

ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 119 OF 1998

BETWEEN:

EXPRESS DATA SYSTEMS LTD

Plaintiff

and

VINCENT ALEXANDER

Defendant

Appearances:

Mr Samuel Commissiong for the Plaintiff

Mr Arthur Williams for the Defendant

2000: July 5, 6, 18, 31, October 3, 10

JUDGMENT

[1] MITCHELL, J: This was a case of detinue, passing off, and libel brought by the Plaintiff company (hereinafter "the Plaintiff") as the sole authorised Xerox distributor in St Vincent, against the Defendant, an ex-employee.

[2] The generally endorsed writ had been issued at the request of the Plaintiff on 10 March 1998. The Statement of Claim was filed on 26 May 1988. In it, the Plaintiff made the following allegations. At all material times it was the sole authorised representative for Xerox Business Machines in the State of St Vincent and the Grenadines. As such, the Plaintiff alone was entitled to order the entire range of Xerox machines for any other person in St Vincent. The Defendant had been an employee of the Plaintiff. On 1 April 1997 the Defendant without any notice resigned from his job as a technician and began to work on his own. He took with him 2 manuals for the photocopier models 1012 and 5310. As a result, the

Plaintiff was not able to repair the machines in question for about 3 weeks. The Plaintiff sent several messages to the Defendant to return the manuals, but the Defendant refused to do so. He threatened to shoot the Plaintiff's Managing Director, Roger Clifton, like a dog if he came into his yard. Roger Clifton had reported the matter to the police who had started a criminal investigation. The Plaintiff claimed US\$450.00 for each of the 2 manuals. Further, the Defendant began to approach the customers of the Plaintiff and falsely represented himself as the authorised Xerox dealer. The value of the business from the various named customers was on average EC\$25,000.00. Further, the Defendant had falsely and maliciously written of the Plaintiff on 7 February 1998 to Xerox that he, the Defendant, had been reading Xerox's customer operation location page on the internet and had noted that the island of St Vincent and the Grenadines was left out of the customer operation location page. The Defendant had asked to know if Xerox did not recognise St Vincent or if there was no longer an official dealer in St Vincent. If so, the Defendant pointed out he had 10 years of training in sales and servicing products and was interested in representing Xerox in St Vincent. The Plaintiff complained that by these words the Defendant wrote and intended to convey the suggestion that the Plaintiff neglected Xerox's business and might no longer be Xerox's dealer in St Vincent and the Grenadines. His sole intent was to suggest that the Plaintiff did not work in the best interest of Xerox, and that he, the Defendant, with his 10 years of training in sales and service, would do a better job than the Plaintiff. The Plaintiff claimed the return of the 2 manuals, damages for their detention of US\$900.00, damages for passing off and/or misrepresentation, damages for libel, and any other relief that might seem to the Court to be just.

- [3] By his Defence filed on 22 July 1997, the Defendant denied the claims of the Plaintiff. In particular, he asserted that any person in St Vincent can obtain Xerox machines from a source other than Xerox and sell them in St Vincent. He accepted that the Plaintiff was the only person who could sell Xerox machines that came directly from Xerox. The Defendant claimed that he had been trained in the sales and servicing of Xerox products long before the Plaintiff was formed. The

Defendant had resigned from the Plaintiff on 1st May 1997. He had taken no manuals of the Plaintiff with him when he did so. He had had manuals long before he worked for the Plaintiff. The customers named by the Plaintiff had all been the customers of the Defendant and not of the Plaintiff. The Defendant had carried them to the Plaintiff when he had joined the Plaintiff, and they had come back to him when he had left the Plaintiff. As regards the alleged libel, the Defendant had gone on the internet and had seen the Xerox website and had seen a listing of all Caribbean countries except St Vincent. He had asked Xerox if there was no representative for St Vincent, and if there was none he had stated that he would be willing to represent Xerox as he had 10 years experience. The Defendant had had a gentleman's agreement with the Plaintiff to be a partner in the Plaintiff's business regarding the Xerox business. He was to have put in to the business \$20,000.00 and a vehicle. The business was to have been known as Xerox Copying Center, and the Defendant was to have been the manager of it. Roger Clifton had never honoured the gentleman's agreement, and so the Defendant had left the employment of the Plaintiff. This closed the pleadings in the case.

- [4] The order for discovery, etc, on the Summons for Directions was made on 25 September 1998, and the Request for Hearing was filed on 19 October 1998. The matter has been ready for hearing ever since. A trial date was given at call over on 2 December 1999. Giving evidence for the Plaintiff was Roger Clifton, while Grantley Williams and Noel Williams supported the Defendant. The trial took up nearly two full days. The time spent on legal argument was much shortened through both counsel having reduced to writing their legal submissions, for which the court was grateful. The Plaintiff relied on the cases of:

Rosenthal v Alderton [1946] 1 All ER 583

Maxim's Ltd v Dye [1978] 2 All ER 55

J Bollinger v Costa Brava Wine Co Ltd [1959] 3 All ER 800

Erven Warnink Besloten Vennootschap v J Townend & Sons (Hull) Ltd [1979] AC 731

South Hetton Coal Co v North-Eastern News Association Ltd [1891-4]
All ER Rep 548

- [5] **The Facts.** The facts as I find them are as follows. The Plaintiff was formed by Roger Clifton of Kingstown Park in the year 1995. Its purpose is to sell and service office equipment and supplies. It is the authorised dealer in St Vincent and the Grenadines for the Xerox Corporation and IBM, both office equipment suppliers from the United States of America. The Plaintiff's contract with the Xerox Corporation for the year 1998 was put in evidence. From the copy of the contract put in evidence, it appears that Xerox Corporation makes its dealers sign an annual Standard Xerox Distributor Agreement. By the contract, the Plaintiff undertakes to buy a minimum quantity of Xerox product and undertakes to service them when on-sold to customers. The Plaintiff is required to employ a well-trained staff and to maintain a suitable organization for the sale and maintenance of the products. There is a trade secrets clause binding the Plaintiff to keep confidential all verbal and written communications designated by Xerox Corporation as confidential. The Plaintiff is permitted to identify itself as the authorised distributor of Xerox products. If the contract is terminated, the Plaintiff is required to return products in its possession, together with all information, documentation and materials confidential to Xerox.
- [6] The Defendant has some ten years experience in selling and servicing Xerox products in St Vincent. He has been trained in Xerox products since 1990. He used to work for Xerox Corporation's previous distributor in St Vincent, Modern Business Machines, owned by one Sinclair Leacock. That company appears now to have ceased distributing Xerox products. How the Defendant subsequently came to be working for the Plaintiff was put into dispute by the Defendant at the trial, though he had not originally raised any issue on this point on the pleadings. The two versions that came out in the evidence are as follows. Roger Clifton of the Plaintiff takes the view that the Defendant was a mere employee of the Plaintiff working for a salary, that is that the Defendant was employed as service manager

for Xerox products. The Defendant's contrasting recollection is that in 1995, after Modern Business Machines had ceased to deal with Xerox, he had continued to sell and maintain Xerox products on his own account. His customers had included Shell, the Eastern Caribbean Group of Companies, the Ministry of Education, the British High Commission, the OAS, Scotiabank, and others. At this time the Plaintiff was not yet in existence. He was sharing office space with Roger Clifton at the Russell Building on Back Street. Roger Clifton told him that he was about to open his own office at the Georges Plaza and he would welcome the Defendant operating out of his office. Roger Clifton had applied for the distributorship for Xerox and wanted the Defendant to work for the Plaintiff. The Defendant was not willing to be an employee, but was willing to join with Roger Clifton on the understanding that a company would be formed to sell and service Xerox products in which company the Defendant would hold equity. The Defendant believed that he had a gentleman's agreement with Roger Clifton for a company to be formed in which they would both hold shares. His recollection is that he was never paid a salary, but earned commissions for sales and fees for repairs and servicing of Xerox and other products sold by the Plaintiff. He introduced the Plaintiff to his contacts in Xerox and to his customers. His view was therefore that he had never been an employee of the Plaintiff, but had been an independent contractor working on his own account. That contrasts with his filed Defence, which has him not disputing that he was an employee of the Plaintiff. This dispute as to what exactly was the relationship of the Defendant with the Plaintiff during the time the Defendant worked in the offices of the Plaintiff does not require any decision by the court at this time, and I make no finding in relation to that issue.

[7] By the year 1997, it had become apparent to the Defendant that he was going to continue to remain an employee of the Plaintiff contrary to his hopes and expectations, and that Roger Clifton was not going to include him as an equity holder in the Plaintiff or any other related entity. He felt that Roger Clifton had broken their gentleman's agreement. He was dissatisfied. He gave notice on 1 May 1997 that he was ceasing his relationship with the Plaintiff, and he left the

Plaintiff's premises the same day. He continued to conduct his office equipment supply and repair business from other premises. Many of the customers who had gone over with him to the Plaintiff when he joined the Plaintiff left with him when he severed his relationship with the Plaintiff. Some of the new customers of the Plaintiff, who had not been customers of the Defendant before he joined the Plaintiff, but who had become accustomed to the Defendant personally servicing their Xerox equipment, also transferred their Xerox machine servicing and repair business from the Plaintiff to the Defendant after the Defendant left the Plaintiff's premises.

[8] This development must have put the Plaintiff in some difficulty. The Defendant had taken what he considered to have been his tools and his Xerox manuals with him when he left the offices of the Plaintiff on 1st April 1997. Roger Clifton demanded of the Defendant the return of these manuals. On or about 14 May he went to the house of the Defendant. He accused the Defendant of stealing them from his company. There was an altercation between the two of them, which resulted in the police being called to the scene. Roger Clifton claims that there is a criminal case brought against the Defendant, which case was still pending. The Defendant denies that there is any criminal case, and, indeed, there is no evidence of any criminal case other than Roger Clifton's saying so. As a result of the accusations made against him by Roger Clifton, the Defendant filed a case against Roger Clifton for slander. Shortly after that case was filed, the writ in this case was issued by the Plaintiff and served on the Defendant. The slander case never came to trial. The Defendant views this present suit as Roger Clifton's strategy to defend the slander case. Roger Clifton denies that such was his reason for filing this suit, and he views this suit as his remedy to protect his company from what he views as the illegal acts of the Defendant.

[9] When the Defendant left the Plaintiff's employment in April 1997 he formed his own firm, Business Machines and Services. On the top of the letterhead he placed the following advertisement: "We specialize in and stock parts and supplies

for all Xerox machines. We also provide prompt and efficient service.” He continued to sell Xerox parts and supplies that he obtained from overseas. He continued to service Xerox equipment for individuals and companies that owned such equipment in St Vincent and the Grenadines. All this was in competition with the Plaintiff, which was the authorised Xerox agent in St Vincent and the Grenadines. This is the passing off of which the Plaintiff complains. The Plaintiff considers that by the Defendant describing himself as “specialising” in Xerox parts and supplies he is, either expressly or impliedly, wrongfully claiming to the public to be an authorised Xerox representative. Incidents occurred between the Defendant and Roger Clifton of the Plaintiff. We have seen the incident over the ownership of the manuals that came to a head in May 1997. The Plaintiff was able to get Xerox Corporation in May 1997 to send a circular letter to all Xerox customers in St Vincent confirming that the Defendant was no longer an employee of the Plaintiff, was therefore not authorised to transact any business on behalf of the Plaintiff or of Xerox Corporation, and that the Plaintiff remained the sole distributor for Xerox in St Vincent and the Grenadines. The Plaintiff was perfectly entitled to have its supplier protect the Plaintiff’s business and customer relationships in this way. The Defendant does not claim otherwise or complain of this action by Xerox or the Plaintiff. The Defendant did not give up his hope of becoming an authorised representative of the Xerox Corporation in St Vincent and the Grenadines. In November 1997 the Defendant applied directly to Xerox to be officially given the right to represent Xerox in St Vincent. His application was written on the letterhead that mentioned Xerox in the way described above. He applied for a pass code and a number to be able to access Xerox Service hot line directly. The Defendant concluded that if his proposal was accepted this would improve customer satisfaction and give Xerox a second set of eyes in the St Vincent market, and strengthen Xerox’s hold on the local market. The Plaintiff complains that this application of the Defendant was malicious and cast imputations on the quality of the Plaintiff’s representation of Xerox in St Vincent. In February 1998 the Defendant was on the internet viewing the Xerox web site. He came across a listing of Caribbean authorised agencies. He noticed that St

Vincent and the Grenadines was missing from the list. Whether mischievously or innocently, he dashed off to Xerox an enquiry. He enquired whether Xerox no longer recognised St Vincent or whether there was no longer an official dealer here. If not, he expressed his interest in representing Xerox in St Vincent. To this enquiry the Xerox representative replied that the Plaintiff was the authorised Xerox distributor in St Vincent, and that Xerox would be fixing the error on the web page listing. The Plaintiff complains that by this enquiry the Defendant implies that the Plaintiff was neglecting Xerox's business. The Plaintiff complains that this allegation was false and malicious and entitles the Plaintiff to damages for libel.

- [10] **The Claim in Detinue.** The tort of detinue is committed when a person has a right to immediate possession of some goods that are wrongfully detained by the defendant who refuses to give them up on demand. The redress usually claimed is the return of the chattel or payment of its value together with damages for its detention. The Plaintiff's view is that the Xerox manuals, however obtained by the Defendant, contain trade secrets of Xerox and are the property of Xerox and the Plaintiff has the right to claim them back and to sue for them. The Plaintiff produced no evidence, other than the word of Roger Clifton, that the repair manuals contain trade secrets of Xerox; the Defendant on the contrary gave evidence that such manuals are easily obtainable to repair-technicians on the open market and contain no trade secrets. I am satisfied that the repair manuals contain technical information necessary to be known for the repair and servicing of Xerox machines. There is no necessary connection between technical information and trade secrets. I am not satisfied that the repair manuals contain any information that would amount to trade secrets. While Xerox may discourage any other than their authorised agents from owning manuals or repairing their equipment, I accept the evidence of the Defendant that there is nothing to stop the owner of a Xerox machine from employing any person he chooses to repair the equipment he has purchased. It was for the Plaintiff to prove the ownership of the manuals in question. I am not satisfied on a balance of the probabilities from the evidence that the repair manuals are the property of Xerox. I am not satisfied from

the evidence that the Defendant removed from the premises of the Plaintiff Xerox repair manuals that the Plaintiff had acquired and that were the property of the Plaintiff. I have no difficulty in believing the Defendant that he had acquired manuals before he joined the Plaintiff in whatever capacity, and that he did no more than take with him his personal copies of the Xerox manuals. The claim of the Plaintiff in detinue fails.

[11] **The Claim of Passing Off.** The common law tort of passing off is constituted by a misrepresentation made by a trader in the course of trade to prospective customers of his or ultimate consumers of goods and services supplied by him which is calculated to injure the business or goodwill of another trader, and which causes actual damage to a business or goodwill of the trader by whom the action is brought. The question that is to be asked when one is looking to see if the tort of passing off has been committed in this case is: has the Plaintiff proved that the use by the Defendant of the trading style "We specialize in and stock parts and supplies for all Xerox machines" was calculated to lead to the belief that its business was the business of the Plaintiff? Xerox Corporation has confirmed to the customers of the Plaintiff that only the Plaintiff is its authorised distributor. Xerox Corporation has not attempted to prevent the Defendant from selling Xerox products or servicing them. I am not satisfied that Xerox Corporation has the right in law in any country, far less in the State of St Vincent and the Grenadines, to place such a restriction on the Defendant. Xerox Corporation has not attempted some indirect restriction on the right of the Defendant to trade in Xerox supplies by, for example, complaining about any alleged misuse by the Defendant of any copyright or trade mark belonging to Xerox Corporation. Xerox Corporation has made no complaint to or against the Defendant either before or after this case was filed about his use of the Xerox name or trade mark or copyright. In exchange for promising Xerox Corporation that he will limit his stock and services to those produced by Xerox, an authorised distributor may get a better price from Xerox and make a higher profit than an unauthorised dealer; an authorised distributor may get support and help from Xerox that may make him more efficient and

competent and profitable than an unauthorised dealer; but, there is nothing I can find in the evidence to suggest that there is anything to restrict or prohibit the right of any technician or business person in St Vincent from selling Xerox products and supplies or servicing Xerox machines. I find that there is nothing inherently wrong in a technician claiming on his letterhead or other literature that he “specialises in and stocks parts and supplies for” particular machines. This is especially so if the claim is true, as I find it was in this case. I do not find that this amounts to the Defendant claiming either expressly or impliedly to be an authorised Xerox distributor. I find nothing in the evidence or in common sense that satisfies me that Xerox has the power or authority to prevent persons other than authorised distributors from repairing or servicing or distributing Xerox supplies. Even if the Defendant had wrongfully claimed in his literature to be an authorised distributor in St Vincent and the Grenadines for Xerox Corporation, which he did not, only Xerox Corporation or someone acting on its behalf could properly complain about this wrong in the civil courts of this State. The Plaintiff had no standing in law to complain that the Defendant was detaining the property of Xerox Corporation, or was misusing the intellectual property of Xerox Corporation. Nor do I find that the evidence can be stretched to find that the Defendant was by his actions complained of passing himself off as an authorised distributor of Xerox Corporation, in effect that he was passing himself off as the Plaintiff.

- [12] **The Claim in Libel.** The law is that a trading company has a trading character the defamation of which may ruin it. Accordingly, a trading company may maintain an action of libel or slander for any words that are calculated to injure its reputation in the way of its trade or business, and it is not necessary to prove special damage. The nub of the Plaintiff’s further complaint is that the Defendant was not merely seeking business from Xerox; he was implying something quite malicious about the Plaintiff’s handling of Xerox’s products and services. The complaint is that the Defendant was not only passing off himself as an authorised Xerox representative in St Vincent and the Grenadines, he also wished to clothe his wrongful operations with the sanction of Xerox. He did so, the complaint goes, by suggesting to Xerox

that if Xerox would only appoint him Xerox would see a vast improvement in Xerox's business in St Vincent and the Grenadines; he was seeking to defame the Plaintiff in the minds of the Xerox Corporation in North Carolina; he was attempting to create mistrust that would lead to the loss of business and ultimately the distributorship for the Plaintiff with the resulting loss in work and income; he was suggesting that Xerox's interests were not receiving the level of attention in St Vincent as it deserved; he was wrongfully implying to officers of the Xerox Corporation that the Xerox customers in St Vincent were not receiving a satisfactory level of service from the Plaintiff; the statements made by the Defendant were reasonably calculated to lead Xerox Corporation to believe that the Plaintiff conducted its business in such an inefficient manner that it was to Xerox's detriment to continue to keep the Plaintiff as the sole authorised distributor. As it was, Xerox Corporation has, as we have seen above, shown itself confident in the ability of the Plaintiff to operate the Xerox distributorship in St Vincent. Every person in St Vincent who considers himself suitably trained or competent has the right to apply to Xerox Corporation to represent the company in this State. The Defendant had every right to apply to Xerox to allow him to be the authorised distributor in place of or in addition to the Plaintiff. On the evidence, I am satisfied that all that the Defendant did in this case was to make a number of legitimate enquiries of and approaches to Xerox Corporation. The Defendant was entitled to say or to infer that he would do a better job than the present distributor. To have done so was not to slight or libel the existing authorised distributor in a way that was illegal. I have heard nothing to suggest that it has not always been normal and proper for business machine technicians and would-be distributors to compete for business in this way. To find otherwise would be to place an unauthorised restraint on competition in supplies and services and would be contrary to public policy and the public interest. The Plaintiff's claim in libel is dismissed.

[13] Given the findings of fact above and the dismissal of the claims brought by the Plaintiff against the Defendant, the Defendant is entitled to his costs to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge