

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV 2012/151

BETWEEN:

CELIA FORDE

Claimant/Respondent

AND

(1) CITCO B.V.I. LIMITED

(2) SIOBHAN NICOLA GILLESPIE

Defendants/Applicants

Appearances:

Mr. Jamal Smith of Thornton Smith for the Claimant
Mr Robert Nader of Forbes Hare for the Defendants

2013: 30th January 2013

JUDGMENT

[1] **Ellis J:** By Notice of Application filed on 11th September 2012, the Defendants/Applicants applied to the Court pursuant to Part 26.3 (1) (b) and (c) for the Claimant's/Respondent's Statement of Claim to be struck out or alternatively that all or some of paragraphs 4 to 13 of the Statement of Claim and the prayer be struck out. The Applicants also seek their prescribed costs on the entirety of the claim, in the event of the entire statement of claim is struck off.

[2] Part 26.3 (1) provides as follows:

"In addition to any power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that-

- (a) there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

- (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or likely to obstruct the just disposal of the proceedings; or
- (d) the statement of case or the part to be struck out is prolix or does not comply with the requirement of Part 8 or 10."

[3] It is now well settled that the jurisdiction to strike out is to be used sparingly. This is largely premised on the fact that the exercise of the jurisdiction has the potential to deprive a party of the right to a trial, and of the ability to strengthen its case through amendment, disclosure and requests for further information. As a result English courts have generally limited the exercise of this jurisdiction to plain and obvious cases so that as long as a case discloses a cause of action with some prospects of success, it would not be struck out.¹

[4] More recent case law demonstrates that judges have not deviated from this general approach. In **Partco Group Ltd v Wragg**² Potter LJ attempted to prescribe the cases where striking out would be appropriate. Those include: (a) where the statement of case raises an unwinnable case so that continuing the proceedings is without any possible benefit to the defendant and would waste resources on both sides (b) where the statement of case does not raise a valid claim or defence as a matter of law;(c) if the facts set out do not constitute the cause of action or defence alleged; or (d) if the relief sought would not be ordered by the court.

[5] The Eastern Caribbean Court of Appeal has largely followed the English courts in holding that striking out is a very drastic step which a court would only take in exceptional circumstances. The rationale for this is explained by Mitchell JA in **Tawney Assets Limited v East Pine Management**³ thusly,

"The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. **The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.**"

BACKGROUND

[6] By Claim Form filed on 23rd May 2012, the Claimant claims as against the Defendants herein damages for libel, interest at a rate of 10% for every month from the date of the claim, plus any

¹ Provided the statement of case raised some question fit to be tried, it did not matter that the case was weak or unlikely to succeed. **Wenlock v Moloney** [1965] 1 WLR 1238)

² [2002] EWCA Civ. 594

³ Civil Appeal No. 7 of 2012, Territory of the Virgin Islands unreported judgement

further interest at such rate and for such period as the Court deems just, costs and further and other relief.

[7] The Claimant alleges that while employed by the Second Defendant, the Defendants and each of them caused to be published, a warning letter dated 29th February, an email dated 27th March 2012 and letter of termination dated 30th March 2012 with the intention of discrediting her in her employment capacity in order to justify her termination and to attack her integrity and character.

[8] The statements complained were written and signed by (1) the Second Defendant and (2) the Human Resource Manager and read as follows: **First Statement:** *"You exhibit poor time writing behaviour. For example, your supervisor has to constantly remind you to complete and release your ICorp time card. For the week 13th -17th February the Financial Controller, after reminding you several times to complete your time card, had to record for you otherwise he could not meet his reporting deadline."*

[9] **Second Statement:** *"Thanks – this is helpful. However, it does raise some questions as to your whereabouts on Friday. You were expected at work on Friday, however did not come in and nor did you inform us on Friday that you were unable to attend work for any reason.*

....this is not an acceptable explanation, particularly when combined with the fact the info provided indicates you returned on Thursday. If you were able to access Facebook, then you would have been able to contact us via email at the very least."

[10] **Third Statement:** *"Citco was contacted by the Social Security Department for information on your salary in support of a sickness benefits claim made by you for week of 6th – 10th February 2012. The Financial Controller and HR Manager met with you on 15th February informing you that you would be receiving your full salary for the month because you had not exhausted your allotted 12 paid sick leave days as per the Labour Code. You agreed that in such circumstances you knew that the procedure is to endorse the social security check over to the Company. You confirmed that you would give the check to the Company, however, as the current date you have not done so, and it is assumed that you in fact deposited the check in your own account. You were therefore paid by both the Company and Social Security for those sick days which shows a lack of integrity on your part."*

[11] The Claimant alleges that she was terminated from her employment; that her reputation has been seriously damaged and that she has suffered considerable distress and embarrassment as a result. Copies of the alleged defamatory material were annexed to the claim and save for the email message of 27th March 2012 (which was addressed to the Claimant and the HR Manager), it is clear the correspondence was addressed to and delivered to the Claimant herself and to no one else.

[12] The Defendants argued that the statement of claim should be struck out on the following bases:

1. That it does not disclose a workable defamation claim. They contend that the Claimant has not demonstrated that the words complained of are defamatory in the natural or ordinary meaning. They also contend that the Claimant's pleaded case does not allege that the alleged defamatory statements were in a fact

published to anyone but her. Rather, the Claimant complains primarily that the correspondence caused damage to her reputation because of publication only to her family members and friends. The Claimant does not allege that such publication was carried out by the Defendants.

2. That this claim amounts to an abuse of process in any event because any award of damages is likely to be *de minimis*. Counsel for the Defendants contended that any damage to reputation would be minimal because the publication would have been to her family and friends and there is no indication in either the pleadings or in the evidence filed that she has in any way been lowered in their estimation.
3. That it is abundantly clear that what the Claimant really seeks is compensation as a result of her dismissal. The Defendants submitted that this case has the potential to open the floodgates for persons who are dismissed from employment following receipt of warning letters. Counsel for the Defendants submitted that the correspondence and letters delivered to the Claimant were part of a statutory procedure prescribed by the Labour Code in order to effect the lawful termination of her employment. He suggested that if the Claimant were allowed to ground her claim in defamation then all persons who were dismissed could ground similar challenges. He submitted that the claim should therefore be dismissed on the basis of public policy. Given the overriding objective, it would be a waste of time and expense to permit this case to continue.
4. That the claim in respect of interest is unprincipled and unsupported both in law and fact.

[13] In response, Counsel for Claimant submitted that the Claimant has addressed all of the constituent elements of the tort of defamation in her statement of claim which would facilitate further development in witness statements. However he readily conceded that the element of publication could have been better developed in the pleadings. He submitted that this is a defect which could be easily cured through amendment. He submitted that applying the overriding objective demands that the Claimant be allowed to amend her pleadings rather than have her claim struck out.

[14] In so far as the issue of publication is concerned, Counsel for the Claimant vacillated through a number of contentions. He first alleged that there had been publication by the Second Defendant to the First Defendant. He then contended that there had been publication by the Second Defendant to the other signatory of the letters. His submission here is that despite the fact that the other signatory signed the letter it was in fact written only by the Second Defendant who then sent it to the Human Resource Manager for her signature which necessitated publication to her. Finally, he submitted that in so far as the publication of the defamatory statements were carried out by the Claimant herself, given the particular context of this case, this was the natural and probable and foreseeable consequence of the Defendants actions and so they must be held liable. According to Counsel, the context of this case makes it inevitable that the Claimant would have to disclose the reasons for her dismissal to her family, close friends and to potential employers.

[15] He contended that the *de minimis* principle would have no application here because of the peculiar circumstances of this case. In this case he submitted that the Claimant has lost her employment and is likely that the alleged defamatory statement could affect her future employment prospects.

[16] He submitted there is a potential claim in respect of substantial pecuniary loss suffered as a result although he conceded that such claim is not currently set out in the Claimant pleadings.

[17] **Part 8.7 (1)** provides:

“The claimant must include in the claim form or in the statement of claim, a statement of all of the facts on which the claimant relies”.

[18] In order to establish reasonable grounds for bringing a claim in defamation, a claimant must therefore demonstrate on the face of his pleadings the material facts and or particulars which are capable of disclosing reasonable grounds for bringing a claim for damage in defamation.

[19] The material facts necessary to allege a complete cause of action for defamation are set out in **Part 69.2** which provides as follows:

“The statement of claim (or counterclaim) in a claim for defamation must, in addition to the matters set out in Part 8-

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

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

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

Defamatory Meaning

[20] The Defendants submits that paragraphs 4-9 of the statement of claim ought to be struck out because in their natural and ordinary meaning the words are not defamatory of the Claimant.

[21] Having heard the parties' submissions, the Court is not satisfied given the context of this case that all of the statements complained of would be incapable of being defamatory of the Claimant.

[22] The natural and ordinary meaning of words is to be determined according to the fair and natural meaning in which reasonable persons would likely to understand them in the context in which they were used. The relevant test to be applied by the court is whether the words complained of in the natural and ordinary meaning, determined in accordance with the principles stated above, may

tend to lower the claimant in the estimation of reasonable persons or to expose the claimant to hatred, contempt or ridicule.

- [23] In order to determine the natural and ordinary meaning of words, it is therefore necessary to take into account the context in which the words were made and the mode of publication.⁴ The pleadings in this case allege that the defamatory statements were made in the context of the Claimant's employment. Within this context allegation of defamation usually arise when an employee is subjected to the publication of false criticism of poor performance, incompetence or dishonesty.
- [24] In the case of the first statement, it is apparent that the Claimant's performance is being critiqued. The Claimant alleges that the words are defamatory in their natural and ordinary meaning. She further alleges that at least one of examples mentioned as justifying this conclusion was later accepted by the Defendants to be false and that no apology or retraction followed as a consequence. It is clear from the correspondence that the observation here was adverted on a general basis. In those circumstances the Court has some difficulty in discerning how the statement would be any less true merely because of the Financial Controller accepted that he got the relevant period wrong in the one example cited. If the statement can be made out in other respects it is doubtful that the Claimant would be able to succeed on this count.
- [25] As pleaded the Claimant has not denied the truthfulness of the general statement made or the fact that she had to be constantly reminded to complete and release her time card. It is not immediately clear from the pleadings that any other part of the statement (than is specially highlighted at paragraph 5 of the statement of claim) is alleged to be defamatory.
- [26] In respect of the third statement, the Defendants allege that there is no allegation to the effect that the Claimant committed a theft merely that the Claimant failed to follow the correct procedure. While the word theft is not specifically used in the statement, an assumption is raised here to the effect that the Claimant was in fact paid and wrongly kept funds to which she was not entitled, and which the Defendants assert demonstrates a "lack of integrity" on her part. The Court is not satisfied that this statement is incapable of bearing a defamatory meaning.
- [27] However, the same cannot be said of the words complained of in the second statement. Paragraph 8 of the statement of claim pleads that the words are defamatory of the Claimant in their natural and ordinary meaning but the Court has some difficulty in discerning how such a conclusion could reasonably be drawn.
- [28] In their natural meaning, the words seek to convey that the Claimant failed to follow the relevant procedures which mandate that she contact the Defendants personally when it became clear that she would not be able to report to work. It is apparent from the statement that the fact of her

⁴ Claim No. DOMHCV2008J0436 Lennox Linton v Anthony Astaphan

whereabouts had apparently long ceased to be in issue by the time the statement was made. This is the only logical meaning that any reasonable person could ascribe to these words.

- [29] The Claimant does not deny that she was not at work at the material time nor does she deny that she failed to inform the Defendants or her inability to report to work. The gravamen of the complaint which is actually made in the second statement has not been traversed by the Claimant. The fact that the flight was in fact changed and she was consequently delayed does not appear to be the issue. The Court is of the view that the statement made at paragraph 7 of the statement of claim is incapable of bearing the defamatory meaning attributed in paragraph 8 of the statement of claim and falls woefully short of being defamatory of the Claimant. In the circumstances the Court is of the view that the claim made at paragraphs 7, 8 and 9 should be struck out.

Publication

- [30] In order to succeed in an action for defamation, a claimant must prove that the libel has been published i.e. communicated to some person or persons other than the Claimant himself. During the course of the hearing, Counsel for the Claimant readily conceded that the element of publication is not properly particularized or developed in the pleadings. He advanced a number of alternative positions all of which would have understandably caught the Defendants unawares.
- [31] In so far as the second statement, it is apparent that the email had been composed by the Second Defendant and copied to the Claimant's supervisor. To that extent the communication itself (which has been exhibited) would have been copied to the Human Resource Manager, there would have been publication to at least one third party. However the Court is satisfied that the claim made in respect of this statement cannot be maintained and should be struck out.
- [32] The other statements complained of disclose that they were signed by two persons, the Second Defendant and the Human Resource Manager both of whom are employed by the First Defendant. Despite this, Counsel for the Claimant contended that as the statements would have been written only by the Second Defendant, that internal publication would have occurred as between the Second Defendant and the Human Resource Manager. However this is also not alleged in any of the Claimant's pleadings.
- [33] Counsel for the Claimant then contended that the Second Defendant would have published to the First Defendant. This, despite the fact that the statement of case claims that both Defendants and each of them published or caused to be published the alleged defamatory statements. Given this unequivocal averment, the Court has no hesitation in rejecting this oral submission.
- [34] Finally, Counsel for the Claimant argued that the self - publication by the Claimant was the natural and foreseeable consequence of the Defendants' actions and that they should therefore be held liable as a consequence. This is obliquely referenced in paragraph 5 of the Claimant's Reply and detailed at paragraph 18 of the Claimant's Response to the Defendants' Request for Further Information filed on 29th August 2012 which provides that-

“...having left work early on 30th March 2012 as a result of being terminated the natural and probable consequence of the termination letter is that my boyfriend, Mr Kevin Parsons

and my mother Mrs Anestene Forde along with my friends Ms Tyrita Hart and Mrs Pamela Rymer – Trumpet became aware of the letter since I would need to rely on their financial and moral support.”

- [35] During the hearing, Counsel also argued that it would be foreseeable that the Claimant would be obliged to disclose the details of the termination letter to prospective employers. The pleadings however do not allege that any actual publication to potential employers did in fact take place.
- [36] There is no doubt that a defamer is responsible for each and every foreseeable publication of the libel. But can an alleged defamer be held liable for damages caused by the disclosure of contents of the defamatory statement by the person defamed?
- [37] It is clear that there are few American states in which the concept of compelled self-publication has been upheld and where the courts have held the author of the defamatory statement liable where such disclosure is the natural and probable consequence of the author’s actions.⁵ This has generally been applied only in an employment context where an originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third party after he has read it or been informed of its contents. This concept has however been rejected in a most jurisdictions and the Court was unable to find any judicial authority applying the concept in the English common law or in the region. Nevertheless in the absence of a definitive and binding judicial authority rejecting compelled self-publication the Court considers that it would not further the overriding objective to have this issue determined on a strike out application.
- [38] Counsel for the Defendants argues that the Claimant should not be allowed to complain of injuries caused by her own act of publishing the defamatory material. In any event he argues that this contention is not made out in the Claimant’s pleadings. Counsel for the Claimant readily admits that this has not been specifically alleged by the Claimant in her pleadings. He submitted however that this is a defect which could be easily cured through amendment. He contended that applying the overriding objective demands that the Claimant be allowed to amend her pleadings rather than have her claim struck out.
- [39] In considering any strike out application, a court must recognize that it has the power to permit a litigant to cure defects in their pleadings through amendment. It is clear however that the power to permit amendment should only be exercised as an alternative to striking out, where there is a real prospect of establishing the amended case.⁶
- [40] If this claim is to be viable then it is clear that publication will have to be alleged and proven. It follows that substantial amendments to Claimant’s statement of case will be necessary.

De minimis damages

⁵ McKinney v County of Santa Clara (1980) 110 Cal App. 3d 787

⁶ Charles Church Developments plc. v Cronin [1990] FSR 1.

- [41] Counsel for the Defendants contended that given the pleadings, the Claimant's claim amounts to an abuse of process because the likely damage to her reputation would be negligible. This submission is premised on that fact the Claimant only alleges publication to her mother, boyfriend and friends.
- [42] He argued that any award of damages is therefore likely to be nominal in the circumstances and completely disproportionate to the costs of these proceedings. The Court was referred to the observations of Lord Phillips in the case of **Jameel v Dow Jones 2005 EWCA Civ. 76** in which the Learned Judge balanced the likely recovery in damages against the cost and resources of the litigation and concluded that the cost of the exercise would be out of all proportion to what has been achieved. In his words "*The game will not merely not have been worth the candle, it will not have been worth the wick.*"
- [43] Counsel for the Claimant submitted that in the event that the Claimant is successful, she would be entitled to be compensated for the damage to her reputation taking into account the distress, hurt, and humiliation which the defamatory publication would have caused. Given such limited publication and the persons to whom publication is said to have been made, the Court has some difficulty in seeing how the statements could have possibly reduced the Claimant in their estimation. That however may well be a matter for evidence and later pre-trial review.
- [44] During the hearing Counsel for the Claimant also contended that the Claimant has suffered pecuniary losses due to the fact that she was unable to obtain alternative employment in any other financial services or related business in the British Virgin Islands. This contention is averred not in the Statement of Claim but at paragraph 2 of the Claimant's Reply although no sufficient details are provided. It is clear that if the Claimant intends to seek a remedy in that regard, she will need to expressly make that claim and provide the underlying factual basis for the same establishing a causal link between her continued unemployment and the publication of the defamatory statements.
- [45] Counsel for the Claimant also argued that the Claimant would be entitled to aggravated damages based on the manner in which or the motives with which the statements were made. Again, no claim for aggravated damages has been set out in the Claimant's pleadings and this will certainly be necessary if the Claimant is to have any chance of recovery.
- [46] At this stage in these proceedings, the Court is of the view that the Claimant should be afforded an opportunity to properly plead a claim in damages rather than have the claim struck out on this basis.

Claim for Interest

- [47] The Court accepts the submissions made by Counsel for the Defendants in respect of the Claimant claim for interest at a rate of 10% for every month from the date of the claim, plus any further interest at such rate and for such period as the Court thinks just.
- [48] Counsel for the Claimant was unable to provide any statutory or other legal authority to support this claim and it was therefore not surprising when he indicated that this would not be pursued by the Claimant. Paragraph (b) of the Prayer will therefore be struck out.

Amendment

- [49] Given the stage of these proceedings, no witness statements have been filed so that all the evidence upon which the Claimant intends to rely have not been disclosed. Witness statements will usually amplify the pleadings and provide the Defendants with a comprehensive picture of the case they are to meet.
- [50] In this case therefore the question which the Court must consider is whether on the face of the pleadings all the facts on which the Claimant intends to base her claim are before the court. The answer is clearly no. If the Claim is to be viable there is no doubt that the Claimant pleadings will require substantial amendment.
- [51] The next question which then arises is whether it is fair for this court at this early stage, prior to the service of witness statements and discovery to rule that there is no prospect of the claimant successfully proving her case. There can be no doubt that the Claimant's case is fraught with difficulty; but the mere fact that the case is weak and not likely to succeed is not generally a ground for striking out⁷. In the Court's view, striking out the entire claim at this stage would be premature and would not advance the overriding objective of the Rules to deal with cases justly.
- [52] It is clear from the pleadings however that the Claimant and her Counsel have been aware for some time of the defects in her pleadings and yet has taken no steps to remedy the same. The Court will therefore order that the Claimant take the necessary steps to file and serve her amended statement of case within 14 days of this order.

Costs

- [53] The Court notes that the Defendants have been partially successful in this application. Additionally, having reviewed the state of the Claimant's pleadings and having seen the protracted correspondence between the parties regarding the Request for Further Information including the judgment of Wallbank J, it is clear to the Court that the Claimant has been aware for some time of the defects in her pleadings.
- [54] In **East Caribbean Flour Mills Limited v Ormiston Ken Boyea et al**, Barrow JA in interpreting Part 8.7 of the CPR stated:
- "The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it".
- [55] The Court is satisfied that the Claimant has failed to satisfy the requirements of Part 8.7 of CPR. The Court further finds that the Claimant's refusal thus far to take the necessary steps to address these defects to be unreasonable. In the premises the Defendants' were obliged to make this application.
- [56] In the circumstances the Court will exercise its discretion under Part 64.6 in the circumstances to award the Defendants the costs of this application to be assessed if not agreed. In addition, the

⁷ Smith v Chief Constable of Sussex [2008] EWCA Civ 39, [2008] PIQR P12

Claimant will pay the Defendants' costs consequential upon any amendments which will become necessary as a consequence of this Order.

CONCLUSION

[57] **In the circumstances and for the reasons outlined above, it is ordered that:**

1. The following parts of the Claimant's Statement of Claim are struck off:
 - i. Paragraphs 7 – 9.
 - ii. Paragraph (b) of the Prayer.
2. The Claimant shall pay the Defendants' costs of the application to be assessed if not agreed.
3. The Claimant will amend her statement of case within 14 days of this order.
4. The Defendants will have 14 days thereafter to amend their statement of case.
5. The Claimant shall pay the Defendants' costs consequential upon any amendments which will be necessary as a result of this order.

.....
Vicki Ann Ellis
High Court Judge

