EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: NEVHCV2017/0049

Between Delta Petroleum (Nevis) Limited

Claimant

and

Farrell Smithen
Nevis Printing Limited

Defendant

Appearances:

Ms. Vadeesha John of counsel for the claimant
Ms. Kurlyn Merchant of counsel for the 1st defendant

2019: February, 5th
March, 13th

JUDGMENT

[1] MOISE, J (A.g).: This is the court's decision on an application made by the 1st defendant pursuant to rule 69.4 of the Civil Procedure Rules 2000 (CPR). The 1st defendant seeks a determination as to whether or not that the words complained of, as set out in the claimant's statement of case, are capable of bearing the meaning or meanings ascribed to them. The 1st defendant also seeks an order, pursuant to rule 26.3(1)(C) of the CPR, striking out the claim on the basis that it is an abuse of the process of the court. In order to address the issues raised in the application, it is important to set out in some detail, the nature of the claim and the chronology of events which have transpired since the commencement of the action.

The Claim

[2] These proceedings were initially commenced on 23rd March, 2017. The claimant however filed an amended claim form and statement of claim on 13th April, 2017 claiming damages for libel, including exemplary and special damages against both defendants. The claimant also sought an injunction preventing the material, which it finds offensive, from being further published by the

defendants. The words complained of were contained in a newspaper article published by the 2nd defendant on 10th October, 2016. The portion of that article which the claimant finds offensive states as follows:

> **"In early 2016, the source alleged, Delta breached its contract with NEVLEC and without** warning discontinued the supply of oil lubricants to the Prospect pow**er plant. "We had** to find **other oil lubricants from somewhere else", the source said. "The generators had to be drained of Delta's oil so that we could put in the other oil."**

[3] The claimant asserts that by letter dated 25th October, 2016, the editor of the 2nd defendant identified the 1st defendant as the source of the information contained in the article. The editor also offered an apology and subsequently published a retraction of the article after protest by the claimant that the content was untrue. On the basis of what was contained therein, the claimant asserts that these words were meant and understood to mean that:

(a) The claimant was not a reliable business partner and could not be relied upon to comply with the terms of any agreement which it entered into;

(b) The claimant's manner of doing business was quite questionable and left a lot to be desired;

(c) The claimant was not a reliable business partner and was to be avoided and was not a company that any serious person would want to enter into a business relationship with.

[4] The defendant's duly entered appearances and filed defences to the claim. The matter went through is normal case management procedure and on 11th December, 2017 pre-trial directions were ordered. However, on 18th October, 2018, after general compliance with the case management orders, a consent order was filed, having been signed by the claimant and the 2nd defendant, whereby the claim against the 2nd defendant was discontinued. This was done on the premise of a settlement between the claimant and the 2nd defendant; the terms of which are not contained within the consent order. The claimant however continues to pursue its claim against the 1st defendant.

The Application under Rule 69.4 of the CPR

[5] Rule 69.4 of the CPR states as follows:

> *(1) At any time after the service of the statement of claim, either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case.*
>
> *(2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statement of case, the judge may dismiss the claim or make such other order or give such judgment in the proceedings as may be just.*

[6] By invoking these provisions, the claimant requests that the court exercises its powers to determine whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case. It is submitted that they are not so capable.

[7] Both parties referred the court to the case of *Skuse v Granada Television Limited*[1] in which Lord Bingham outlined the factors which a court ought to consider when dealing with an application of this nature. He states as follows:

> *(1) **"The court should give to the material complained of the natural and ordinary** meaning which it would have conveyed to the ordinary reasonable person **...***
>
> *(2) The hypothetical reasonable reader (or viewer) is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.*
>
> *(3) While limiting its attention to what the defendant has actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue.*
>
> *(4) The court should not be too literal in its approach.*

[1] [1996] EMLR 278

(5) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.

(6) In determining the meaning of the material complained of the court is not limited by the meanings which either the plaintiff or the defendant seeks to place upon the words.

(7) The defamatory meaning pleaded by the plaintiff is treated as the most injurious meaning the words are capable of bearing and the questions a judge sitting alone has to ask himself are, first, is the natural and ordinary meaning of the words that which is alleged in the statement of claim and, secondly, if not, what (if any) less injurious defamatory meaning do they bear.

(8) The court is not at this stage concerned with the merits or demerits of any possible defence."

[8] The starting point therefore is to assess the natural and ordinary meaning of the words which the claimant has found to be offensive. This is not to be taken to mean that the court must apply a strict and literal meaning. What is required is to determine what these words would mean to the ordinary and reasonable man. As Lord Reid noted in the case of *Lewis et al v. Daily Telegraph*[2], the task facing the court is not one of ***"construction in the legal sense"*** but a determination of whether the reasonable man, who does not live in an ivory tower, would ascribe meaning to the words complained of in the same manner as the claimant. The general test therefore is whether the words complained of *would tend to lower the plaintiff in the estimation of right thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.*

[9] In the exercise of the powers conferred by rule 69.4, the court may employ what has been described as the most draconian of its discretion, as the rule states that the judge, upon a determination under sub rule (1), *may dismiss the claim or make such other order or give such judgment in the proceedings as may be just.* Indeed counsel for the 1st defendant refers the court to the case of *Roosevelt Skerrit et al v. Lennox Linton et al*[3] where the court noted that the "*striking out of a statement of case which includes a defence is a draconian step which a court would only take in exceptional circumstances"*. To my mind, giving due regard to the

[2] [1963] 2 All ER 151
[3] DOMHCV2014/0210

ultimate power granted by section 69.4 to dismiss an action for libel without the full ventilation of the case, the court ought to be cautious and ensure that the circumstances warrant such an intervention in the proceedings at this stage. It is only where none of the words complained of are capable of being defamatory should the court adopt this nuclear option.

[10] I wish also to refer to the case of *Jones v. Skelton*[4] where Lord Morris notes in his judgment that ***"[i]n deciding whether words are capable of conveying a defamatory meaning the court will*** *reject those meanings which can only emerge as the product of some strained or forced or* ***utterly unreasonable interpretation."*** It is therefore left for me to assess the words upon which the claimant relies to determine whether a reasonable person would consider them to bear the meaning or meanings ascribed to them in the statement of claim.

[11] The statement of claim asserts that words published meant that the claimant was not a reliable business partner and could not be relied upon to comply with the terms of any agreement which it entered into. I note that paragraphs 30 to 32 of the submissions filed by the 1st defendant refers to the fact that the words complained of were clear statements of fact and that the defence of the 1st defendant substantiates them as such. However, in an application under rule 69.4 of the CPR the court is not concerned with the defence. The sole issue is whether, if proven, the words complained of are capable of bearing the defamatory meaning ascribed to them. The issues raised in the defense are of no avail to the 1st defendant at this stage in the proceedings.

[12] As I understand it, NEVLEC is the electricity company which supplies the population of Nevis with access to electricity. The claimant is the supplier of oil lubricants and other related products to NEVLEC. The statement of claim indicates that the 1st defendant was the Chairman of the Board of NEVLEC at the time of the publication. The article published indicates clearly that the claimant had breached its contract with the NEVLEC and goes further to state that the claimant, without any warning, discontinued the supply of oil lubricant to the power plant at Prospect. This was published in a local newspaper in print and via the internet. It is true that the article does not make the allegation in and of itself but rather states that the information was derived from a "source". The 2nd defendant identified the 1st defendant as the source of this information. I must reiterate that the court is not determining whether this allegation is proven, but rather states that it is an allegation

[4] [1963] UKPC 29

contained in the statement of claim. If proven at trial the allegation would establish that the 1st defendant communicated to the 2nd defendant that the claimant was in breach of its contract with NEVLEC in the manner so described in the article.

[13] Further, the statement of claim goes on to state that the claimant is a company engaged in contractual relationships with other electricity providers in the region. It is alleged that the 1st defendant would have had full knowledge of this information. Taken as a whole, I disagree with the submissions of the 1st defendant. A reasonable man may very well infer that the claimant is an unreliable business partner if it breached a contract of such significance and did so without any warning to NEVLEC. The fact that the article references that there was an ongoing dispute between the parties is not enough to draw the court to the conclusion, at this stage, that the test under rule 69.4 of the CPR has been met. To ascribe such a meaning to the words published would not be a stretch in anyway; and one would not have to be *avid for scandal* in order to reach such a conclusion. In the circumstances I find that the words are capable of bearing the meaning or meanings ascribed to them in the statement of claim and that these words are capable of being defamatory. The 1st defendant's application in that regard is therefore denied.

Application to strike out as an abuse of process

[14] According to rule 26.3 of the CPR ***"****the court may strike out a statement of case or part of a* ***statement of case if it appears to the court that ...*** *the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of* ***the proceedings."*** It is perhaps important for the court to continue to remind itself that "*to strike* ***out a party's case*** *and so deny him a hearing on the merits, is an extreme step not to be* ***lightly taken."***[5] Despite this, it has been observed that the court must also be fully aware of the role it plays in modern civil litigation. This was descried by the English Court of Appeal in the case of *Jameel v. Dow Jones & Co*.[6] in the following manner:

> ***"[a]****n abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing-field and to referee whatever*

[5] See CCJ President de La Bastide in Barbados Redifusion Services Limited v. Asha Merchandani et al CCJ Appeal No. CV 1 of 2005 at paragraph 44

[6] [2005] EWCA Civ. 75

game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice."

[15] The 1st defendant therefore seeks the court's intervention and requests that the claim be struck out as an abuse of process for the following reasons:

(a) The present claim is a claim for libel and the claimant has failed to prove any publication by the 1st defendant so as to cause him to be liable;

(b) The 1st defendant did not request, procure or authorize the publication of the offending words to any third party;

(c) The defendants have been sued jointly and as such any settlement between the claimant and the 2nd defendant ought to be a settlement in the claim; and

(d) The claim is frivolous and vexatious.

[16] From the onset I wish to state that I do not accept these grounds as a basis upon which the claim should be struck out. The claimant, quite rightfully, refers the court to Halsbury's Laws of England which states that ***"every person who takes part in or procures the publication of a*** *libel is* ***prima facie liable jointly and severally for all the damage caused by it."*** The statement of claim clearly asserts that the 1st defendant was the source of the information which it has alleged to be defamatory. The publication was eventually retracted by the 2nd defendant who provided information regarding the alleged source to the claimant. No doubt the claimant will have to establish these as matters of fact at the trial. However, I can find no justifiable reason for the court to strike out the case at this stage on the basis that the claimant has failed to prove any publication by the 1st defendant. The time for such proof has not yet arrived.

[17] Submitting that the 1st defendant did not request, procure or authorize the publication of the offending words to any third party is not a ground on which the court should strike out this claim. Indeed, if the claimant is able to prove that the words are defamatory at trial and that the 1st

defendant did publish those words to the 2nd defendant, then it is quite possible that the claimant may succeed in its claim. The court ought not to close its doors to the claimant at this stage in the proceedings. I make no findings of fact here but merely state that the issues contained in the statement of claim provide reasonable grounds for bringing the claim in the first place.

[18] The 1st defendant also takes issue with the fact that the claimant has arrived at a settlement with the 2nd defendant and has therefore discontinued its claim against it. Counsel for the 1st defendant refers the court to the Halsbury's Laws of England where it is stated that ***"a settlement between*** *the claimant and one of severally liable defendants must be taken into account in any subsequent proceedings against any of the remaining defendants in order to prevent* ***double recovery by the claimant."*** In my view, this in no way supports the proposition that the court is to employ its most draconian power and strike out a claim in such circumstances. No doubt, the court must concern itself with the interest of justice overall. However, as counsel for the claimant rightly pointed out, settlement of a claim with one of a number of parties does not affect the cause of action against the others; especially in circumstances where they may be jointly and severally liable. What the court will be called upon to consider if it is determined that the 1st defendant did defame the claimant, is what measure of damages should be awarded, bearing in mind that the claimant has already obtained some measure of payment from the 2nd defendant. It may very well be the case that the 1st defendant would be entitled to full disclosure of the terms of this settlement. However, this is not a ground upon which the claim should be struck out as an abuse of process.

[19] I can also find no reason to determine that the continuation of the claim against the 1st defendant is frivolous or vexation and would reject this as a ground on which to determine that there is an abuse of the process of the court. There has been nothing provided to enable the court to come to such a conclusion.

[20] In the circumstances the application is dismissed with costs to the claimant in the sum of $800.00;

[21] The matter is to be listed for trial by the court office on a date to be communicated to the parties;

[22] The claimant is to file core bundles 1, 2 and 3 in keeping with the time frame outlined in the CPR 2000.

Ermin Moise
High Court Judge

By the Court

Registrar