[2014] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 104/2012

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**DEANDRA CHUNG**	**APPELLANT**
AND	**FUTURE SERVICES INTERNATIONAL LIMITED**	**1st RESPONDENT**
AND	**YANEEK PAGE**	**2nd RESPONDENT**

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones & Co for the appellant

Abraham Dabdoub and Kevin Page instructed by Dabdoub, Dabdoub & Co for the respondents

1 March 2013 and 13 June 2014

MORRISON JA

Introduction

[1] Up to 6 February 2012, the appellant was employed to the 1st respondent, a company of which the 2nd respondent is a director, as senior client relations officer. On that date, the appellant resigned with immediate effect.

[2] It is not in issue that on more than one occasion between 9 and 21 March 2012, in reference to the appellant, the respondents caused to be published in the Daily Gleaner, the Sunday Gleaner and the Star newspapers, the following words:

> "***NOTICE*** *– The public is hereby advised that* ***Miss Deandra Chung*** *is no longer employed to* ***Future Services International Ltd*** *and is therefore not authorized to conduct any business on our behalf*."

[3] In an action for libel filed as a result of these publications, the appellant contended that these words were defamatory of her. By an order made on 6 July 2012, D McIntosh J dismissed the appellant's claim, with costs, on the basis that the words complained of were not capable of bearing the meanings which the appellant had attributed to them in her statement of case.The single issue which arises on this appeal is whether the learned judge was correct in this determination.

The pleadings

[4] In her particulars of claim filed on 10 April 2012, the appellant stated the following (at paras 26-27):

> "26. In their natural and ordinary meaning the said words meant and were understood to mean that the Claimant's termination of employment was such as to warrant notification to the public at large and that the Claimant was at the time (post resignation) engaging in conduct which was detrimental to the company and which warranted the public being warned.
>
> 27. Further in alternative [sic], the said words bore and were understood to bear the meaning pleaded in paragraph 26 above by way of innuendo.

PARTICULARS

It is commonly known by right thinking Jamaicans that such publications is [sic] warranted in circumstances where ex-employees are dishonest, thieves, fraudsters and are purporting the [sic] act for their ex-employers for the benefit of the ex-employees."

[5] In their defence filed on 24 May 2012, the respondents denied that the words complained of by the appellant were capable of bearing or bore the meanings pleaded by the appellant (paras 27-29):

"27. The Defendants deny that in their natural and ordinary meaning the words complained of are capable of bearing the meaning attributed to them by the Claimant in Paragraph 26 of the Particulars of Claim.

28. The Defendants specifically deny that the words complained of mean or could be understood to mean that the Claimant's employment was terminated by the 1st Defendant or that the termination of employment was such as to warrant notification to the public at large that at the time (post resignation) the Claimant was engaging in conduct which was detrimental to the company and which warranted the public being warned.

29. The Defendants aver and say that in their natural and ordinary meaning the words complained of meant and could only mean the following:

(a) That the Claimant was no longer employed to the 1st Defendant,

and

(b) That the Claimant was no longer authorized to conduct any business on behalf of the 1st Defendant.

The Defendants further aver and say that the words in their natural and ordinary meaning could not and did not and

> could not possibly be taken by any reasonable man to mean, as the Claimant alleges, that her employment was terminated by the 1st Defendant, that subsequent to termination her conduct was detrimental to the Company."

The proceedings before D McIntosh J

[6] By an application filed on 22 May 2012, the respondents moved the court, pursuant to rule 69.4 of the Civil Procedure Rules 2002 ('the CPR'), for orders that (i) "the words complained of are not capable of bearing the meaning or meanings attributed to them in the statement of case"; and (ii) the claim be dismissed.

[7] Rule 69.4 of the CPR provides as follows:

> "69.4 (1) At any time after the service of the particulars of claim either party may apply to a judge sitting in private for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statements 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 [sic] capable of bearing the meaning or meanings attributed to them in the statements of case, the judge may dismiss the claim or make such order or give such judgment in the proceedings as may be just."

[8] The application was supported by an affidavit sworn to by the 2nd respondent, in which she stated that, before the appellant's resignation, the 1st respondent had projected her in its advertisements as one of the persons authorised to transact business on its behalf. Further, that after the appellant's unexpected resignation, she

had made contact with some of the 1st respondent's clients and had failed to return the identification card issued by the 1st respondent, despite having been asked to do so. In these circumstances, the 2nd respondent stated, the 1st respondent had a right to advise the public that a person held out by it as a person capable of conducting business on its behalf was no longer its employee; and, as a director of the 1st respondent, she had a duty to protect the 1st respondent's business by advising the public that the appellant was no longer employed to or authorised to conduct business on its behalf.

[9] In a brief affidavit in response, the appellant denied making any contact with the 1st respondent's clients and explained that the identification card which had been issued to her had been lost by her and was never replaced. The appellant also relied on three affidavits sworn to by acquaintances of hers, all of whom spoke to having immediately assumed on reading the words complained of that the appellant was guilty of theft or some other illegal or unethical behaviour.

[10] In a brief written judgment, the learned judge noted (at para. [3]) that (a) there was no denial by the respondents of the publication of the words complained of; and (b) the appellant had made no complaint that the publication "bears any falsehood". The judge then resolved the application in this way (at paras [5]-[8]):

> "[5] The Claimant has ascribed certain meanings to the published words.
>
> [6] The Defendant insists that the publication is truthful and in their [sic] natural and ordinary meaning are [sic] not capable of bearing the meaning attributed to them [sic] by the Claimant in her statement of claim and are therefore not defamatory.

> [7] An examination of the authorities relied on by the Claimant does not detract or change the rules which were promulgated to jettison spurious claims for defamation where the words complained of consist of statements of fact which were true in substance and in fact.
>
> [8] That being the case in this instance this court finds that the words complained of are not capable of being defamatory. They are true in substance and in fact."

The appeal

[11] The appellant filed three grounds of appeal:

> "a. The judge failed to consider whether the words complained of were capable of bearing a defamatory meaning pleaded by way of innuendo.
>
> b. The judge failed to demonstrate that he considered the words complained of in the context of the Jamaican society and the meaning that would be ascribed to the words complained of by the average Jamaican.
>
> c. The learned judge only directed his mind to whether the words complained of consisted of statements which were true in substance and in fact."

[12] On the first ground, Mr Jones for the appellant pointed out that the appellant in her particulars of claim had relied, not only on the natural and ordinary meaning of the words of which she complained, but also on their extended meaning by way of innuendo, particulars of which she had provided. Mr Jones submitted that it was clear that the judge had failed to demonstrate in his judgment that he had given any consideration to the innuendo meaning in coming to his conclusion on the application. On the second ground, Mr Jones contended that the judge had failed to approach the matter from the standpoint of the ordinary, reasonable and fair-minded Jamaican

reader, as he was required to do. And on the third ground, which was really an extension of the first, it was submitted that, by directing his mind only to the question of whether the words were true in substance and in fact on their face, the judge had failed to consider whether the secondary meaning pleaded was defamatory.

[13] In a general response to these submissions, Mr Dabdoub for the respondents submitted that, when considering an application under rule 69.4, the judge is required to apply an objective test to determine the natural and ordinary meaning which the words complained of would convey to the ordinary, reasonable and fair-minded reader. It was submitted that on this analysis, which was the one undertaken by the judge in this case, none of the words complained of was capable of bearing the meanings attributed to them by the appellant in the particulars of claim: to ascribe to those words the meanings contended for by the appellant would require a "strained, forced and utterly unreasonable interpretation" of them. Mr Dabdoub submitted further that, there being no question that the words complained of were true in substance and in fact, this was an absolute defence to the claim in the absence ofmalice, which was not pleaded by the appellant. Accordingly, the submission concluded, the judge was correctto find that the words complained of were incapable of bearing the meanings attributed to them in the particulars of claim.

[14] The grounds of appeal and the submissions therefore give rise to the same question which the judge had to consider, that is, whether, either by their natural and ordinary meaning or by way of the pleaded innuendo, the words complained of by the appellant meant or were capable of being understood to mean that the termination of

her employment by the respondents "was such as to warrant notification to the public at large and that the [appellant] was at the time [post resignation] engaging in conduct which was detrimental to the company and which warranted the public being warned".

The authorities

[15] Both Mr Jones and Mr Dabdoub very helpfully referred us to a number of authorities, covering a wide area of the law of defamation. I will mention some of them.

[16] I take as a starting point **Bonnick v Morris et al** [2002] UKPC 31, in which Lord Nicholls explained (at para. 9) the correct approach to determining whether a statement can bear or is capable of bearing the defamatory meaning alleged:

> "As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in *Skuse v Granada Television Ltd* [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the [newspaper], reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant. An appellate court should not disturb the trial judge's conclusion unless satisfied he was wrong."

[17] In **Jeynes v News Magazines Ltd and Another** [2008] EWCA Civ 130, the English Court of Appeal applied these criteria in an application (pursuant to CPR 53 PD, para. 4.1 – which is similar in effect to rule 69.4(1)) to determine whether the words

complained of in an action for libel were capable of bearing their pleaded meanings. But with regard to the correct approach of the appellate court to the finding of the judge at first instance on such an application, the court (in a judgment delivered by Sir Anthony Clarke MR) approved a slightly more nuanced test (at para. 12):

> "The correct approach in this court is that stated by Lord Phillips MR in *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 at paragraphs 5 and 6 as follows:
>
> > "5. The Court of Appeal will always be very reluctant to reverse an interlocutory finding of a judge at first instance that the words alleged to be libellous are capable of bearing the defamatory meaning alleged (see *Hinduja v Asia TV Limited* [1998] EMLR 516, 523 per Hirst LJ and *Cruise v Express Newspapers* [1999] QB 931, 936 per Brooke LJ)
> >
> > 6. Where the judge has held that words are not capable of bearing a defamatory meaning, with the result that the issue will never go to a jury, the reluctance to interfere will be less marked (see Hirst LJ in *Geenty against Channel Four Television* [1998] EMLR 524 at 532)."

[18] Still on the ascertainment of meaning, in **Charleston and Another v News Group Newspapers Ltd and Another** [1995] 2 All ER 313, 317-318, Lord Bridge outlined "two principles which are basic to the law of libel":

> "The first is that, where no legal innuendo is alleged to arise from extrinsic circumstances known to some readers, the 'natural and ordinary meaning' to be ascribed to the words of an allegedly defamatory publication is the meaning, including any inferential meaning, which the words would convey to the mind of the ordinary, reasonable, fair-minded reader. This proposition is too well established to require

> citation of authority. The second principle, which is perhaps a corollary of the first, is that, although a combination of words may in fact convey different meanings to the minds of different readers, the jury in a libel action, applying the criterion which the first principle dictates, is required to determine the single meaning which the publication conveyed to the notional reasonable reader and to base their verdict and any award of damages on the assumption that this was the one sense in which all readers would have understood it."

[19] The decision of this court in **Griffiths v Dawson** (1968) 10 JLR 398, in which it was held that, viewed in its context, the assertion by the defendant that the plaintiff was a "criminal" was mere vulgar abuse, may be regarded as an example of the first of these two principles in action. For, as Mr Dabdoub pointed out, the criterion applied by the court in arriving at this conclusion was the natural and ordinary meaning which would be ascribed to the words by the ordinary, reasonable and fair-minded person. To similar effect is **Haynes v Johnson** (1978) 31 WIR 95, a decision of Sir William Douglas CJ, on an application for an interlocutory injunction in a case of alleged libel against a medical practitioner. The Chief Justice had regard (at page 96) to the sense in which the words complained of would be understood by "the ordinary, sensible person", bearing in mind "the esteem in which...the medical profession is held in Barbados".

[20] In **Charvis v Radio Jamaica Ltd** (Claim No HCV 0989/2003, judgment delivered 28 September 2004), King J had before him an application under rule 69.4 of the CPR, by the defendant in a libel action, for a determination whether the words complained of by the claimant were capable of bearing the meaning attributed to them in the statement of case. In the course of his brief written ruling in the claimant's

favour, the learned judge was careful to observe that, on an application of this nature, the court is concerned only with the issue whether the words are capable of bearing the meaning attributed to them by the claimant, and not with "the further question of whether such a meaning is or is capable of being defamatory". But in the earlier leading case of **Lewis and Another v Daily Telegraph Ltd** [1963] 2 All ER 151, to which King J also referred, in which the respondents also sought a ruling that the words complained of were not capable of having the particular meaning which the appellants attributed to them, Lord Reid had observed (at page 154) that "the test must be the same as that applied in deciding whether words are capable of having any libellous meaning".

[21] **Lewis and Another v Daily Telegraph Ltd** is also an important case on the role of an innuendo in the law of libel. In that case, Lord Morris stated the position in this way (at pages 159-160):

> "Where a plaintiff brings an action for libel he may sustain his case (where there is a trial with a jury) if the judge rules that the words, in what has been called their natural and ordinary meaning…are capable of being defamatory and if the jury find that they are defamatory. A plaintiff may, however, sustain his case in a different way. He may plead an innuendo. He may establish that because there were extrinsic facts which were known to readers of the words, such readers would be reasonably induced to understand the words in a defamatory sense which went beyond or which altered their natural and ordinary meaning and which could be regarded as a secondary or as an extended meaning. The nature of an innuendo (using that word in its correct legal sense) has recently been reviewed in the valuable judgments delivered in the Court of Appeal in *Grubb v Bristol United Press Ltd*. A defamatory meaning which

> derives no support from extrinsic facts, but which is said to be implied from the words which are used, is not a true innuendo. If there are some special extrinsic facts the result may be that to those who know them words may convey a meaning which the words taken by themselves do not convey."

[22] In the earlier case of **Grubb v Bristol United Press Ltd** [1963] 1 QB 309 (to which Lord Morris had made reference in the passage quoted above) Davies LJ had elucidated the nature of a 'true' innuendo in this way (at page 336):

> "The word 'innuendo' is used in at least two meanings in the law of defamation. First, it is applied to facts and matters tending to show that the alleged libel or slander - between which, for the purposes of this judgment, there is no difference - refers to the plaintiff. Second, it is applied to a secondary or extended or expanded meaning of the alleged libel, as based upon and proved by the existence of extrinsic facts and matters.
>
> Of these usages, only the second is, in my view, strictly accurate."

[23] In order to ground a true innuendo, as the learned editors of Gatley explain (Gatley on Libel and Slander, 9th edn, para. 3.17), the claimant must plead the special meaning he contends for and prove that the facts upon which this meaning is based were known to at least one of the persons to whom the words were published. The meaning thus established gives rise to a cause of action separate from that (if any) arising from the words in their ordinary and natural meaning, because it is an extended meaning not present in the words themselves. If, on the other hand, "the defamatory meaning arises indirectly by inference or implication from the words published without

the aid of any extrinsic facts there is said to be 'false' or 'popular' innuendo and this does not give rise to a separate cause of action".

[24] The requirement that the extrinsic facts upon which a claimant relies in support of an innuendo must be pleaded now finds expression in rule 69.2(b) of the CPR, which provides that the claimant must, "where [he] 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".

[25] **Capital and Counties Bank Ltd v George Henty & Sons Ltd** (1881-82) LR 7 App Cas 741, still regarded as one of the leading cases in the law of defamation, neatly illustrates the interplay between the natural and ordinary meaning of words and an alleged extended meaning by way of innuendo. In that case, the defendant ('Henty & Sons'), a firm of brewers, was in the habit of receiving from its customers cheques drawn on various branches of the plaintiff ('the bank'). As a convenience to Henty & Sons, these cheques would be cashed at a particular branch of the bank. After a squabble with the manager of that branch, Henty & Sons sent a printed circular to a large number of its customers (who knew nothing of the squabble) indicating that, "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of [the bank]." The circular became known to other persons, there was a run on the bank (though it was not proved that the circular is what caused the run) and the bank sued Henty & Sons for libel, alleging in an innuendo that the circular imputed that it was insolvent.

[26] The House of Lords held that, in their natural meaning, the words were not libellous and that there was no evidence fit to be left to the jury to support the pleaded innuendo. The bank's action accordingly failed. On the question whether the circular bore the meaning complained of in its natural meaning, Lord Selborne LC said this (at pages 744-5):

> "The alleged libel, in the present case, is a printed circular sent through the post by the defendants (brewers at Chichester) to certain of their own tenants and customers, giving them notice that the defendants 'would not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank.' The meaning ascribed to this document by the innuendo is, 'that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers.' The question is, whether there was evidence to be left to the jury in support of that innuendo. From the words, standing by themselves, it appears to me to be impossible to collect such a meaning, on any known principle of construction. By construction, merely, the only conclusion to be arrived at is, that they mean exactly what they say, viz., that the defendants had come to a resolution not to receive in payment of any moneys due or to become due to them, from the persons to whom that circular was addressed, cheques drawn on any of the branches of the plaintiffs' bank. For such a resolution they might have had various motives and reasons, good, bad or indifferent. To mention some, which (whether morally right or not) would be remote from any question of libel, the defendant might (as the fact really was) have taken offence at some conduct on the part of the plaintiffs' agents; or they might have found that mode of payment, from some cause or other, inconvenient; or they might have had greater facilities for cashing cheques drawn upon the branches of

> some other bank (e.g. the London and County Bank); or they might wish, as far as their influence went, to favour some competitors of the plaintiffs in the business of banking. They were under no obligation to give, and they did not give, any reason; and it would, in my opinion, be arbitrary and not reasonable, to imply, from the mere words of the circular, an imputation upon the plaintiffs' credit or solvency. The test, according to the authorities, is whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense. Sometimes (perhaps generally) that test may be satisfied from the mere words of the document; in this case, I think it is plain that the mere words of the document are not enough for that purpose."

[27] As regards the supposed innuendo, Lord Selborne LC observed (at page 748) that "[t]here was no evidence of any extrinsic fact affecting the reputation or credit of the [bank] at the time which could be connected with the circular, so as to give it a meaning to those who read it which it might not otherwise have had". In the result, his Lordship concluded (at page 750) that "[t]he document, not being a libel on the face of it, is not shewn to be so by any extrinsic evidence proper, in my judgment, to be considered by a jury for that purpose".

[28] Concurring, Lord Blackburn observed (at page 772) that "[i]n construing the words to see whether they are a libel, the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are

calculated to convey an injurious imputation". And of the words complained of in that case, Lord Blackburn said this (at pages 785-786):

> "There can be no doubt that the defendants were not required to take cheques drawn on this bank on account of any debts due to them, or in any other way whatsoever, and had a right to refuse to do so. No reason was needed to justify such a refusal. Such a refusal could not be made without using words which, whether written or spoken without sufficient occasion to give rise to a privilege, would be actionable if the tendency of those words would be to cast a doubt on the credit of the bank. I think however, that there are so many reasons why a person may refuse to take on account the cheques drawn on a particular bank, that…the Court could not say that the letter, which in terms goes no further than merely to state the fact, was libellous, as tending to impute a doubt of the credit of the bank. No doubt some people might guess that the refusal was on that ground, but…it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to that document. I do not think it libellous by itself to state the fact. But I quite agree that such a statement might be published in such a way, and to such persons, as to [shew] that its natural tendency would be to convey an impression that the person refusing to take the cheques on that bank did doubt its credit, and then it would be libellous."

[29] **Cassidy v Daily Mirror Newspapers Ltd** [1929] 2 KB 331 is among the best known of the older innuendo cases. In that case, a newspaper innocently published a photograph of a man and a woman, who were together at a race meeting, over a caption which identified the woman, as the man's fiancée. As it turned out, the man was already married to the plaintiff. The plaintiff successfully sued the newspaper for libel, alleging an innuendo that the publication conveyed to those who knew her as the man's wife the defamatory imputation that the plaintiff was an immoral woman who

had in fact been living with the man without being married to him. At the trial she called evidence from persons who had held her in respect and treated her as a friend, but who, on seeing the publication, thought that she had been deceiving them, masquerading as the man's wife while cohabiting with him as his mistress.

[30] Another example is **Tolley v JS Fry & Sons Ltd** [1931] AC 333, in which the plaintiff was a well-known amateur golfer. The defendants, who were manufacturers of chocolate in various forms, caused to be published in two popular newspapers a caricature of the plaintiff, in golfing costume, with a packet of the defendants' chocolate protruding from his pocket, in what clearly appeared to be an advertisement for the defendants' products. In the plaintiff's subsequent action for libel, he made no complaint that the caricature or the words which accompanied it were libellous, but complained that they gave rise to an inference that he had consented to the use of his portrait, either gratuitously or for a consideration. He also alleged an innuendo, to the effect that the defendants meant, and were understood to mean, that, for the purpose of gain and reward, he had permitted his portrait to be exhibited in the advertisement of the defendants' chocolate and had thereby prostituted his reputation and status as an amateur golf-player for advertising purposes. He supported this innuendo by the evidence of persons also well-known in golfing circles, who testified to the loss of reputation that would ensue if an amateur golfer lent himself to the advertisement of the goods of others. It was held by the House of Lords that the trial judge was right to have left the case to the jury on this evidence, Viscount Dunedin remarking (at page

343) that "the inference in the circumstances is not so extravagant as to compel a judge to say it was so beside the mark that no jury ought to be allowed to consider it".

[31] Before leaving the case law, I should mention for completeness a trio of 'announcement' cases (to add to **Capital and Counties Bank Ltd v George Henty & Sons Ltd**, which is probably the best known of the genre). In **Nevill v Fine Art and General Insurance Co** [1895-99] All ER Rep 164, the appellant, Lord William Nevill, brought an action against the respondents to recover damages for an alleged libel. The respondents, who carried on an insurance business in the city of London, had at one time engaged the appellant as their West End agent. The agency having been terminated, they wrote and published and sent to their customers a circular in which they stated that, "The agency of Lord William Nevill, at 27, Charles Street, St James's Square, has been closed by the directors." The appellant alleged that this statement was untrue, the engagement having been terminated at his instance, and that the statement was calculated to injure him in his business as an insurance agent.

[32] It was held by the House of Lords that, in their natural and ordinary meaning, the words of which the appellant complained were not libellous. Lord Halsbury LC said (at page 166), "I am unable now to know what is the sense in which any ordinary reasonable man would understand the words of this communication to be words exposing the appellant to hatred, or contempt, or ridicule." Lord Macnaghten added (at page 168) that "[w]hen people [in] business desire to sever their connection it is very easy to suggest that the fault lies on the one side or the other, but I do not think that

any reasonable person reading this letter fairly would come to the conclusion that the directors had closed the agency for any reason discreditable to Lord William Nevill". And Lord Shand pointed out (at page 169) that "[i]n the statement of claim there was no averment of extrinsic facts known to those receiving the circular, which would show that the language was fitted to convey to them any secondary meaning injurious to the appellant, and no evidence of such facts, no evidence of circumstances calculated to give the words used a more extended sense than their natural meaning, was presented at the trial".

[33] **Nevill v Fine Art and General Insurance Co** was distinguished by the Court of Appeal in **Morris and Another v Sandess Universal Products** [1954] 1 All ER 47. In that case, the defendants, who were distributors and retailers of office supplies, employed each of the plaintiffs as a sales manager, earning a weekly salary and a commission. The plaintiffs alleged that, each of them having agreed orally with the defendants to determine their employments, by the plaintiffs tendering their resignations and the defendants accepting the same, the defendants wrote a circular letter addressed to their customers informing them in respect of each plaintiff that "…we have dismissed [the plaintiff] from our employ, he having been our representative in your area, and… he has now no connection whatsoever with our company". The plaintiffs contended that, by the said words, the defendants meant and were understood to mean that they had dismissed the plaintiffs from their employment against their will, and that they had been guilty of some conduct entitling the defendants to terminate their employment without notice or salary in lieu, or that the

circumstances of the termination of the plaintiffs' employment were such as to be discreditable to them.

[34] The issue of whether the words complained of were capable of bearing the defamatory meaning alleged by the plaintiffs was tried as a preliminary point of law. Lord Goddard CJ having decided at first instance that the words "dismissed from our employ" in a letter of this kind were capable of a defamatory meaning, the defendants appealed. The appeal was dismissed. Delivering the leading judgment in the Court of Appeal, Jenkins LJ said this (at page 51):

> "Counsel for the defendants has suggested to us a variety of meanings for the word 'dismissed', and he says that it does not, by any means, necessarily have a derogatory connotation. But, in my view, the function of the judge on such a matter is to endeavour to decide what meaning the language used could reasonably be held to convey to the persons to whom the communication was addressed. Looking at this letter from that point of view, notwithstanding the various inoffensive meanings which the words: 'We have dismissed [the first, or second, plaintiff]', might be said to be capable of bearing, I find myself unable to hold that the words complained of are not capable of a defamatory meaning, or that it is not possible that a reasonable jury might hold them to be defamatory. With the question whether or not they are defamatory, this court at this stage has nothing whatever to do. That will be a question for the jury when the case comes to be tried."

[35] In a brief concurrence, Morris LJ added this (at page 52):

> "It seems to me that, in deciding at this stage whether or not the words are capable of a defamatory meaning and whether or not the action should go forward for trial, we are entitled to have regard to facts and events which are of

> general and ordinary knowledge and to the general and ordinary understanding of words which are in common use. I agree with Jenkins LJ that the test is whether or not a jury could reasonably come to the conclusion that the words are defamatory. I have no doubt, speaking for myself, that the words are capable of a defamatory meaning, and the result is that the case goes forward for determination whether the words bear the alleged, or any, defamatory meaning."

[36] Lastly in this group of cases is a case which had been distinguished by the court in **Morris and Another v Sandess Universal Products**. This was **Beswick v Smith** (1907) 24 TLR 169, in which the plaintiff's former employers circulated a letter advising that, "H Beswick is no longer in our employ. Please give him no order or pay him any money on our account." The Court of Appeal held that, taken in their natural meaning, these words would not convey to the mind of a person of ordinary intelligence the impression that an imputation of anything criminal was being made against the plaintiff.

Some conclusions on the law

[37] It seems to me that, from this brief and necessarily selective review, it is possible to advance at least the following propositions:

(1) On an application for a determination on meaning under rule 69.4 of the CPR, the court's immediate concern is whether the words complained of are capable of bearing the meaning attributed to them by the claimant; however, for this purpose, the test to be

applied by the court is no different from that applied in deciding whether words are capable of having any libellous meaning.

(2) In considering a publication that is alleged to be libellous, the court should give the words complained of the natural and ordinary meaning which they would have conveyed to the ordinary, reasonable and fair-minded reader; that is, a person who is not naïve, unduly suspicious or avid for scandal.

(3) Applying this criterion, the judge must determine the single meaning which the publication might be apt to convey to the notional reasonable reader and to base his consideration on the assumption that this was the one sense in which all readers would have understood it.

(4) Either in addition, or as an alternative, to the natural and ordinary meaning of the words complained of, the claimant may rely on extrinsic facts, which must be pleaded, to show that the words convey a meaning defamatory of her which, without such evidence, they would not bear in their natural and ordinary meaning.

(5) While the Court of Appeal will always be very reluctant to reverse an interlocutory finding of a judge at first instance that the words complained of are capable of bearing the meaning or

> meanings alleged by the claimant in the statement of case, where the judge has held that the words are not capable of bearing that meaning or those meanings, with the result that the issue will never go to trial, the court's reluctance to interfere will be less marked.

Applying the principles

[38] Before turning to the facts of this case, I should perhaps say a word about the role of the judge on an application under rule 69.4. The rule has its origin in the former RSC Ord 82, r 3A, which was introduced in England in 1995. As Hirst LJ explained in **Mapp v News Group Newspapers Ltd** [1995] QB 520, 524, prior to the introduction of that rule, rulings as to the meaning of the words complained of in a libel action were traditionally sought and given at the trial itself, unless tried as a preliminary issue. Any earlier interlocutory proceedings were confined to a summons to strike out under RSC Ord 18, r 19, which applied "in plain and obvious cases". After referring to **Lewis and Another v Daily Telegraph Ltd** and other authorities which established the principle that in actions for libel the question is what the words would convey to the ordinary man, Hirst LJ explained the purpose of the rule in this way (at page 526):

> "In my judgment, the proper role for the judge, when adjudicating a question under Ord. 82, r. 3A, is to evaluate the words complained of and to delimit the range of meanings of which the words are reasonably capable, exercising his own judgment in the light of the principles laid down in the above authorities and without any Ord. 18, r. 19 overtones. If he decides that any pleaded meaning falls

> outside the permissible range, it is his duty to rule accordingly. It will, as is common ground, still be open to the plaintiff at the trial to rely on any lesser defamatory meanings within the permissible range but not on any meanings outside it. The whole purpose of the new rule is to enable the court in appropriate cases to fix in advance the ground rules on permissible meanings which are of such cardinal importance in defamation actions, not only for the purpose of assessing the degree of injury to the plaintiff's reputation, but also for the purpose of evaluating any defences raised, in particular, justification or fair comment. This applies with particular force in a case like the present where there is a defence of justification of a lesser meaning than that pleaded in the statement of claim."

[39] In considering the application that was before him, D McIntosh J was therefore required to direct his mind to whether the notice advising the public that the appellant "*is no longer employed to* ***Future Services International Ltd*** *and is therefore not authorized to conduct any business on our behalf"* was capable of bearing, either in its natural and ordinary meaning or by way of the pleaded innuendo, the meaning attributed to it by her in the particulars of claim. (The pleaded defamatory meaning, it will be recalled, was that "the Claimant's termination of employment was such as to warrant notification to the public at large and that the Claimant was at the time (post resignation) engaging in conduct which was detrimental to the company and which warranted the public at large being warned".)

[40] I should say at once that it is not easy to discern if this is the approach that D McIntosh J took to the matter. On the one hand, there is the learned judge's - obviously incorrect- assertion (at para. [7]), that the rules "were promulgated to jettison spurious claims for defamation where the words complained of consist of statements of fact

which were true in substance and in fact". But on the other hand, and much closer to the point, there is the judge's clear finding (at para. [8]) that "the words complained of are not capable of being defamatory", by which I take him to mean that they are not capable of bearing the meaning attributed to them by the appellant's statement of case. This is in fact the finding which the application invited and one which it was open to the judge to make. Accordingly, despite the judge having further confounded things somewhat by adding that the words "are true in substance and in fact", I propose to approach the matter on the footing that the judge gave consideration to the respondents' application for a ruling on the meaning of the words complained of in accordance with rule 69.4.

[41] So the question is: was the judge correct in his conclusion that the words complained of are incapable of bearing the meaning attributed to them by the appellant? Although I must also say that the appellant's pleading is hardly a model of clarity in this regard, I think the burden of her complaint can fairly be taken to be that the notice published by the respondents carries the implication that the termination of her employment (by the 1st respondent) resulted from misconduct of some kind on her part and that, after her resignation, "she was engaging in conduct which was detrimental to the company and which warranted the public being warned".

[42] In my view, the ordinary, reasonable and fair-minded reader of this notice would take it to mean no more than it said, *viz*, that the appellant was no longer employed to the 1st respondent and that she was as a result not authorised to conduct any business on its behalf. Such a reader would appreciate, I think, that persons leave the

employment of other persons for a variety of reasons, including, as in this case, resignation of their own volition, or other reasons not necessarily reflecting on their honesty or competence. It seems to me that it would take a reader who is either unduly suspicious or especially astute to discover scandal at every turn, to, assuming the worst, attribute to the notice in this case the meanings that (a) the appellant's employment was terminated for misconduct by the 1st respondent and (b) after the termination, the appellant was engaging in conduct detrimental to the 1st respondent, making it necessary to warn the public.

[43] As has been seen, the same conclusion was arrived at by the courts in respect of the notices published by the defendants in: **Capital and Counties Bank Ltd v George Henty & Sons Ltd** (advising "that they will not receive in payment cheques drawn on any of the branches of [the bank]"); **Nevill v Fine Art and General Insurance Co** ("The agency of Lord William Nevill…has been closed by the directors"); and **Beswick v Smith** ("H Beswick is no longer in our employ. Please give him no order or pay him any money on our account."). In all three cases, as in this case, the statements complained of were factually accurate, and did not carry within them any potentially negative connotation, unlike in **Morris and Another v Sandess Universal Products**, where the use of the words "dismissed from our employ" were plainly capable of conveying to the ordinary reader that the termination of the plaintiffs' employment was involuntary and in circumstances that were discreditable to them. So in that case it was a matter for the jury to determine whether the words were in fact defamatory of the plaintiffs.

[44] In my view therefore, the learned judge was correct in his conclusion that the words complained of in this case are not capable of bearing the defamatory meanings attributed to them by the appellant in the particulars of claim. This brings me then to the appellant's reliance on an innuendo. As has been seen, the appellant pleaded that, further or in the alternative to their natural and ordinary meaning, the words complained of bore or were understood to bear the same meaning by way of an innuendo. In the particulars in support of the innuendo, the appellant stated that, "It is commonly known by right thinking Jamaicans that such publications is [sic] warranted in circumstances where ex-employees are dishonest, thieves, fraudsters and are purporting the [sic] act for their ex-employers for the benefit of the ex-employees."

[45] Mr Jones complained, I think justifiably, that the learned judge failed to consider whether the words complained of were capable of bearing the pleaded defamatory meaning by way of the innuendo. In fact, the judge made no mention of the innuendo at all in his judgment, although, as the authorities establish, an innuendo, when pleaded and proved, gives rise to a separate cause of action. In my view, the proper determination of the application under rule 69.4 required that the judge give separate consideration to the words complained of, in both their natural and ordinary meaning and in their alleged extended meaning by way of the pleaded innuendo.

[46] But that having been said, it is still necessary to consider whether the pleaded innuendo in this case could possibly have taken the matter any further. As I have attempted to demonstrate, the establishment of the true innuendo is completely dependent on the proof of extrinsic facts. In **Cassidy** (para. [29] above), the extrinsic

fact proved was that the man whose engagement was reported by the defendant was already married to the plaintiff. The plaintiff accordingly succeeded in her claim for libel on the basis of the defamatory imputation that she was an immoral woman who had been living in sin with the man. In **Tolley** (para. [30] above), the extrinsic facts relied on by the plaintiff were established by the uncontradicted evidence of an eminent amateur golfer as well as the secretary of two well-known golf clubs that, as an amateur golfer, the plaintiff would be regarded as having prostituted his amateur status by agreeing to the use of his image in an advertisement for commercial purposes.

[47] By contrast, in the instant case, it appears to me that the extrinsic 'fact' pleaded by the appellant, that is, the "commonly known" views of "right thinking Jamaicans", is not so much a reference to a fact, capable of proof, as it is to an attitude of mind or a way of thinking. As such, I would expect this attitude or way of thinking, given its supposed prevalence, to find its reflection in the view of the ordinary, reasonable and fair-minded (Jamaican) person, by whose judgment the natural and ordinary meaning of the words complained of is to be assessed. In other words, it seems to me, the pleaded innuendo adds nothing to the case: it is, in essence, a reference to an alleged defamatory meaning of the words complained of that arises by inference or implication from the words themselves, rather than from any extrinsic fact or facts. Thus, in the language of the law of libel, it is in reality no more than a 'false' or 'popular', rather than a true, innuendo.

[48] I therefore do not think that the appellant fulfilled the requirements of rule 69.2(b), in that no or no sufficient particulars were provided of the facts and matters

relied on in support of her claim that "the words or matters complained of were used in a defamatory sense other than their ordinary meaning". Accordingly, there was nothing before the judge, in my view, to support any extended meaning beyond the natural or ordinary meaning of the words complained of.

Disposal of the appeal

[49] I would therefore dismiss the appeal, with costs to the respondents to be agreed or taxed.

PHILLIPS JA

[50] I agree with the reasoning and conclusions of my learned brother, Morrison JA, and have nothing to add.

BROOKS JA

[51] I have read, with admiration, a draft of the judgment of Morrison JA. His assessment of the relevant authorities and his characteristically clear application of the principles to be derived from them, completely dispose of this appeal. There is nothing that I can usefully add.

MORRISON JA

ORDER

Appeal dismissed. Costs to the respondents to be agreed or taxed.