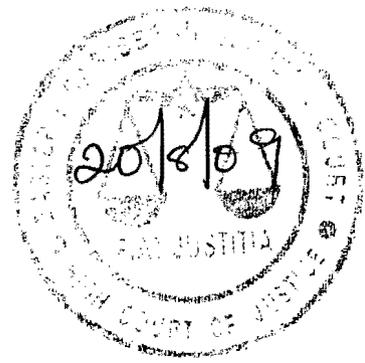


ST VINCENT AND THE GRENADINES
THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO SVGHCV2007/0356

BETWEEN:

CARLOS MALONEY & COMPANY LIMITED

Claimant

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Defendant

Appearances:

Mr Samuel E. Commissiong for the Claimant
Mr Pamel Campbell QC, with him Ms Raemona Frederick for the Defendant

.....
2009: July 22nd
August 20
.....

JUDGMENT ON ASSESSMENT OF DAMAGES

- [1] **LANNS, MASTER:** This is an assessment of damages arising out of a claim against the Defendant for damages for breach of duty for the Defendant's failure to honour six cheques issued by the Claimant on his chequing account maintained with the Defendant, and for libel arising from the answer placed on those dishonoured cheques.
- [2] The Defendant did not contest liability and consented to judgment being entered against it for damages to be assessed.
- [3] In accordance with the rules of court, the Defendant was permitted to cross examine the Claimant's sole witness and to make submissions.

The Parties

- [4] The Claimant, Carlos Maloney & Company Limited (CMCL) is a limited liability company incorporated and existing under the Companies Act of Saint Vincent and the Grenadines. It carries on the business of security and janitorial services. It also operates a radio station.
- [5] Mr Carlos Maloney (Mr Maloney) is the Managing Director of CMCL.
- [6] The Defendant, First Caribbean International Bank (Barbados) Limited (the Bank) is a financial institution which carries on the business of commercial banking at Halifax Street, Kingstown.
- [7] At the material time, CMCL was a customer of the Bank and maintained a chequing account (current account) at the Bank.

The Statement of Claim

- [8] I think it convenient to set out the pleadings in some detail in order to show the complaint made.
- [9] At paragraph 4 of the statement of claim, CMCL pleaded a duty on the Bank to honour cheques drawn on the Bank by CMCL and duly presented for payment provided there were sufficient funds standing to the credit of CMCL.
- [10] At paragraph 3 of the statement of claim, CMCL pleaded that between 13th September 2006 and 19th September 2006, CMCL drew six cheques (which it listed) on its current account.
- [11] By paragraph 5 of the statement of claim CMCL pleaded that the Bank by its negligence neglected to honour the cheques drawn and that in so doing the Bank led the payees in whose behalf the six cheques were drawn, to believe that CMCL is a person who issues

cheques to them for payment knowing that there were no or no sufficient funds in its account at the Bank to pay the sums of money stipulated in the 6 cheques.

[12] By paragraphs 12 and 13 of the statement of claim CMCL pleads that the Bank falsely and maliciously wrote on each cheque the words "refer to drawer" and published those words to:-

- Paulette Williams in the case of cheque No 6050;
- Patrick Marks & Sons and RBTT Bank in the case of cheque No 6058;
- Multigraphic Services in case of cheque No 6070;
- Bank of Nova Scotia in the case of cheque No 6075, in favour of C & R Enterprises;
- Southern Sun Lines Inc in the case of cheque No 6076;
- Bank of Nova Scotia in case of cheque No 6078 in favour of Paulette Williams.

[13] By paragraph 14 of the statement of claim CMCL pleads further and in the alternative that by the words "refer to drawer" the Bank meant and was understood to mean that CMCL had no or no sufficient funds standing to its credit; and that it was a person whose financial standing was unsecured, and to whom credit should not be given and with whom no one should have business dealings.

Liability not contested

[14] As previously stated, the Bank did not contest liability. However, it was allowed to make written and oral submissions on the quantum of general damages claimed.

Damages

[15] The principles to be applied in the assessment of damages in libel cases are set forth in several cases including **Addis v Gammophone** (1909) AC 488; **Wilson and Another v United Counties Bank Limited and Another** (1919) A.C 133; **Cassel v Broome** (1972) 1 All ER 801. Damages are at large. General damages are said to serve three main purposes; 1) as a consolation for the distress, hurt and humiliation caused; 2) to repair

injury to reputation; and 3) as a vindication of reputation (See **Gatley on Libel 8th Edition, paragraph 9:2**). I will now consider the submissions and authorities presented in respect of damages.

Mr Commissiong's submissions

[16] The gist of Mr Commissiong's submissions is that CMCL is entitled to substantial damages for the pain and humiliation, suffered at the hands of the six creditors two of whom have put CMCL on a cash basis only.

[17] Mr Commissiong submitted that by dishonouring the cheques, the Bank was proclaiming to the world that CMCL was committing a criminal offence under Section 223 of the Criminal Code Cap 124 of the Laws of Saint Vincent and the Grenadines. This offence, he points out carries a penal sanction of two years in jail on summary conviction and 10 years on indictment

[18] Section 223 reads:-

223. (1) Any person who by any deception dishonestly obtains any property belonging to another, with the intention of permanently depriving the other of it, is guilty of an offence and liable—

(a) on summary conviction to imprisonment for two years; or

(b) on conviction on indictment to imprisonment for ten years.

[19] It has not been disputed that section 223 is inapplicable to the case.

[20] It was Mr Commissiong's contention that "this is a very small community where, through the internet, radio talk shows and newspapers, rumours run wild.... To call a trader a thief... is a serious matter. It besmirches the claimant's character as a businessman in the six-fold libel, and causes tongues to wag more mischievously than before. From these false allegations the businessman's reputation in the way of his business is destroyed".

[21] He reasoned that the dishonour of the six cheques was effectively six libels to six different creditors and as such, was a vital consideration in the assessment of damages.

In Mr Commissiong's view, each libel is worth \$50,000.00. He therefore asks the court to award the sum of \$300,000.00.

[22] Unable to find reported cases in this jurisdiction or under the wider jurisdiction of the Eastern Caribbean Supreme Court, (ECSC), Mr Commissiong referred me to cases beyond the ECSC. For example, **Wilson v United Counties Bank** (ibid) and information referred to in **"The Lawyer"** dated June 2007, pp 8-11. Mr Commissiong agrees that the **"The Lawyer"** may well be inapplicable, but may be used as a rough guide.

Mr Campbell QC submissions

[23] While Mr Campbell QC does not dispute the principles of law set out in various cases cited by Mr Commissiong, he submitted that the data extracted from **"The Lawyer"** are not relevant to these proceedings.

[24] Mr Campbell QC went on to submit that in assessing damages in this matter the court has to take into account the following factors:-

- 1) The circumstances surrounding the origin of the libel;
- 2) The reach of the publication;
- 3) The conduct of the parties after discovery of the libel; and
- 4) The degree of actual damage to the Claimant's reputation.

[25] When all the above factors are taken into account and viewed in their proper perspectives, submitted Mr Campbell QC, the sum of \$7500.00 would be a fair compensation in each case. Mr Campbell QC reasoned that given that the same person was the intended payee in two of the six cases, the multiplier ought to be five and not six.

Mr Commissiong's Reply to Mr Campbell QC submissions

[26] Mr Commissiong's reply may be summarised thus:

- The bank did not file a defence and thus it has implicitly accepted the factual contents of CMCL's case.
- It is not open to the bank to include any matter that has not been pleaded;
- Referring to paragraph 2 of Mr Campbell QC submissions, Mr Commissiong submitted that Mr Campbell QC cannot make any comments on the factual aspects of the case because the bank has neither pleadings nor witness statements on which to guide such comments.
- The court may not have regard to the Affidavit of Natalie Ollivierre filed on 17th April 2009. This Affidavit and the mitigating factors outlined in the unfiled submissions of the bank must also be struck out.
- The court may not take into consideration any mitigating factors referred to in the bank's submissions including the apology because it is not in evidence and cannot be deemed to be before the court.

[27] I agree with Mr Commissiong's submissions in reply save for the apology which I shall address below.

Other submissions

[28] Before the court, Mr Commissiong, maintained that CMCL is entitled to substantial damages in accordance with the observations in **Wilson's** case. The plaintiff in that case was awarded £7,500.00 and Mr Commissiong updated that amount to \$50,000.00. Mr Campbell QC countered that the words "substantial damages" used in libel cases are not to be connoted as "excessive damages." He drew the court's attention to the fact that the award in **Wilson** was a jury award and jury awards are never considered as a reliable basis for determining quantum. He pointed out that in the Wilson case, the libel was such that it resulted in the claimant's bankruptcy. The claimant in **Wilson's** case went to war leaving his financial affairs in the hands of the bank and the bank "messed him up." This

led to his bankruptcy. Therefore, submitted Mr Campbell QC, the award of £7,500.00 in that case, cannot be used as any basis for the award in this case.

[29] Mr Campbell QC submitted that since it appears that there are no cases dealing with dishonoured cheques in the jurisdiction of the ECSC, the court should look to general libel cases in the ECSC. He referred the court to the following cases:

- **Ulric Smith v Kathleen Huggins**, Saint Vincent and the Grenadines Civil Appeal No 6 of 2000
- **Abraham Mansour, et al v Grenville Radio Ltd et al** Antigua and Barbuda High Court Suit No ANAHCV2004/0408;
- **David Carol Bristol v Dr Richard St Rose**, St Lucia Civil Appeal No 16 of 2005.

[30] Mr Campbell QC urged the court to take into consideration that the libel in the cases cited at paragraph 29 above was published to the whole world, whereas the libel in the present case was limited to the people with whom CMCL dealt. Mr Campbell QC opined that Mr Maloney would have told the payees that the bank “messed him up” and they would have accepted that. However, the uncontroverted evidence before the court is that in at least two cases, CMCL's cheques were refused and it was required to pay cash.

Analysis and decision

[31] There is no doubt in my mind that CMCL in general and Mr Maloney in particular suffered much hurt, humiliation and embarrassment as a result of the Bank's negligence and libel. And for this CMCL must be adequately and fairly compensated. However, I find myself in agreement with the submission advanced by Mr Campbell QC that while CMCL is entitled to damages, damages must be fair and not excessive.

[32] It is a matter for regret, and much has been made of the fact that the Bank took two weeks to discover that it deposited CMCL's money into another person's account. I am in

agreement with Mr Commissiong that this must be seen as an aggravating factor and tends to suggest that something is wrong with the Bank's accounting system.

[33] In his affidavit in support of the assessment, Mr Maloney adverted to an apology by the Bank and Mr Campbell QC sought to cross examine Mr Maloney on his failure to disclose the letter containing not only the apology to CMCL but also a request by the bank for the names of payees to allow the bank to apologise to them directly. Mr Campbell QC was no doubt attempting to see whether the damages which CMCL would otherwise have received could be reduced. However, Mr Commissiong objected to, and criticised this move stating that the 'letter' was not in evidence and cannot go to the issue of mitigation.

[34] It is clear to me, from a reading of paragraph 21 of the Affidavit of Mr Carlos Maloney in support of the assessment, that the Bank offered an apology to CMCL. And I so find. However, I am unable to agree that the apology was useless. I am the view that it did serve to remove or at least reduce the defamatory sting from the libel.

[35] Having said that, I say further that I do not take the purported apology or any "letter" containing it into consideration as they were not in evidence.

[36] The evidence need not have been so limited. The defendant filed no defence in compliance with CPR 10.3 (4) or CPR 16.6. The assessment proceeded without any pleading and without any evidence beyond the affidavit of Mr Maloney and the exhibits attached thereto. Had there been pleadings, however, it would have been the clear duty of the Bank to plead in its defence that the bank had apologised to CMCL and had taken steps, with a view to mitigation of damages, to obtain the names of the payees so as to send them personal apologies, and to give CMCL appropriate particulars sufficient to alert it to the nature of the Bank's case, to enable CMCL to direct its attention and to respond appropriately and avoid surprise.

No cases in the ECSC

[37] It is common ground that there are no cases within the jurisdiction of the ECSC dealing with the issue of dishonoured cheques. However, I intend to use the cases cited by both counsel as a guide. In so doing, I am of the view that the sum of \$30,000.00 is a fair and reasonable sum for CMCL's distress, hurt and humiliation and as reparation to its reputation.

The multiplier

[38] As to the multiplier, I accept Mr Campbell QC submission that technically each instance of a dishonoured cheque constitutes a libel, and that it does not necessarily mean that in this case where the libel was published to the same person twice, the multiplier should be 6. However, I am of the view that the delay in discovering the error militates against the Bank benefitting from its own wrongdoing. In my view the dishonour of the second cheque in favour of Paulette Williams led to further aggravation. I am content to use a multiplier of 6.

Conclusion

[39] For all the forgoing reasons, I award CMCL the sum of \$180,000.00.

[40] CMCL is to have its costs as prescribed in the sum of \$20,400.00 being 60% of \$34,000.00.

[41] This judgment bears interest at the rate of 6% per annum from today's date until final payment.

[42] Let judgment be entered accordingly.

[43] If my arithmetic is faulty, I would gratefully accept the assistance of counsel.

[44] I am grateful to learned counsel for their industry.


PEARLETTA E LANNS
Master