C. Malaykhan for Plaintiff
Mr. K. Monplaisir Q.C. and Mrs. C. Hinkson - Ouhla for Defendants

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1996: October 22 and 24;
November 6.

J U D G M E N T

MATTHEW J.

The Plaintiff was the General Manager of the second Defendant company in Saint Lucia from 1980 until 1988. The first Defendant was at the time and still is the Chairman of the Board of Directors of the second Defendant company.

On March 1, 1989 the first Defendant wrote in French to the Plaintiff the following which has been admitted by both to be a correct translation in English -

"Mr. Olivier Garon

La Ferme/Redoute

97200 Fort de France

Martinique.

Dear Sir,

For several years you occupied the post of Director of Radio Caribbean (1982) Limited.

Various investigations and audits which I have conducted recently in that company have revealed a particularly disturbing disorder in the administrative, accounting and financial departments. You were the one in charge however, and for several years you were the only one to have committed the company by your signature. Yet I was forced to make external enquiries to get a true picture of the situation.

It is in this confusing situation that I have noted that for several years now, many withdrawals were made under your signature from the company's account in the Credit Martiniquais in Fort de France, and deposited in another account, apparently belonging to the company, but whose domiciliation mentions your name, or sometimes that of your predecessor. According to the information we have, you were the only signatory to that account opened at the Banque Francaise Commerciale in Dominica, an account which was used to settle the company's expenses in Dominica.

Now it appears that since 1982 more than EC $500,000 (five hundred thousand EC dollars) was deposited into this account but the vouchers for many of the payments drawn from that account were not annexed; in other words, many withdrawals were not supported by the relevant vouchers.

This vexing state of affairs cannot escape you, particularly since we have no documents whatsoever in our possession since 1/10/86, no bank statements, vouchers, receipts etc.

This is why we are requesting that you send us most urgently all documents relevant to that account which may still be in your possession. We will then send you a detailed list of expenses for which we have no vouchers, bills or invoices, so that you can furnish the necessary explanation.

I am persuaded that you fully appreciate the need to let

us have that information, and that you will give it your most urgent attention.

Jean Ebrard

Chairman of the Board."

As a result of that letter the Plaintiff on February 28, 1990 instituted a libel action against the Defendants.

In paragraph 5 of his statement of claim the Plaintiff alleged that in their ordinary and natural meaning the words in the second paragraph of the letter, that is -

"Yet I was forced to make external enquiries to get a true picture of the situation." -

taken in the context of the letter as a whole and, in particular, in the context of the first and second paragraphs of the said letter, meant and were understood to mean that the Plaintiff as the person in charge of Radio Caribbean (1982) Limited had dishonestly given a false picture of the administrative, accounting and financial departments of the company, and accordingly, the said words are defamatory.

In paragraph 6 of his statement of claim the Plaintiff alleged that in their ordinary and natural meaning, the words in the third, fourth and fifth paragraphs of the said letter taken in the context of the letter as a whole, meant and were understood to mean that the Plaintiff had dealt dishonestly with funds of the company, and accordingly, the said words are defamatory.

In their defence filed on April 24, 1990 the Defendants denied that the words complained of bore or were understood to bear or are capable of bearing any meaning defamatory of the Plaintiff and in addition they relied on qualified privilege.

In the Plaintiff's reply filed on May 23, 1990 he alleged that the publication was malicious.

I think the Parties are ad idem on the issues which arise in this case. They are as follows:

1. Whether there was a publication.
2. If there was a publication, whether the words complained of are capable of bearing a meaning defamatory of the Plaintiff.
3. If the words bear a defamatory meaning whether the occasion was privileged.
4. If the occasion was privileged whether it was defeated by express malice.

I shall proceed to deal with these issues in the order stated above.

Publication is dealt with in Chapter VI of the eighth edition of Gatley on Libel and Slander. Paragraph 221 states that no civil action can be maintained for libel or slander unless the words complained of have been published. Lord Esher M.R. said in one case: "The material part of the cause of action in libel is not the writing, but the publication of the libel."

Paragraph 222 states that by publication is meant the making known of the defamatory matter, after it has been written, to some person other than the person of whom it is written.

In this case the Plaintiff cannot establish that there was publication to a specific third party and indeed is relying on the pleadings in support of the fact that there was a publication. In paragraph 3 of the statement of claim the Plaintiff alleged that the first Defendant wrote and published of the Plaintiff the things stated in the letter of March 1, 1989. In paragraph 1 of the defence the Defendant admitted paragraphs 1, 2 and 3 of the

statement of claim.

The only evidence of publication comes from the defence. Jean Ebrard, one of the two witnesses for the defence, said in cross-examination that as far as he could remember, it was Christian Bonnel, the other witness and present General Manager of the second Defendant company, who typed the letter of March 1, 1989. When Bonnel gave evidence, again under cross-examination, he stated that it is possible that he typed the letter but he could not really recall the matter.

So the Plaintiff can only rely on publication by the first Defendant to an employee of the second Defendant company.

In **PULLMAN and ANOTHER v. WALTER HILL & CO. LTD. 1891 1 QB 524** the Court of Appeal held in an action for libel that there was a publication from the writer of the letter to his clerks and the occasion was not privileged.

The later case of **BRYANSTON FINANCE LTD and OTHERS v. DE VRIES and ANOTHER 1975 2 AER 609** seems to have modified the view held in Pullman's case. That was a majority decision of the Court of Appeal. In that case Lord Denning M.R. who gave the leading judgment held that the dictation by a businessman to his typist, where the dictation was the accepted mode of writing the letters, gave rise to an original privilege, which was quite independent of who the intended recipient might be or whether the letter was actually sent.

Based on the decision of Lord Denning it would seem that the publication to Bonnel would not give rise to an actionable publication for this would be barred by the original privilege.

Lord Justice Lawton, who agreed with Lord Denning that the appeal would be allowed, did not go along with his notion of original

privilege between the writer of the letter and his typist. Lawton L.J. was of the view that at least some of the intended recipients of the letters in the case had a common interest with the writer in receiving the complaints and publication to them would have been protected by qualified privilege; and so he held that the publication to the typist and photocopier would also have been protected if the publication to them had been in the usual course of business which every employee had an interest in ensuring was successful. Lawton L.J. was thus advocating an ancillary privilege which is more clearly defined in the judgment of Lord Diplock.

If I were to adopt the view for the time being that the letter of March 1, 1989 to the Plaintiff was clothed with qualified privilege I would come to the conclusion on the authority of Lawton L.J. that the publication to Bonnel would be privileged and so there would be no actionable publication.

To complete the picture I should state the view of Lord Diplock who in his dissenting judgment took the view that he was unable to accept the broad and novel proposition of Lord Denning that there is an original privilege arising out of the contractual relationship of employer and employee which automatically attaches to every occasion on which a businessman dictates a business letter to a typist in his office; and can only be displaced by proof of malice. Lord Diplock thought that it was not an original privilege but one ancillary to, and dependent on, the existence of a privilege for the publication of the defamatory contents of the letter to its addressee. Lord Diplock came to the conclusion that the main publication to the Plaintiff was incapable of attracting any ancillary privilege for its prior publication to clerical employees of the defendants in the course of preparing it for despatch to him.

Worthy of note is the view of Lord Diplock at page 623 of the judgment that the members of the Court of Appeal in Pullman's case

do not appear to have regarded it as being in the ordinary course of business practice at that date to dictate letters to short hand typists.

On the authority of Bryanston's case, for the reasons given both by Lord Denning M.R. and Lawton L.J. I would hold that there was no publication of the letter of March 1, 1989 that would give rise to a cause of action to the Plaintiff, that is, whether the publication to Bonnel be regarded as an original privilege or only as an ancillary privilege.

But I would not wish to rest my decision on this aspect of publication and so I pass on to consider whether the words complained of are capable of bearing a defamatory meaning.

Paragraph 119 of Gatley states as follows:

> "It is well settled that the question whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for the decision of the Court. If the words are so capable then it is a question for the jury whether the words do in fact convey a defamatory meaning. If a publication, either standing alone, or taken in connection with other circumstances, is reasonably capable of a libellous construction, it is for the jury, and not for the Court, to say whether a libellous construction should be put upon it."

Paragraph 1311 deals with the natural and ordinary meaning. It states -

> "Where the Plaintiff relies on the natural and ordinary meaning of the words complained of, no evidence is admissible of their meaning or the sense in which they were understood or of any facts giving rise to any inferences to be drawn from the words used, for it is for the jury to determine the sense in which the words would reasonably have been understood by an

ordinary man in the light of generally known facts and meanings of words. For instance, evidence of the meaning of a slang expression which has passed into common use would not be admissible."

In this jurisdiction of course, and in this case, the Judge performs the functions of the Court and the jury.

When I read the letter of March 1, 1989 in its totality I see a concern by the Chairman of the Board of Directors of the second Defendant company in respect of the administrative, accounting and financial departments of the company in that it was not clear in whose name was the Dominica account; and there appeared to many withdrawals from that account without supporting vouchers. The Chairman therefore requested the Plaintiff to send all documents in his possession which could help to clarify the position and when he would send these the company would send him a detailed list of expenses for which there were still no supporting documents so that he could furnish any further explanation.

I am at a loss to see any imputation of dishonesty by the Plaintiff either in giving a false picture of the administrative, accounting and financial departments of the company or in dealing with the funds of the company.

I agree with learned Counsel for the Defendants that the nature of the letter was one of enquiry.

In my judgment the words complained of in the letter of March 1, 1989 written by the first Defendant did not bear and are incapable of bearing a defamatory imputation of the Plaintiff.

But I shall assume for the time being that the words did bear a defamatory meaning and I therefore go on to consider the defence of qualified privilege.

As indicated earlier I shall assume there was an actionable publication from the Chairman of the Board of Directors to the General Manager of the second Defendant company. There is no evidence of any other publication to any other known person. Learned Counsel for the Plaintiff in her extensive cross-examination of the first Defendant suggested that the letter may have been published to a Miss Gibson. When the witness said he did not know a Miss Gibson the suggestion was dropped like a hot potato. And in her closing address learned Counsel for the Plaintiff admitted that the only evidence of publication was to Mr. Bonnel.

The subject of qualified privilege is dealt with in the fourth edition of Halsbury's Laws of England, Volume 28, and is related to the communication from the writer to the addressee.

Paragraph 108 of Volume 28 deals with the defence of qualified privilege. It states:

> "On grounds of public policy the law affords protection on certain occasions to a person acting in good faith and without any improper motive who makes a statement about another person which is in fact untrue and defamatory. Such occasions are called occasions of qualified privilege. It is not possible to set out all the occasions at common law which will be held to be privileged but, as a general rule, there must be a common and corresponding duty or interest between the person who makes the communication and the person who receives it."

Learned Counsel for the Defendants has quite rightly stated that it was a duty of the Chairman of the Board of Directors to write the alleged defamatory letter to the General Manager of the radio station who had a corresponding duty to receive it.

Paragraph 111 of the said Volume 28 of Halsbury's Laws of England states that an occasion is privileged where the person who makes a

communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

I am of the view that if the letter of March 1, 1989 could ever be regarded as defamatory the defence of qualified privilege could apply to avoid the action.

Now it is trite law that malice can defeat the defence of qualified privilege. Paragraph 109 of Volume 28 of Halsbury's Laws of England deals with the effect of malice and states -

> "It is for the Defendant to prove that the occasion of publication is one of qualified privilege. To defeat that defence the Plaintiff must then prove that the Defendant, in publishing the words complained of, was actuated by express malice."

So the burden is on the Plaintiff to prove express malice on the part of the Defendants. Paragraph 762 of Gatley states that the Plaintiff will succeed in proving the existence of express malice if he can show that the Defendant was not using the occasion honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected with the privilege, i.e. actual malice. Paragraph 765 states that actual malice does not necessarily mean personal spite or ill will . . . any indirect motive other than a sense of duty is what the law calls malice. Both Counsel referred to the case of **HORROCKS v. LOWE 1974 1 AER 662,** H. L. on the question of malice. In that case the Plaintiff brought an action claiming damages for slander in which he accepted the Defendant's plea that the words were spoken on a privileged occasion but alleged that the Defendant was actuated by express malice. The Judge found that the Defendant had not been actuated by personal spite and that he had honestly believed that what he was saying was true and justifiable. He held however that, owing to the Defendant's anxiety to have the

Plaintiff removed from the Committee, his state of mind was one of gross and unreasoning prejudice from which express malice could be inferred. Accordingly he awarded the Plaintiff damages. The Court of Appeal allowed the Defendant's appeal and the Plaintiff appealed to the House of Lords.

The House of Lords held that since the Defendant, however prejudiced he had been, or however irrational in leaping to conclusions unfavourable to the Plaintiff, had believed in the truth of what he had said he was entitled to succeed in his defence of privilege. They said that although gross and unreasoning prejudice could give rise to an inference of malice where it constituted evidence that the Defendant had been indifferent to the truth or falsity of what he had said, it could not do so in a case when it had induced him to believe in the truth of his allegations and there were no other circumstances from which malice could be inferred. The House dismissed the Plaintiff's appeal. Lord Diplock who gave the leading judgment describes express malice at pages 669 - 670.

In her closing address learned Counsel for the Plaintiff submitted that because the Defendants did not inform the Plaintiff of the result of their inquiries they did not believe in the truth of the allegations contained in the letter. In my view that submission is untenable. It does not follow that because the Defendants did not inform the Plaintiff of the results of their external inquiries that they did not believe in the truth of what they wrote.

The Plaintiff has relied heavily on the fact that the letter was written to him three months after he instituted a civil action against the Defendants for fees owed to him as proof of malice on the part of the Defendants. It is true that under cross-examination the first Defendant stated that he was not happy that Garon had filed a case against the company but this without more is not sufficient to satisfy the burden on the Plaintiff that there

was express malice on the part of the Defendants.

An issue was made of the fact that the first Defendant signed the unaudited accounts of the company for the years 1985, 1986 and 1987 the inference being that if he signed the accounts he could not later question any matter related to the accounts. I think Mr. Ebrard answered the inference correctly when he said -

> "I approved financial statements for 1985, 1986 and 1987. I approved documents that were submitted to the Board. That does not mean that I approved problems or frauds discovered subsequently that did not come to my knowledge at the time of approval."

This must have satisfied learned Counsel for the Plaintiff who never mentioned the accounts in her closing address.

In my judgment no express malice has been proved on the part of the Plaintiff in this case.

For the reasons stated above the action is dismissed with costs to the Defendants to be taxed, if not agreed.

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A. N. J. MATTHEW
Puisne Judge