THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2017/0341

BETWEEN:

WENTWORTH SARGEANT

Claimant

and

MONIQUE WILLIAMS

Defendant

Appearances:
Mr. Garth Wilkin for the Claimant
Mr. Terrence Byron for the Defendant

2018: December 10
2019: January 15

JUDGMENT

[1] VENTOSE, J.: The Claimant filed a claim form on 6 November 2017 seeking principally an order that the Claimant be paid "damages for deceit and/or fraud by the Defendant" for a sum to be assessed by the court. The Defendant acknowledged service on 13 November 2017 and filed her defence on 6 December 2017, which was subsequently amended on 16 March 2018. The matter came on for case management on 3 July 2018 where the master gave the

usual trial directions, including: the Claimant was to call a maximum of 7 witnesses and the Defendant to call a maximum of 4 witnesses. The witness statements were to be filed and exchanged by 28 September 2018 and further the witness statements were to stand as examination in chief and all witnesses were to attend the hearing and give evidence unless the court otherwise decides. Any applications were to be made on or before 30 August 2018. The pre-trial review was to be held on 14 November 2018.

[2] The Claimant filed his witness statement by 28 September 2018 in a sealed envelope pursuant to CPR 29.7. The Defendant did not file any witness statements as ordered by the court on 3 July 2018 or make any application by 30 August 2018. On 12 November 2018, the Claimant filed an application with supporting affidavit for permission to call an expert witness. On 14 November 2018, the day on which the pre-trial review was to be held, the Defendant applied pursuant to CPR 26.3(1)(b) for an order that the Claimant's statement of claim be struck out on the ground that it does not disclose any reasonable ground for bringing the claim.

[3] The pre-trial review was held on 15 November 2018. At the hearing, Counsel for the Claimant informed the court that the expert named in the application no longer wished his name to be put forward in the application. The court was of the view that the application for an expert witness was relevant if only the Claimant was successful at trial. In relation to the application to strike out, the court was of the opinion that such an application was too late coming as it did at the pre-trial review when the matter was soon to be set for trial. The court was also of the view that the matters set out in the application could be dealt with at the trial of the claim. Counsel for the Defendant stated that he could in any event make a no case submission at the end of the Claimant's case and that he had the opportunity at trial to cross-examine the Claimant's witnesses. The court ordered the Claimant's filed sealed witness statement to be served on the Defendant within 7 days and dispensed with the need to file trial bundles, setting 10 December 2018 for the trial on liability.

The **Claimant's** Case

[4] The Claimant avers that the Defendant was a legal clerk at the office of Reginald James with Chambers located in Basseterre in Saint Christopher and she was also an administrative assistant at a business named Complete Land Services also in Basseterre. The Claimant also avers that he and the Defendant were in relationship from 2009 to December 2011. He states from 2010 to December 2011 he lived with the Defendant and that they have one son who was born on 10 April 2010. He also states in 2010 he entered into a written agreement with the National Land Sales Agency (the "NLSA") to purchase 5,879 square feet of land at East West Farm Housing Development in Saint Christopher (the "Land"). The Claimant further states that in 2010 the NLSA issued him a letter setting out the terms of the agreement.

[5] The Claimant avers that in April 2012, the Defendant contacted him via telephone and informed him that he needed to sign a document to give her permission to travel with their son out of the jurisdiction. He also avers that he signed the document in front of the Defendant who was the only person present when he signed and that he did not sign any other document at the office of Complete Land Services, or at the offices of Reginald James or in front of Reginald James between the years 2010-2015. He continues that any affidavits or documents that the Defendant purports to have in her possession other than the one in respect of the overseas travel of their son are fabrications.

[6] The Claimant avers that in 2015 he went to the NLSA to pay the balance due on the Land but he was informed that the Land was reassigned to Maria Jones. The Claimant also avers that an official at the NLSA provided him with a document entitled "Affidavit of Consent" dated 10 April 2012. In that document, it was stated, inter alia, that Maria Jones was a "friend of [his] family" and that the Claimant wishes to "turn over" the Land to her. The Claimant states that he had never before seen the purported Affidavit of Consent until the employee of the NLSA showed it to him. He also states that he did not know and does not know Maria Jones and that he did not sign the purported Affidavit of Consent or any similar or

similarly worded affidavit. The Claimant avers that during his visit to the NLSA an officer provided him with a letter dated 17 April 2012 addressed to "Wentworth Sargeant c/o Monique Williams, St. Johnson (sic) Village, Basseterre, St. Kitts". The letter indicated that the Land was reassigned to Maria Jones. He also avers that he never received that letter and never saw it before it was handed to him by the officer at the NLSA.

[7] The Claimant states that the Defendant falsely created the Affidavit of Consent and delivered it to the NLSA without his knowledge and consent for the following reasons: (1) the Claimant's mailing address was registered as that of the Defendant with the NLSA because he lived with her at the time; (2) the Defendant received correspondence from the NLSA intended for the Claimant; (3) the Defendant used her position as a legal clerk at the Chambers of Reginald James to create the Affidavit of Consent which contained false information attributed to the Claimant; (4) the Defendant used her position as legal clerk at the Chambers of Reginald James to create the Affidavit of Consent which falsely indicated that his signature was witnessed by Reginald James; (5) the Defendant affixed a false signature block to the Affidavit of Consent which contained a forged signature attributed to the Claimant; and (6) the Defendant, without his permission or knowledge, delivered the falsely created Affidavit of Consent to the NLSA. The Claimant avers that because of the Defendant's false and deceitful actions he has suffered loss and damage, in particular, his right to purchase the Land.

The Defe**ndant's** No Case Submission

[8] Counsel for the Defendant submitted that in this action the Defendant has been sued for damages for "deceit and/or fraud". Counsel referred the court to the tort of deceit and stated that it was of ancient origin and required various elements to be proved to sustain the action, in particular, "to sustain an action in deceit, there must be proof of fraud, and nothing short of that will suffice", citing Derry v Peek (1889) 14 App Cas 337.

[9] In AIC Ltd. v ITS Testing Services (UK) Ltd. [2006] EWCA Civ 1601; [2007] 1 Lloyds Rep. 555 Rix LJ stated that "[t]he elements of the tort of deceit are well

known. In essence they require (1) a representation, which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on" (at [251]). In an earlier case, namely, Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All E.R. 205, Viscount Maugham expanded upon these four requirements as follows:

> My Lords, we are dealing here with a common law action of deceit, which requires four things to be established:-
>
> First, there must be a representation of fact made by words or, it may be, by conduct. The phrase will include a case where the Defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit.
>
> Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true.
>
> Thirdly, it must be made with the intention that it should be acted upon by the Plaintiff or by a class of persons which will include the Plaintiff in the manner which resulted in damage to him. If however fraud be established, it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made.
>
> Fourthly, it must be proved that the Plaintiff has acted upon the false statement and has sustained damage by so doing. (Internal citations omitted)

[10] The Defendant submits that if the Claimant cannot prove that he acted upon the fraudulent misrepresentation made to him by the Defendant and that he suffered loss as a result of the deceit, his action must fail. The Defendant contends that the Claimant does not allege that he: (1) is a representee; (2) was induced to do anything by any alleged representation made by the Defendant; and (3) altered his position as a result of any such inducement or at all. Accordingly, the Defendant submits that the Claimant has not made out his case based on fraud or deceit.

[11] In Todman v Hodge (BVIHCV2009/0020 dated 29 December 2011), the Court of Appeal stated that:

> [24] In a civil trial, where the defendant has elected not to call any evidence upon making an application of no case to answer, the test by which the no case application falls to be considered is whether or not the

claimant has established his claim on the balance of probabilities: Miller (t/a Waterloo Plant) v Cawley.

[12] The courts have warned against entertaining a no case submission at the end of a civil trial: Benham Limited v Kythira Investments Ltd [2003] EWCA 1764 (Bentham). In Benham, Simon Brown LJ after examining the leading authorities stated as follows:

> 25. Rather than myself having to trawl through the line of cases explaining just when adverse inferences can properly be drawn from a party's failure to give evidence, I am in the fortunate position of being able to draw on Brooke LJ's leading judgment in this court in *Wisniewski -v- Central Manchester Health Authority* ([1987] PIQR P324, [1998] Lloyd's Rep Med 223) itself unfortunately unreported. Brooke LJ in *Wisniewski* analysed the various cases and derived from them a number of principles (which, if I may respectfully say so, seem to be both accurately and concisely stated). The cases he examined were *McQueen -v- Great Western Railway Company*(1875) LR 10 QB 569, *Chapman -v- Copeland* (1966) 110 SJ 569, *Herrington -v- British Railways Board* [1972] AC 877, *O'Donnell -v- Reichard* [1975] VR 916, *Hughes -v- Liverpool City Council* (Court of Appeal transcript, 11 March 1988) and *T C Coombs -v- IRC* [1991] 2 AC 283.
>
> 26. The principles Brooke LJ derived from those cases are:
>
> > "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
> >
> > (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> >
> > (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
> >
> > (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

> The fourth of those principles, of course, can have no possible relevance to the consideration of no case submissions. The first three, however, seem to me clearly relevant. Let me explain why.

27. The test to be applied by the judge if he *does* entertain a no case submission is whether or not on the evidence adduced by the claimant the claimant has "a real prospect of success". As the cases make plain, this is a different and lower test than that of a balance of probabilities, the test to be applied once the court has heard all the evidence that is to be called. What, however, is less plainly discernible from the cases is just what in this context is meant by "a real prospect of success". There is, of course, a good deal of authority as to the nature of this test when it applies under CPR Part 24.2. It seems to me difficult, however, to relate the approach to be taken *before* trial directly to the situation arising at the conclusion of the claimant's evidence *at* trial. Mance LJ made much the same point in paragraph 12 of his judgment in *Miller* (see paragraph 21 above), commenting on what Latham LJ said in *Bentley* (see paragraph 18 above).

28. It is at this stage that the relevance of the principles stated in *Wisniewski* becomes apparent. The judge entertaining a no case submission should in my opinion clearly recognise and bear in mind the real possibility that the defendant, were his submission to fail, might choose to call no evidence (or, indeed, call evidence which in the event proves helpful to the claimant, something in the experience of all of us) thereby entitling the court to draw adverse inferences which go to strengthen the claimant's case. Of course such adverse inferences can only be drawn when the claimant's own evidence itself establishes a case to answer. A case to answer, however, as the third *Wisniewski* principle indicates, is established by "some evidence, however weak" ("only a scintilla of evidence … to support the [relevant] inference" as May LJ put it in one of the earlier authorities, *Hughes -v- Liverpool City Council*).

29. Obviously, the possibility of drawing adverse inferences only arises where the defendants have material evidence to give on the issue in question. But generally that will be the case and manifestly it was so in the instant case. As Mance LJ said in paragraph 5 of his judgment in *Boyce* (see paragraph 14 above):

> "There may be some cases, probably rare, in which nothing in the defendant's evidence could affect the view taken about the claimant's evidence or case, but this is not one of them, and care would be required in identifying them."
>
> Mance LJ reiterated the point in paragraph 13 of his judgment in *Miller* (see paragraph 21 above). What, however, neither *Boyce* nor *Miller* specifically drew attention to is the possibility of a claimant's case being strengthened after the

conclusion of his evidence, either by the defendant not calling evidence or by that evidence in the event damaging his defence.

30. The point is worth making too even in those cases where the defendant elects to call no evidence. True, as Mance LJ made plain in *Miller* (see paragraph 20 above), the only issue then is whether the claimant has established his claim on the balance of probabilities. But it must be recognised that he may have done so by establishing no more than a weak *prima facie* case which has then been strengthened to the necessary standard of proof by the adverse inferences to be drawn from the defendant's election. Such adverse inferences can in other words tip the balance of probability in the claimant's favour.

31. The linking of the two strains of authority in this way to my mind lends added weight to the need for caution at the half way stage of a trial. The disadvantages of entertaining a submission of no case to answer are plain and obvious and have been spelled out already in the cases. Essentially they are twofold. First, as Mance LJ explained both in *Boyce* and in *Miller*, the submission interrupts the trial process and requires the judge to make up his mind as to the facts on the basis of one side's evidence only and applying the lower test of a *prima facie* case with the result that, if he rejects the submission, he must then make up his mind afresh in the light of whatever further evidence has been called and on the application of a different test. This, to say the least, is not a very satisfactory procedure. The second disadvantage, as again Mance LJ made plain in *Boyce* and *Miller*, is that if the judge both entertains and accedes to a submission of no case, his judgment may be reversed on appeal with all the expense and inconvenience resulting from the need to resume the hearing or, more probably, retry the action.

32. Let me state my central conclusion as emphatically as I can. Rarely, if ever, should a judge trying a civil action without a jury entertain a submission of no case to answer. That clearly was this court's conclusion in *Alexander -v- Rayson* and I see no reason to take a different view today, the CPR notwithstanding. Almost without exception the dangers and difficulties involved will outweigh any supposed advantages. Just conceivably, as Mance LJ suggested at the end of paragraph 12 of his judgment in *Miller* (see paragraph 21), "some flaw of fact or law may … have emerged for the first time, of such a nature as to make it entirely obvious that the claimant's case must fail, and it may save significant costs if a determination is made at that stage". Plainly, however, that was not the case here and hardly ever will it be so. Any temptation to entertain a submission should almost invariably be resisted.

[13] In this case it would have mattered little since the Defendant had not filed any witness statements so would not have had any evidence to call at trial. The court would invariably have had to determine whether the Claimant had proven his case

on the balance of probabilities either on a no case submission by the Defendant or after the close of the Claimant's case.

[14] The Defendant submits that, in the statement of claim, the Claimant sought an "Order that the Claimant be paid damages for deceit and/or fraud by the Defendant in a sum to be assessed by" the court. The Claimant then set out the particulars of deceit in a section headed: "Particulars of Deceit by Defendant" and this was also referred to in the pre-trial memorandum where the Claimant mentions "damages for deceit and/or fraud" and "deceit and/or fraud". The Defendant further submits that the Claimant did not prove the constituent and necessary elements for an action for damages for deceit, which must contain an allegation that a representation was made by the Defendant to the Claimant, and that the Claimant was induced by that representation to alter his position to his detriment.

[15] The arguments of Counsel for the Defendant on the no case submission are unassailable. Even Counsel for the Claimant in reply conceded that Counsel for the Defendant would be correct and the Defendant ultimately successful in her no case submission if the Claimant's claim was in fact based on deceit and/or fraud. I therefore hold that the Claimant has not established that the Defendant made a representation, which was false, dishonestly made, and intended to be relied on and in fact relied on by the Defendant. The Defendant's no case submission succeeds because the Claimant has not established on the balance of probabilities a case for deceit and/or fraud.

The **Claimant's** Reply

[16] Counsel for the Claimant in reply stated that the Claimant's claim was not in fact for deceit and/or fraud but rather based on the tort of malicious or injurious falsehood. I must confess that I was surprised by this since there is nothing in the claim form, statement of claim, witness statement or pre-trial memorandum that would have alerted the Defendant or anyone reading the pleadings that the Claimant's case was in any way based on the tort of injurious or malicious falsehood. I agree with the Defendant that it was impermissible for the Claimant to

advance a wholly new case in response to a no case submission, which Counsel for the Claimant accepts was bound to succeed.

[17] What therefore does the tort of injurious falsehood comprise? This tort has a variety of names, and has been and is sometimes called: "trade libel", "slander of title", "slander of goods", "disparagement of goods", or "malicious falsehood". In Ratcliffe v Evans [1892] 2 Q.B. 524, the plaintiff alleged that the defendant had falsely and maliciously published an article in its weekly newspaper which suggested that the plaintiff had ceased to carry on his engineering and boiler-making business, and that the plaintiff's firm did not then exist. The Court of Appeal had to consider whether the plaintiff had to prove special damage in order to establish a cause of action for a false and malicious publication about his trade and business. Bowen LJ stated (at 527-528):

> That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title.

[18] Damage must be proved and this is an essential element of the tort of malicious falsehood. The plaintiff did not provide any specific evidence of the loss of particular customers or orders it suffered as a result of the publication by the defendant. The plaintiff was only able to prove a general loss of business because of the publication. Bowen LJ stated that:

> If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shewn. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage"— says Pollock, C.B., in Harrison v. Pearce — "it is general damage resulting from the kind of injury the plaintiff has sustained." So in Bluck v. Lovering, under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also Ingram v. Lawson. (Internal citations omitted)

[19] The tort of injurious or malicious falsehood originally covered "slander of title" where a person makes a statement that questioned another person's title to land as a result of which the land became unsaleable. The tort was extended later in the 19 century to include slander of goods and passing off. It is analogous to the law of passing off which seeks to protect the goodwill in the goods of one person from appropriation by another person. In the tort of injurious or malicious falsehood, the law protects the goodwill of the person's commercial activities from false statements made about that person to third parties, which causes that person financial loss. It is also akin to commercial defamation. It is unlike defamation where damage is presumed; in injurious falsehood, the claimant must show actual damage. Likewise, malicious intent is a necessary ingredient of the tort whereas in defamation it is relevant mainly in respect of proving damages. The tort therefore protects a person's business reputation and goodwill from injury from disparaging and false statements made by another person.

[20] Deceit however covers the situation where a defendant makes a false statement to the claimant, knowing it is false, or reckless as to its truth, with the intention that the claimant acts on it, the claimant does act and suffers damage as a result. It is related to the tort of fraudulent misrepresentation that is based on negligence and covers statements of fact and opinion, whereas deceit is based on fraudulent misrepresentation and covers only statements of fact. In Kaye v Robertson [1991] F.S.R. 62, the tort was defined as follows:

> The essentials of this tort are that the defendant has [1] published about the plaintiff, [2] words which are false, [3] that they were published maliciously and [4] that special damage has followed as the direct and natural result of their publication.

[21] The tort of deceit or fraud requires: (1) publication; (2) a false statement of fact; (3) malice; and (4) special damage. It must be determined, first, whether the claimant has properly pleaded the tort of injurious or malicious falsehood, and second whether the tort is established on the evidence before the court.

[22] In Schulke and Mayr UK Ltd v Alkapharm UK Ltd [1999] F.S.R. 161, Jacob J stated (at p 165) the following of the tort of malicious falsehood:

> Its whole origin is therefore based on some kind of disparagement of the plaintiffs: "knocking", to use the advertisers jargon. I can see nothing in any of the authorities to which I was taken which suggest that the tort goes further than disparaging statements about the plaintiff or his goods.

[23] The context in which the tort originates is important to determine whether it can be extended to cover areas that are similar. The extensions of the tort of malicious or injurious falsehood from title to land, to goods and to trade indicate that it is to be used in the area of commercial activity. It is no surprise that it is usually found alongside a passing off action, and is discussed in intellectual property and tort textbooks.

[24] A statement of fact. The Defendant must have made a statement of fact to a person other than the Claimant. In the statement of claim, the Claimant pleads that: (1) the Defendant "falsely created the said purported "Affidavit of Consent" and delivered it to the [NLSA] without the Claimant's knowledge or consent"; and (2) "[d]ue to the Defendant's aforesaid false and deceitful actions, the Claimant suffered loss and damage, in particular, losing his contractual right to purchase [the Land] …". In the Affidavit of Consent it is stated, inter alia, that the Claimant: (1) was allocated the Land; (2) was given two years to complete the payments for the Land; (3) gave the NLSA permission to "turn over the [Land] to [Mrs. Maria Jones] … who is a friend of [his] family who had been trying to purchase land for some time"; and (4) was "no long (sic) interested in the [Land]…". Do these amount to a statements of fact for the purpose of establishing the tort?

[25] The problem is that the Affidavit of Consent purports to originate from the Claimant himself. In cases concerning malicious falsehood, the defendant would have made a statement about the claimant, for example, the defendant in Ratcliffe published an article in its weekly newspaper which suggested that the plaintiff had ceased to carry on his engineering and boiler-making business, and that the plaintiff's firm did not then exist. In the instant case the alleged statement is that the Claimant no longer wants to purchase the Land and wishes to "turn over" the Land to Maria Jones. These words were not published "about" the Claimant and they do not say

anything about the Claimant or his business that may affect any trade that the Claimant was carrying on at the time if at all.

[26] Even if the Claimant was able to overcome the hurdle that the Defendant published a false statement about the Claimant to a third party, there is still the question of whether this was done with malice. On the facts, it is not clear how this could be established. However, in relation to special damages the Claimant must prove that he has suffered pecuniary loss and that the loss is attributable to the Defendant's statement. The Claimant states that as a result of the Defendant's action he has "suffered loss and damage, in particular, losing his contractual right to purchase [the Land]". The Claimant on 16 February 2010 was informed by the NLSA that his application was successful and that the total cost to him for the Land was EC$19,222.05. He was to pay a minimum payment of $100.00 to secure the Land and had two years within which to complete the purchase of the Land.

[27] The Claimant's evidence is that in 2015 he went to the NLSA and was informed that the Land was reassigned to Maria Jones. The Claimant provided no evidence that he inquired about the Land during the period 2010-2012 or at any time before 2015. What is even more striking is that the Claimant provided no evidence that he made any payments to the NLSA for the Land. The Head of the NLSA wrote the Claimant on 17 April 2012 in relation to the transfer to Maria Jones and thanked him for his letter of 21 March 2012. The Claimant disputes writing any letter to the NLSA and states that he never received the letter in response from the NLSA.

[28] The Claimant was contractually bound to complete the purchase of the Land by February 2012. The NLSA would have been within its right to make the transfer to anyone else since the Claimant breached the agreement with the NLSA by not completing the purchase of the Land by February 2012. In April 2012 when NLSA informed the Claimant of the transfer of the Land to Ms. Maria Jones, the Claimant had no contractual right to the Land. That right expired in February 2012. Therefore the Claimant would have suffered no loss in the event he was able to establish on the balance of probabilities all the other elements of his "claim" against the Defendant for malicious or injurious falsehood.

[29] It is plain that the Claimant's impermissibly re-imagined case based on malicious or injurious falsehood was essentially, as the Defendant contends, pulling a rabbit out of a hat. I addressed it for completeness but the tort having not formed part of the Claimant's pleaded case could not properly be advanced by the Claimant without first amending his statement of claim and the claim based on malicious falsehood was in any event bound to fail for the reasons explained earlier.

Disposition

[30] For the reasons explained above, I make the following orders:

(1) The Claimant's case is dismissed.

(2) Costs to the Defendant to be assessed if not agreed within 21 days of today's date.

Eddy D. Ventose
High Court Judge

By the Court

Registrar