SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997

SUIT NO: 144 OF 1997

Between:

KENNY D. ANTHONY

PLAINTIFF

AND

PETER JOSIE

DEFENDANT

Appearances:

Mr. A. D. Astaphan in association with Miss Michel Anthony and Miss Loraine Jolie for the Plaintiff/Applicant

Mr. Marius Wilson for Defendant/Respondent on 25th September, 1997
No appearance by the Defendant or his Counsel on October 14th, 1997

1997: SEPTEMBER 25
OCTOBER 14
NOVEMBER 21

JUDGEMENT

FARARA J In Chambers

In this action, commenced by Writ of Summons indorsed with Statement of Claim issued 17th February, 1997 the Plaintiff claims, against the Defendant, an injunction restraining further publication of certain pleaded or similar words defamatory of the Plaintiff; damages for slander published by the Defendant of the Plaintiff on 4th September, 1996 and 7th November, 1996 and on divers other occasions; aggravated and/or exemplary damages; interest and costs. A Defence was filed herein on 5th March, 1997.

By Summons filed 17th April, 1997 the Plaintiff sought (1) an interlocutory injunction restraining further publication by the Defendant of the words complained of in the Statement of Claim; and/or (2) an order that the Defence be struck out under Order 18 r.19 of RSC 1970 and/or under the Court's inherent jurisdiction; (3) an order permitting the Plaintiff to enter judgement against the Defendant for damages to be assessed and costs; and (4) costs of the application.

The Summons is supported by the Plaintiff's affidavit filed 17th April, 1997. The Defendant filed his opposing affidavit on 2nd May, 1997 and on the same day an affidavit of Simon Phillip was filed on behalf of the Plaintiff. This latter affidavit dealt with the publication by the Defendant of similar defamatory words on 16th April, 1997 with an audio cassette exhibit.

In a written judgement delivered 4th June, 1997 d'Auvergne J, who heard the first limb of the Plaintiff's application only, granted the injunction sought until the determination of the action or further order.

At page 10 of her judgement the Learned Judge found that the words complained of in the Statement of Claim were capable of having a defamatory meaning. She stated -

"In my view, the ordinary sensible person hearing those words complained of, would understand them to mean that the Plaintiff was a thief and a dishonest person, one morally unfit to be elected to public office".

And at page 11 -

"As I have said, in my judgement, the words complained of, would convey imputations of misconduct and dishonesty to the reasonable man on the part of the Plaintiff in relation to his profession as a barrister and as someone morally unfit to hold public office".

There has been no appeal from the said judgement.

The further hearing of the Plaintiff's summons were listed and gazetted for hearing before me on 25th September, 1997. This fixture was made at the call over in July, 1997 and a copy of the published list of fixtures circulated to all legal practitioners by the Registry of the High Court of

Justice.

At the hearing on 25th September, 1997 Counsel for the Defendant, Mr. Marius Wilson, appeared and requested an adjournment on the grounds that (1) he was of the view that the matter would be heard by Justice d'Auvergne, and that in light of a circular notice sent by the Registrar to all legal practitioners informing of the Learned Judge's absence from the State on that date, he assumed that this matter would be adjourned; and (2) that he would prefer that his client be present when the matter is heard. This application was, quite understandably, opposed by Learned Counsel for the Plaintiff who had, to the certain knowledge of Counsel for the Defendant, travelled from overseas to attend this fixture.

I considered the first ground for an adjournment advanced by Counsel for the Defendant to be devoid of merit since, as Counsel admitted, he had received the list of court fixtures which has this matter clearly listed for hearing before me.

As regards the second ground advanced by Counsel for the Defendant for the adjournment, while the presence of the Defendant was certainly not necessary on the hearing of an application to strike out the Defence, I nevertheless, with reluctance, acceded to Counsel's application on terms for payment of the Plaintiff's costs of the day, so that Counsel for the Defendant could have his client present whilst the matter was being argued. Incidentally, Counsel for the Defendant when pressed, admitted to the Court, that he was not really prepared to argue the matter that day. At the Court's request, he agreed to provide skeleton arguments with copies of authorities to be cited (the Plaintiff's Counsel had already made his available to me) in advance of the adjourned fixture of 14th October, 1997 at 9:30 a.m.

On 14th October 1997 when this matter was called at 9:37 a.m. neither the Defendant or his Counsel appeared, and their being no explanation for their non-appearance, the matter proceeded.

At 12:35 p.m., when Counsel for the Plaintiff had almost completed his submissions, a letter then delivered to the Registry from someone on

behalf of Counsel for the Defendant, was passed to the Court. It was a request for an adjournment to the next day (Wednesday) on the basis that Counsel for the Defendant was ill and at home. It was not accompanied by a medical certificate. Further, as Counsel for the Defendant would be well aware, the following day was my usual chamber day, when over fifty (50) matters are normally listed for hearing.

At 1:28 p.m., after Counsel for the Plaintiff had completed his submissions, the Defendant was again called and there was no appearance by him or his Counsel. I then reserved my decision on paragraphs 2 and 3 of the Plaintiff's Summons.

As of delivery of this judgement there has been no approach made to this judge, or as far as I am aware to the Registrar, by Counsel for the Defendant regarding his non-appearance.

Learned Counsel for the Plaintiff relied on the submissions made, and numerous authorities cited in his rather lengthy skeleton arguments filed 24th September, 1997 and supplementary skeleton arguments dated 13th October, 1997 except that, at the hearing, Counsel informed the court that he would not be making any submissions on the issue of qualified privilege as he concluded, quite rightly, that this defence had not been pleaded by the Defendant. This is confirmed by the Defendant in paragraphs 3 and 4 of his affidavit filed 2nd May, 1997.

In fact at page 7 of the judgement of d'Auvergne J granting interlocutory injunctive relief, she noted:-

> *"He [Mr Marius Wilson, Counsel for the Defendant] contended that the Defendant was not denying that certain words were used but that it was fair comment on a matter of public interest which he could and will justify."*

However, it is clear to me from a careful examination of the Defence filed herein, that the defenses raised are justification and fair comment on a matter of public interest in relation to the first publication and a denial of the second publication.

Striking Out Pleading

The Plaintiff's application is made under Order 18 r 19(1) (a), (b), (c) and (d) on the grounds that the Defence discloses no reasonable defence, is frivolous, vexatious and embarrassing; and/or it is an abuse of the process of the Court.

On an application under Order 18 r. 19 the Court has power to make an order that the action be stayed, or dismissed and that judgment be entered. No evidence is admissible where the ground is that the pleading discloses no reasonable cause of action or defence, RSC Order 18 r. 19(2).

This rule also empowers the Court to amend any pleading or indorsement or any matter therein. In a suitable and proper case, the Court may exercise its coercive and curative powers at the same time. A Court will generally give leave to amend a defect in pleading, rather than give judgment in ignorance of facts which ought to be known before rights are definitely decided.
The Supreme Court Practice 1995, Vol. 1, para. 18/19/3 at page 320.
Steeds v. Steeds [1889] 22 Q.B.D. 537 at 542
However, unless there is a reason to suppose that the case can be improved by amendment leave will not be given, (paragraph 18/19/3 ibid).
Hubbuck v. Wilkinson [1889] 1 Q.B. 86 at 94
Republic of Peru v. Peruvian Guano Co [1887] 36 Ch.D. 489 (leave to amend granted unless no amendment will cure the defect in pleading).

The Plaintiff's application to strike out is also made under the inherent jurisdiction of the Court. This power of the Court to stay proceedings or to strike out actions or indorsements which are frivolous, vexatious or an abuse of its process, is in addition to its powers under Order 18 r. 19, and is in no way affected or diminished by the said rule. **Supreme Court Practice 1995 paragraph 18/10/36.**

The exercise of the Courts powers under Order 18 r. 19 or under its inherent jurisdiction to stay or dismiss an action is discretionary.

Supreme Court Practice 1995 paragraph 18/19/39
Gleeson v. J. Wippell and Co Ltd [1977] 3 AER 54, following Car-Zeiss Stiftung v. Rayner and Keeler Ltd (No.3) [1969] 3 AER 897

The jurisdiction will not be exercised except with great circumspection, and unless it is perfectly clear that the plea cannot succeed (paragraph 18/19/37(1) ibid and cases cited therein).

Under the inherent jurisdiction all the facts can be gone into and affidavits as to the facts are admissible (paragraph 18/19/37(2) ibid).

An application under Order 18 r. 19 though it may be made at any stage of the proceedings, it should always be made promptly and, as a rule, before the close of the pleadings. **Supreme Court Practice 1995 paragraph 18/19/4.**

Where the defence is being attacked the application ought to be made as soon as practicable after service of the defence, and an application maybe made even after close of pleading. (Paragraph 18/19/4 ibid).

In the instant matter the Defence was filed 5th March, 1997 and presumably, for there is no affidavit or acknowledgement of service on file, served the same day. There was therefore an implied joinder of issue and pleadings were closed on 19th March, 1997.

The Summons to strike out was filed some 29 days after filing of the Defence. This notwithstanding, I am of the view that the application was not made late or so late as to cause me to not accede thereto purely on the ground of lateness.

The Summons seeks an order striking out the entire Defence. However, the Court has a discretion whether to strike out a portion or all of a pleading.

It is trite law that it is only in plain and obvious cases that recourse should be had to the summary process under 0.18 r. 19, and only in cases where the claim or answer is on the face of it "obviously unsustainable" or

"beyond doubt" or the defence pleaded is not arguable. **Supreme Court Practice 1995 paragraphs 18/19/7 and 18/19/28**.

In an action for libel or slander, a court will not strike out a plea of fair comment where a sufficient substratum of fact can properly be implied from the words complained of and so it was not necessary for all the facts on which the comment was based to be stated in order to admit the reference of fair comment.
Kemsley v. Foot (1952) 1 AER 501
Supreme Court Practice 1995 paragraph 18/19/29.

Where there is a point of law which requires serious discussion, the matter should be set down for argument as a preliminary point under Order 33 r. 3. Furthermore, where an application to strike out pleading involves a prolonged and serious argument, unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, the application ought not to be granted. Where a court is satisfied, even after substantial argument, that the defence discloses no reasonable ground of defence, it will make an order striking out the defence. **Supreme Court Practice 1995 paragraph 18/19/7**
Williams and Humbert Ltd. v. W. & H. Trademarks (Jersey) Ltd. (1986) 1 AER 129 H.L.

The process of the court must be used bona fide and properly by all parties to the action and must not be abused. Thus, a court will use its powers under 0.18 r. 19 or under its inherent jurisdiction to prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. **Supreme Court Practice 1995 paragraph 18/19/33**.

A defence is said to be embarrassing in which (a) the defendant does not make it clear how much of the statement of claim he admits and how much he denies or (b) is a plea of justification leaving the plaintiff in doubt

what the defendant has justified and what he has not **Fleming v Dollar (1889) 23 QBD 388** or (c) involves denials that are vague and ambiguous or are too general. **Pleadings Principles and Practice 1990 by Jacob and Goldrein pages 224 - 225.**

Similarly, a court will in a summary manner, upon affidavits, prevent its process from being used in a frivolous or vexatious manner, although it may only do so in a plain and obvious case. **The Metropolitan Bank Ltd. v. Pooley (1885) 10 A.C. 210 at 220 - 221**.

When considering an application under 0.18 r. 19 or under the court's inherent jurisdiction to strike out the defence, the court is entitled to look at both the defence and any affidavit filed by or on behalf of the defendant when applying the principles set out above.

It is the submission of Learned Counsel for the Plaintiff, that when both documents are considered in light of the allegations pleaded in the Statement of Claim, the defences raised are unsustainable, unarguable and incurably bad and the defence is frivolous, embarrassing and an abuse of the process of the court.

The Pleaded Cases

In paragraph 4 of the Statement of Claim the Plaintiff pleads certain words spoken and published by the Defendant on 4th September, 1996 at a public political meeting held by the United Workers Party (U.W.P.) at the William Peter Boulevard in Castries, St. Lucia. These are -

> *"You [George Odlum] told us in 1979 [that the Plaintiff] was sent to Guyana, was coming back with Two Hundred and Seventy Five Thousand Dollars ($275,000.00), he said he lost the money in Trinidad at the airport because he went to urinate. You think George Odlum can ever trust, if that really happened, if it really happened . . . Ou pa sav des mal crab qui passer wetay a dan mem tou. You think that can ever survive?"*

The words in patois when literally translated to english are - "Don't you know it is two male crabs that cannot live in the same hole". In common parlance - "two male crabs cannot live in the same hole".

The Defendant in paragraph 4 of the Defence admits using the words in paragraph 4 of the Statement of Claim except the words in parenthesis, that is to say, "George Odlum" and "that the Plaintiff". However, it is not disputed that the words used were said about the Plaintiff as the Defendant goes on to plead in paragraph 4 of the Defence, that the words were true in substance and fact and, at paragraph 5, that they were spoken with the intent of eliciting a public explanation from a public figure on a political occurrence from the Plaintiff who presents himself as an alternative Prime Minister of St. Lucia. Further and in answer to paragraph 4 of the Statement of Claim, he goes on at paragraph 6 of the Defence to plead specific factual matters involving the Plaintiff, George Odlum and himself, concerning a quantity of money allegedly received by the Plaintiff in 1979 from the late Forbes Burnham of the Peoples National Congress (the then ruling political party of the Peoples Co-operative Socialist Republic of Guyana), and Ram Kirpalani of Trinidad and Tobago.

The Defendant has admitted uttering the words pleaded in paragraph 4 of the Statement of Claim and that they were in fact spoken of and concerning the Plaintiff, and pleads that they are true in substance and fact. In other words, the first pleaded defence to paragraph 4 is justification.

Having carefully considered the words pleaded in paragraph 4 of the Statement of Claim, it is my view that the only words which admit of a defamatory meaning are:-

> *". . . he said he lost the money in Trinidad at the airport because he went to urinate. You think George Odlum can ever trust, if that really happened, if it really happened."*

These words when considered in context of the entire pleaded statement at paragraph 4 of the Statement of Claim would, in my opinion, be understood in their natural and ordinary meaning by reasonable persons (as explained by Lord Morris in **Jones v. Slelton (1963) 3 AER 952 at 958** quoted on page 9 of the Judgement of Byron J A in **Learie Carasco (aka) Rick Wayne v. Neville Cenac - Civil Appeal No. 6 of 1994 St. Lucia**) to mean that the Plaintiff had given a false and/or dishonest explanation to George Odlum as to what happened to the money he

received for the party; that he was therefore a dishonest person or at least a person who could not be trusted with other people's money; that he may have misappropriated, taken or stolen the money, and, accordingly, was morally unfit for election to high public office.

At paragraph 5 of the Statement of Claim the Plaintiff pleads certain words allegedly spoken by the Defendant on 7th November, 1996 at a public political meeting of the UWP at William Peter Boulevard in Castries, as follows -

> [that the said Plaintiff] *"can jump high he can jump low, he can run around but there are too many questions including the Two Hundred and Fifty Thousand Dollars ($250,000.00) that Odlum and myself had sent him to collect from Guyana and Trinidad and I will tell you whom we sent him to; I will tell you when the time comes; he has to answer that question and Odlum too; they have to answer because I know . . . If you are a thief before you enter into politics how can you not be a thief when you enter into government. How can you? That is why this election is about honesty. It's about character. It's about issues. It's about the quality of men. I have been here now for 22 years on a platform, nobody can point a finger at me. And its not because I am a perfect man. It is because in the conduct of my public life and private life*
> *. . . I know what I want out of life, money can not buy it".*

There can be no question, if the words pleaded at paragraph 5 were in fact spoken by the Defendant, that they were spoken of and concerning the Plaintiff and were, in their ordinary and natural meaning, defamatory of the Plaintiff in his profession as a barrister-at-law and as someone morally unfit to hold public office. Those words clearly impute criminal wrongdoing and dishonesty to the Plaintiff and, as a slander, they are actionable per se without proof of special damages. **Article 989 H of the Civil Code** and **Gatley on Libel and Slander 8th Ed. para. 174 page 86**.

The Defendant at paragraph 7 of the Defence pleads in answer to paragraph 5 of the Statement of Claim -

> *"The defendant denies that he used the words detailed by the Plaintiff in paragraph 5 in the text reported therein and states that the plaintiff's allegation that he repeated the same or gist of the aforementioned words in paragraph 4 of the Statement of Claim is calculated to prejudice and embarrass him in making his defence and states that the said paragraph should be struck out".*

There has been no application made by or on behalf of the Defendant to strike out the alleged embarrassing portion of the Plaintiff's pleading. However, a plaintiff is required to plead the specific words allegedly used by the defendant, and if the defendant denies having spoken any of those words, the plaintiff's claim will stand or fall on those words as pleaded if defamatory. It is not for the defendant to plead his own version of the words spoken and then seek to justify them, for such a plea will be struck out as irrelevant and embarrassing. **Gatley on Libel and Slander 8th Ed. para. 1149 page 480 and Rassam v. Budge (1893) 1 Q.B. 571 at 575 - 576**.

At paragraph 8 of the Defence, in further response to paragraph 5 of the Statement of Claim, it is pleaded -

> *"Further in answer to paragraph 5 of the Statement of Claim the Defendant denies that the text contained in the said paragraph was used at all or falsely and maliciously of and concerning the Plaintiff and states simply that he reiterated the need for the Plaintiff and George Odlum too to answer the questions concerning the disappearance of the monies which the Defendant and George Odlum had sent the Plaintiff to collect".*

At paragraph 9 of the Defence he again "denies paragraph 5 of the Statement of Claim".

Paragraphs 7, 8 and 9 of the Defence is a denial of publication of the words complained of in paragraph 5 of the Statement of Claim and is a properly pleaded defence. However, to deny in paragraph 8 of the Defence that the words were spoken falsely or maliciously is a bad plea and those words ought to be struck out. **Gatley on Libel and Slander 8th Ed. para. 1104 page 459 and Walcott v. Hinds (1964) 8 WIR 50.**

In response to paragraph 6 of the Statement of Claim where the Plaintiff gives what he considers to be the natural and ordinary meaning of the words quoted in both paragraphs 4 and 5, the Defendant, at paragraph 9 of his Defence, again denies paragraph 5 and in relation to the words in paragraph 4 of the Statement of Claim denies their alleged natural and ordinary meaning and pleads that the words "spoken in paragraph 4 were statements of fact which are true in substance and fact and were spoken to elicit an explanation from the plaintiff in the public interest." This is not

akin to "the rolled-up plea" where the defences of justification and fair comment are rolled into one. It contains no statement that the words spoken were fair comment on a matter of public interest and, also, the essential preamble to the rolled-up plea, that the matters on which he comments involved no misuse or mis-statement of the materials on which his comments were founded, are not therein pleaded. Paragraph 9 is therefore at best a plea of justification.

In relation to paragraph 5 of the Statement of Claim, it is my view that the Defendant having clearly in paragraphs 7 and 8 denied using the "text" of the words pleaded, his apparent failure to deny the Plaintiff's pleaded natural and ordinary meaning of the words used in paragraph 5, cannot be construed and does not amount to an admission of the use by the Defendant of the said words. I do not agree with the submission of Counsel for the Plaintiff that the Defendant is not denying that he used the words at paragraph 5, but is merely stating that he used them in a certain context, that is to elicit a public explanation from the Plaintiff. There is a difference in meaning between "text" and "context".

I also do not agree with Counsel for the Plaintiff that the Defendant's response at paragraph 10 of the Defence to paragraph 7 of the Statement of Claim (where the Plaintiff pleads that "the said words", meaning both pleaded statements, were calculated to disparage the Plaintiff and has injured him in his character, credit, reputation and standing) amounts to an admission of the use of the words pleaded in paragraph 5 of the Statement of Claim, simply because the Defendant only reiterated his pea of justification to paragraph 4 and did not specifically address paragraph 5.

I likewise do not accept the reasoning of Counsel for the Plaintiff, that since the Defendant in paragraphs 10, 11, 12 and 13 of the Defence asserts, in answer to paragraphs 7, 8, and 9 of the Statement of Claim, that the words complained of are statements of fact being true in substance and fact, this amounts to an admission or non denial that he used the words pleaded in paragraph 5 of the Statement of Claim. Once a defendant has clearly denied using certain words complained of, there is in my view no need for him to go on in his defence to repeat that denial

ad nauseam because the plaintiff made reference to those words in successive paragraphs of the statement of claim.

The real question in my view, is whether the Defendant has specifically traversed in his Defence paragraph 5 of the Statement of Claim (Order 18 r. 13(1)) and whether he has done so in clear and certain language: **Gatley on Libel and Slander 8th Ed. paragraphs 1104 and 1632**.

This issue is quite different from whether the defence of fair comment on a matter of public interest has been properly pleaded.

Learned Counsel for the Plaintiff submitted that there has been no denial of the use of the words pleaded in paragraph 5 of the Statement of Claim. He submits further that the use of the expression "in the text reported" is, in substance, an admission that the words were in fact used but in a different text or in a certain alleged context.

Learned Counsel seeks to buttress this argument by reference to the Defendant's statement at paragraph 3 of his affidavit that his Defence "raises two defenses to the Plaintiff's action namely, justification and fair comment in the public interest".

Having carefully considered the pleading, I am satisfied that the Defence does contain a denial of publication of the specific words pleaded in paragraph 5 of the Statement of Claim in sufficiently clear and certain language to traverse that pleading, and to make it clear to the Plaintiff what case he has to meet on this issue at the trial, which is the purpose of pleadings.

At paragraph 7 of the Defence there is a denial that the Defendant used the words pleaded in paragraph 5 of the Statement of Claim. That is what I understand by the use of the expression "the text reported therein". Then, at paragraph 8 of the Defence, the Defendant specifically denies using at all "the text contained in the said paragraph", and goes on to state that on that occasion "he reiterated the need" for the Plaintiff and George Odlum to answer questions concerning the dis-appearance of the

monies which Odlum had sent the Plaintiff to collect.

In short, the pleaded defence to the words complained of in paragraph 5 of the Statement of Claim, is a denial of publication.

Furthermore, and on this issue, it seem to me that if the Plaintiff's Solicitors took the view that paragraphs 7 and 8 of the Defence were not sufficiently particularized or if they wished, at this stage, to refute conclusively any plea that the Defendant did not utter on 7th November, 1996 the words complained of in paragraph 5 of the Statement of Claim, the Plaintiff ought to have sought interrogatories from the Defendant, framed in such a way as to achieve just that end. Depending upon the answers thereto, there may be a clear admission and narrowing of the issues left for determination either at trial or upon an interlocutory application of this kind.

Justification

This plea relates purely to the statements admittedly published by the Defendant on 4th September, 1996, pleaded in paragraph 4 of the Statement of Claim. What do the rules of pleading require to properly raise a plea of justification fit to go to trial.
The law presumes that the words pleaded and admittedly spoken or made of and concerning the plaintiff are false, and the burden is on a defendant, who relies on a plea of justifi- cation, to prove that they are true. **Nicholas v. Augustus Civil Appeal No. 3 of 1994 (St. Lucia) at page 8**.

What then, in light of my findings as to the words pleaded in paragraph 4 of the Statement of Claim which are capable of having a defamatory meaning, is the Defendant required to plead in order to properly raise the defence of justification.

On this issue, I am satisfied that the words "you think George Odlum can ever trust, if that really happened, if it really happened", when considered in the context of the entire state- ment, would, in their ordinary and natural meaning, be under- stood by reasonable person to mean that the Plaintiff

had given
a false or dishonest explanation as to the disappearance of the money and that he may have taken, misappropriated or stolen that money, and is therefore a thief and a dishonest person.

The Defendant would therefore have to plead and prove either that the Plaintiff had been convicted of the offence of stealing or some other offence involving dishonestly or moral turpitude in relation to his handling of the funds as custodian. No such charge or conviction has been pleaded or asserted and clearly the Plaintiff has never been charged with any criminal act or wrongdoing in relation thereto. Alternatively, the Defendant would have to plead facts which, if true, would prove that the Plaintiff had in fact stolen or mis-appropriated the money and was thereof of the character of a thief or dishonest person.

The publication of the words complained of having been admitted, any statement in the Defence which deny that the words were published falsely and maliciously will be struck out as irrelevant and bad. Further, the Defendant's motive for or state of mind at the time of the publication is immaterial as to whether the words spoken were true or not. **Walcott v. Hinds (1964) 8 WIR 50**. I therefore hold that the words in paragraph 4 of the Defence "save that the defendant denies that he falsely and maliciously spoke and published of and concerning the Plaintiff", ought to be and it is ordered that the said words be struck out.
In McDonald's Corp. v. Steel (1995) 3 AER 615 it was held by the Court of Appeal of England that -

(1) *A plea of justification to a libel action was not required to be supported by "clear and sufficient evidence" before being properly placed on the record, since that threshold test, if applied literally, would impose an unfair and unrealistic burden on a defendant (whose plea was properly particularized) but who was entitled to seek support for his case from documents revealed in the course of discovery or from answers to interrogatories. Nevertheless, before pleading justification, a defendant should (i) believe that the words complained of were true, (ii) intend to support the defence at trial and (iii) have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence to prove the allegations would be available at trial.*

(2) *The correct approach of the court in considering whether to allow an interlocutory application under RSC Order 18 r. 19 to strike out a pleading for abuse of process was to determine whether the defendant's case in relation to a particular passage was incurably bad. The power to strike out was a draconian remedy which was to be employed only in clear and obvious cases where it was possible to say at an interlocutory stage and before full discovery that a particular allegation was incapable of being proved.*

Further at page 621 Neill LJ, delivering the judgement of the Court of Appeal, having stated the three criteria outlined at (1) above, went on to state -

> *"A similar approach should be adopted towards facts which are relied upon in support of a plea of fair comment".*

The Defendant's plea of fair comment will be examined later in this judgement.

In England (as demonstrated in McDonald's Corp. v. Steel) the courts are greatly assisted, when considering whether to strike out a pleading, by the provisions of Order 38 r. 2A of the English RSC which provides for the exchange of witnesses statements between the parties. This assists greatly in an assessment of the strength of each party's case and, in particular, whether there is no evidence available to a defendant in a defamation case to establish a plea of justification and whether there was any possibility of his case being improved by discovery (See page 622 of *McDonald's Corp. v. Steel*). However, that practice has not been expressly incorporated into the rules in this jurisdiction, although a case can be made out, based on the silence of our rules on this aspect, for importing into our rules of court, the said English rule and practice by virtue of sections 11 and 20 of the West Indies Associated States Supreme Court (Saint Lucia) Act, 1969.

It is not for me in this matter to decide that issue, but suffice it to be said that there has been no exchange of witness statements between the parties that the Court is aware of and, therefore, this issue has to be determined on the basis of the pleadings and affidavit evidence only.

The statement in paragraph 4 of the Statement of Claim made by the

Defendant relates to matters which allegedly (for they are denied by the Plaintiff who also in his affidavit states that they were also denied by George Odlum) occurred some 18 years prior to the publication. This in and of itself must reflect adversely on the Defendant's ability to have and produce reasonable evidence in support of the plea or reasonable grounds for supposing that sufficient evidence to prove the allegations would be available at trial.

At paragraph 12 (A) of the Defence, the Defendant admits not having carried out any enquiry or independent investigations concerning the event. The reason given by him for his inertia is that a public explanation by the Plaintiff in the public interest would suffice.

The Defendant at paragraph 12 (B) of the Defence states that he "has never and never will impute criminal conduct and or dishonesty to the Plaintiff", but merely seeks to encourage him to give the requested public explanation of the events spoken of by the Defendant.

In light of those clear admissions, while the Defendant's intention or motive is not relevant to establishing a plea of justification, it gives some indication of whether the Defendant has evidence to support the plea or whether there are reasonable grounds for supposing that sufficient evidence to prove the plea will be available at trial and, hence, whether justification has been properly pleaded. It is also relevant as to whether the plea is frivolous vexatious or an abuse of the process of the court.

My conclusions on this issue would be the same assuming that the Defendant has, in some way, rise the plea of justification in answer to the words complained of in paragraph 5 of the Statement of Claim (which in my view he has not), and which words undoubtedly, in their natural and ordinary meaning, are highly defamatory of the Plaintiff.

In **Morrell v. International Thompson Publishing Ltd. (1989) 3 AER 733** May LJ at page 737 j and 738 a, stated -

> *"A defendant who pleads justification must do so in a way as quite clearly, without circumlocution or obfuscation, to inform the plaintiff and the court of precisely what meaning or meanings the defendant may seek to justify. Although this may be done in the particulars of justification, there is then a substantial risk that the precise*

meaning will be lost in words. I see no reason why the meaning or meanings should not be set out directly, briefly and at the start of the plea. That in my opinion, is the result of the authorities referred to and should be the practice followed in future."

See also **Lucas-Box v. New Group Newspapers (1986) 1 AER 177, at 181j - 182 a and 183 f**. The particulars of justification must be limited to the statement complained of by the Plaintiff. **Templeton v. Jones (1984) 1 WLR 448**.

In the instant matter, the Defendant has not pleaded or set out any meaning or meanings of the words in paragraph 4 (or 5) of the Statement of Claim which he will seek to justify. In other words, the plea of justification has not been particularized or sufficiently particularized. I have also concluded that this defect cannot be cured by an amendment to the Defence.

Furthermore, the statements at paragraph 4 which carry the ordinary and natural meanings I have previously mentioned are, in my view, incapable of being proved by the Defendant especially some 18 years later, which period incidentally has seen the passing of President Forbes Burnham. In order to establish the plea of justification the Defendant, who by his own account was not present with the Plaintiff at Piarco Airport or anywhere in Trinidad when the money allegedly was lost or stolen, cannot from his own knowledge of relevant facts establish as true any of the defamatory meanings of the offensive words. At best, all the Defendant can testify to is what the Plaintiff allegedly told him and George Odlum which, from the Plaintiff's Affidavit, Mr. Odlum apparently does not substantiate. And to crown it off, the Defendant himself pleads, at paragraph 12 B of the Defence, that he has never and never will impute criminal conduct and or dishonesty to the Plaintiff, but merely seeks to encourage the Plaintiff to give a public explanation of the events he, the Defendant, spoke of from the political rostrum.

It is settled law that where the words impute a crime, a plea or proof of mere suspicion of dishonourable conduct is not justification.
"Truth" (N.Z.) Ltd. v. Holloway (1960) 1 WLR 997 at 1001 P.C.
Mountney v. Watton (1831) 2 KB 709 at 713 - 714

Stern v. Piper (1996) 3 WLR 715 at 719 C and 724 C, D and F.

This is no less so where the plaintiff is a public figure or the statements were uttered at a political meeting as part of the political campaign. **Craig V. Miller Civil Suit No. 317 of 1986 (Barbados) per Sir Denys Williams CJ at pages 12 and 13.**

Having examined this issue in light of the guiding principles in the cases referred to and the other authorities cited in the skeleton arguments of the Plaintiff's Counsel, I have concluded that the plea of justification has not been sufficiently particularized, and such defect cannot be cured by an amendment to the Defence. I have also concluded the Defendant does not genuinely believe that the offensive words pleaded in paragraph 4 of the Statement of Claim (which he admitted saying), are true in substance or in their ordinary and natural meaning. Further, it is very doubtful from the statements of the Defendant's Counsel at the hearing of the previous application and from the Defence, whether the Defendant intends to support the plea of justification at trial. In any event, I have also concluded that the Defendant does not, by the admissions in paragraph 12 of the Defence, and from the absence of any statement in his opposing affidavit, have any or any reasonable evidence to support the plea of justification and there are no reasonable grounds to suppose that sufficient evidence to prove the truth of the ordinary and natural meaning of the said defamatory words would be available to the Defendant at trial.

Accordingly, I order that the plea of justification be struck out as being frivolous vexatious embarrassing and an abuse of the Court's process under Order 18 r. 19 and under the Court's inherent jurisdiction.

Fair Comment

The defence of fair comment on a matter of public interest is pleaded at paragraph 5 of the Defence, in further answer to the words pleaded in paragraph 4 of the Statement of Claim, admittedly used by the Defendant.

In paragraph 6 of his Defence the Defendant goes on, in answer to paragraph 4 of the Statement of Claim and so as to negative any

allegation of falsity and malice, to set out in sub-paragraphs A to H inclusive, the "context of the occurrence justifying the fairness of the said comments made to elicit a public response from the Plaintiff in the public interest."

These sub-paragraphs are as follows:-

(A) That in 1979 the Defendant, one George Odlum and the Plaintiff were all members of the same political party the St. Lucia Labour Party actively engaged in the solicitation and use of funds in a general election campaign against the United Workers Party the then incumbent Political Party.

(B) The Defendant was at the said time 1979 the parliamentary representative for the constituency of East Castries and a strong political ally of George Odlum and the Plaintiff was then being considered as the political candidate for the Constituency of Vieux-Fort and subsequently was made Education Minister with the Defendant's full support.

(C) That the Defendant and George Odlum as leaders of the then St. Lucia Labour Party sent the Plaintiff to the People's Co-operative Socialist Republic of Guyana to collect funds from the ruling party thereof the People's National Congress and in particular its leader the late Forbes Burnham.

(D) That the Defendant and George Odlum also sent the Plaintiff to Trinidad and Tobago to collect money from Ram Kirpalani.

(E) That to the Defendant's knowledge and information the plaintiff collected approximately $100,000 US dollars from the aforementioned sources but the money was never delivered to the defendant George Odlum or the St. Lucia Labour Party.

(F) That the Plaintiff stated to the Defendant and George Odlum that he collected the money had it in a brief case at Piarco International Airport en route to St. Lucia where he went to urinate in a toilet but the Plaintiff arrived without the said money at the Vigie Airport in St. Lucia.

(G) The Defendant contends that all these facts are true and states that as the Plaintiff states in paragraph 8(d) of his statement of claim the Defendant "has rejected the Plaintiff's explanation of the event surrounding the disappearance of the money which took place some 18 years ago and made these comments in paragraph 4 of the statement of claim questioning whether the Plaintiff's explanation was what really happened so that the Plaintiff would

provide a public explanation as to what transpired in the public interest.

(H) That as a political aspirant and as leader of the St. Lucia Labour Party the Plaintiff if his party is returned to form the next Government may well become the next Prime Minister and therefore as a person offering himself for Public Service should explain this event for the public benefit.

The Plaintiff did go on, after the May 23rd, 1997 general elections, to become Prime Minister of St. Lucia.

The defence of fair comment has not been pleaded in relation to the words complained of at paragraph 5 of the Statement of Claim.

For the defence of fair comment to succeed a defendant must show -

(1) that the words are comment and not statement of facts, and so this defence cannot absolve one from liability where there has been mis-statements of fact (**See Campbell v. Spottis Woode (1863) 3 B and S 749);**

(2) that there is some substratum or basis of fact for the comment contained or referred to in the matter complained of **Kemsley v. Foot (1952) AC 345 at 356** and **London Artist v. Littler (1969) 2 AER 193**;

(3) that the comment is fair in the sense of honest comment;

(4) that the comment is on a matter of public interest;

Gatley on Libel and Slander 8th Ed. para. 692 page 291 British Guiana Rice Marketing Board v. Peter Taylor & Co. Ltd. (1967) 11 WIR 208

Learie Carasco (aka) Rick Wayne v. Neville Cenac Civil Appeal No. 6 of 1994 (St. Lucia) per Byron J A at page 19.

At **paragraph 691 of Gatley of Gatley on Libel and Slander 8th Ed.** the authors states -

> *"It is a defence to an action for libel or slander, that the words complained of are fair comment on a matter of public interest. There are matters in which the public has a legitimate interest or with which it is legitimately concerned. On such matters, it is desirable that all should be able to comment freely and even harshly, so long as they do so honestly and without malice. But in*

protecting public discussion of matters of public concern the law does not in general give the right to make defamatory mis-statements, however honestly they may be made, and however reasonably the maker may have come to believe in their truth".

Learned Counsel for the Plaintiff approached his arguments on the basis that both statements in paragraphs 4 and 5 of the Statement of Claim were uttered and admitted to have been published by the Defendant.

The first question therefore is whether the passage at paragraph 4 of the Statement of Claim contains comments or are they statements of fact. If the latter the Plaintiff must justify and the plea of fair comment would fail at this threshold.

In **London Artist Ltd. v. Litter (1969) 2 AER 193** the defendant published a letter and made a statement at a press conference in which he suggested that the plaintiff had taken part in a "plot" to force the end of a successful play staged at Her Majesty's Theatre in London. The court of appeal held that although the comments were on a matter of public interest, the allegation of a plot was a statement of fact in itself defamatory of the plaintiff and not comment and the plaintiff having not justified, the plea of fair comment failed. (Per Lord Denning MR at page 199 B - D).

And at page 19 of **Learie Carasco v. Neville Cenac** *Civil Appeal No. 6 of 1994 Byron J A* stated -

"A main basis for the defamatory imputations were the allegations that soon after taking office the respondent recently acquired vast properties in a suspicious or dubious manner. These were factual allegations".

In **British Guiana Rice Marketing Board v. Peter Taylor & Co. Ltd. (1967) 11 WIR 208**. *Bollers CJ at page 214 H - I* put it this way -

"Thus to enable alleged defamatory matter to be treated as comment and not as an allegation of fact the facts on which it is based must be stated or indicated with sufficient clarity to make it clear that it is comment on those facts. There must be a sufficient substratum of fact stated or indicated in the words which are the subject matter of the action (Kensley v. Foot). It follows then that if the writer chooses to be ambiguous he runs the risk of having treated as statements of fact, statements which, had he been more specific, might well have ranked only as comment. And in Grech

v. Odhams Press Ltd. it was held that if the court is left in any doubt as to whether the words are comment or fact the defence fails. It is clear therefore, that the entire article in the circumstances of the present case consists of a series of statements of fact and not comment and the defence of fair comment therefore fails".

And at page 217 I - 218 A, the Learned Chief Justice referring to the judgement of *Lord Hershell LC in Davis v. Shepstone* continued -

"Lord Hershell made it clear . . . that there is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism by the press. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of facts, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he had been guilty of particular acts of misconduct".

Finally, on this issue *Fletcher Moulton LJ* in **Hunt v. Star Newspaper Company Ltd. (1908) 2 KB 309** at **321** opined -

"Any other interpretation would amount to saying that, where facts were only sufficient to raise a suspicion of a criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English Law. To allege a criminal intention or a disreputable motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence".

Applying the above stated principles, the Defendant in paragraph 4 of the Statement of Claim, alleged or imputed to the Plaintiff a dishonest, disreputable motive and criminal intention. I conclude that same is an allegation of fact and not comment, which the Defendant can only justify and, as such, the plea of fair comment must fail on this ground.

Furthermore, I am fortified in my view, the Defendant's Counsel having in the previous application, stated that the defence is the "rolled-up" plea, the Defendant ought to have sufficiently particularized his pleadings by stating which of the words complained of are statements of fact and which are comments. **Lord v. Sunday Telegraph Ltd. (1970) 3 AER 504.**

If I am in error on this aspect, I will now go on to consider whether the

Defendant has pleaded a sufficient substratum of fact upon which to base his comment, in the sense that a fair minded person might on those facts honestly hold that opinion (per Lord Denning MR in **London Artist v. Littler** at page 199 F -G).

In order to honestly make statements which carry the imputations that the Plaintiff is a dishonest person who misappropriated or stole the money, there must be pleaded some basis of fact that would warrant such comments, and those facts must have been referred to in the publication giving raise to the comments.

Has the Defendant pleaded any substratum of facts which warrant the said imputations, even assuming them to be comments? In this vein the matters pleaded at paragraph 9 of the Defence were not matters said when the comments were made by the Defendant on 4th September, 1996 (or for that matter on 7th November, 1996). I therefore hold that the Defendant has not pleaded any substratum of facts upon which to base the comments giving raise to the previously mentioned imputations about the Plaintiff.

I also hold that, even if the statements were comments, they were not fair but were simply invectives - an attack upon the honesty and honour of the Plaintiff - without any basis upon which to found such comments.
In the often cited case of **Campbell v. Spottis Moode (1963) 32 English Reports 185** *Lord Chief Justice Cockburn* stated at page 193 - 194 -

> *"I think you have a right to comment upon the conduct of public men, upon the propriety of their conduct, upon its wisdom, upon its discretion and its policy. All those are matters which fairly come under discussion upon public topics, which are everyday agitating public men, and becoming the subject of public discussion; but when you dive into the hearts and bosoms of men, and represent them as acting, where you think they have acted erroneously, not from want of judgement or from want of politic or wise views, but from base or sordid motives, when you attack personal probity, honesty and honour, I think you ought to have something more solid and substantial to found your allegations upon than the mere suggestion of a vague belief, which antagonism, arising either from political or religious controversy, would otherwise be too apt to inspire. It would be disastrous, indeed, to the public character, which is essential to the maintenance of our institutions, and the maintenance of our national honour, if every man's motives and every man's honour might be impugned, simply because those,*

whom political or religious antagonism, or any other source of hostility, might affect, in whose minds those motives might operate, had a ready tendency to take an adverse view of the motives of their opponents".

In my considered opinion that passage, in large measure, sums up this case and the state of the pleadings.

Accordingly, on the basis of the above stated principles and being also guided by the statement of Neill LJ in *McDonald's Corp. v. Steel* at page 621 previously referred to, whereby a similar approach is to be adopted by the Court when considering a plea of fair comment to that to be adopted in relation to a plea of justification, and even if the subject matter may be considered to be one of public interest, I hold that the plea of fair comment on a matter of public interest is bad in law, frivolous, vexatious, embarrassing and an abuse of the process of the court and ought to be struck out.

Orders

It is therefore ordered -

(1) the plea of justification in the Defence is bad in law and is frivolous, vexatious, embarrassing and is an abuse of the court's process and is struck out;

(2) the plea of fair comment on a matter of public interest in the Defence is bad in law, frivolous, vexatious, embarrassing and an abuse of the court's process and is struck out;

(3) that there be judgement for the Plaintiff against the Defendant in relation to paragraph 4 of the Statement of Claim for damages to be assessed and costs.

The defence of a denial of publication of the words complained of in paragraph 5 of the Statement of Claim stands for further hearing.

GERARD ST. C. FARARA, Q.C.
HIGH COURT JUDGE (ACTING)