[2016] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 36/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**THE JAMAICA OBSERVER LTD**	**APPELLANT**
AND	**DENNIS P CHONG**	**RESPONDENT**

Charles Piper instructed by Wayne Piper of Charles E Piper & Associates for the appellant

Respondent not appearing and unrepresented

9 July 2013 and 24 June 2016

PANTON P

[1] I am of the opinion that this appeal ought to be allowed. In my view, consideration of the evidence presented as well as some of the findings of the learned judge result in a conclusion that the judgment cannot be sustained.

[2] On 26 February 2008, Mangatal J adjudged that the appellant had libelled the respondent. Consequently, she entered judgment for $1,700,000.00 and costs in favour of the respondent.

Summary of the pleadings

[3] It is agreed by the parties that the appellant is a company that prints and publishes the Jamaica Daily Observer newspaper which has a large circulation in Jamaica. It is also agreed that on 1 November 1995, the appellant published the following article in the said newspaper:

> "Gov't official suspended for buying bad asphalt
>
> By Rohan Powell
>
> Observer staff writer
>
> DENNIS CHONG, [sic] A senior official in the local government ministry, has been suspended from his job for his part in the unauthorized importation of $3-million worth of unsuitable asphalt from Trinidad and Tobago.
>
> The asphalt was to have been used by the construction firm Surrey Paving and Aggregate for road repair on behalf of the government, but when it arrived it was found that it could not be used.
>
> Government sources say that Chung, a director in the ministry's projects department, overstepped his bounds in 'trying to get something (asphalt) cheaper and at a more competitive price.'
>
> Tests showed that the asphalt settled too easily making it inappropriate for the road repair programme. The problem was compounded by the fact that local facilities are ill-equipped to process asphalt with the characteristic of the one imported from Trinidad and Tobago."

[4] The respondent claimed that these words meant that:

a) he had acted "ultra vires his job", in an incompetent manner;

b) he "had engaged in improper, unprofessional and/or negligent conduct"; and

c) he had been suspended from his job at the Ministry of Local Government and Works.

He claimed that, as a result, he had been injured in "his character, credit and reputation" and had been "brought into public scandal, odium, and contempt, particularly in his office and position as Director of Planning and major projects in the Ministry of Local Government and Works…"

[5] The respondent also alleged that as a result of the publication of the article, his employers commenced an investigation against him and this was followed by the preferring of disciplinary charges of which he was subsequently acquitted. While the charges were pending, he was interdicted from duty, but was reinstated upon his acquittal. His suspension, he said, caused him "great embarrassment, mental distress, stress and financial hardship", and his chances of promotion to the post of Permanent Secretary were ruined. Indeed, a new Permanent Secretary was appointed during the period of his suspension. His "next logical and expected promotion" would have been to the post of Permanent Secretary, he said. Another result of the article, according to the respondent, was the loss of a contract for design and construction of an office complex at 9 Cargill Avenue, Kingston 10.

[6] The learned judge, quite rightly, in my view, found no causal connection between the publication of the article and the laying of the charges, the suspension from duty, the loss of promotion to the post of Permanent Secretary, or the loss of the contract for the design and construction at Cargill Avenue. Indeed, the respondent had

no choice but to concede that the laying of the charges and the subsequent suspension had been recommended several days before the article was published. Furthermore, he had not received permission to engage in the design and construction of the office complex referred to.

[7] In its defence, the appellant stated that the words in the article were "incapable of conveying or supporting any libellous meaning". Instead, according to the appellant, the article was "an honest report published without malice on an occasion of public privilege". It was "a fair comment upon a matter of public interest". The appellant's position was that, "if anything, the article went out of its way to comment favourably of the (respondent)". Rather than being condemnatory of the respondent, the article "if anything…reflected negatively upon the Ministry and the government sources" as they "were depicted as being unconcerned with the commendable and practical motives of the (respondent) as expressed by them but to be focusing on some procedural issue unrelated to the motive, his competence, his integrity, his honesty or public spirited concern".

[8] In his reply, the respondent said that the words in the article were not comment, but instead were assertions of facts that were untrue and had been maliciously printed.

The relevant evidence

[9] In his witness statement, the respondent asserted that the publication of the article on the front page of the newspaper was for the purpose of increasing the sale of the newspaper, rather than to advise the public on a matter of public interest.

[10] The respondent is a highly qualified civil and structural engineer. He holds a Bachelor of Science Honours degree in civil engineering from the University of the West Indies, a Master of Science degree in construction engineering and management, a research fellowship diploma in earthquake engineering (Institute of Earthquake Engineering in Skopjie, Macedonia, Yugoslavia), and a diploma in executive management from the University of the West Indies. He is also a graduate of the Institute of Constructional Engineers, London. At the time of the publication of the article, he was employed to the Ministry of Local Government and Works (the Ministry) as Director of Major Projects and Planning. As such, he was responsible for:

- directing research;
- the development and maintenance of socio-economic data bases;
- providing advice and assistance to the Ministry of Construction as it executes its role which includes the maintenance of roads;
- providing advice on planning; and
- the planning, preparing and monitoring of the Ministry's capital budget programmes.

[11] In 1995, there was a World Bank project in Jamaica for the resurfacing of roads. On 24 July 1995, the respondent wrote to the managing director of Lake Asphalt of Trinidad & Tobago Ltd referring to an earlier indication by the Ministry of its willingness "to conduct some roadway test sections constructed of asphaltic concrete mixed with 60/70 grade Lake Asphalt Bitumen". The letter identified the roadway that would be

involved, and stated that a contract had been awarded to Surrey Paving and Aggregate Company Limited to carry out the work. The letter continued:

> "We would however like to have 60/70 Lake Asphalt Bitumen here in Jamaica to undertake these test sections by August 11 – 15th latest. The quantity required would be 217,000 U.S. gallons or approximately 790 tons. … Therefore, we request that the supply of 217,000 U.S. gallons or 790 tons of Lake Asphalt be provided at a processed cost of Jamaican $30.00/U.S. gallons or 88 cents U.S./gallon C.I.F. to the Contractor."

The letter concluded that the details or mechanisms of payment and delivery for processing were to be "worked out later or in dialogue by telephone and confirmed by an Agreement". A favourable response was being sought, the letter stated, "as the future use of Lake Asphalt" in Jamaica and other Caribbean countries "will have great prospects and advantages arising from this test roadway section".

[12] Lake Asphalt replied to the respondent on 27 July 1995, and referred to "subsequent telephone conversations" that had taken place on the matter, and agreed the price and quantity suggested in the letter of 24 July. According to the letter signed by the marketing manager, Lake Asphalt looked forward to a long and fruitful relationship between itself and the Ministry. A payment schedule was subsequently agreed, and this was confirmed in an exchange of letters – one dated 3 August 1995, signed by the respondent, and the other dated 10 August 1995, signed by Lake Asphalt's marketing manager. The respondent said that he signed the former letter in his personal capacity on behalf of Surrey Paving as its representative was overseas.

[13] On 8 August 1995, according to the respondent, "it was revealed" by Professor Raymond Charles of the University of the West Indies, St Augustine Campus, Trinidad, that the asphalt to be imported from Lake Asphalt would require a further processing step which would require modification of Surrey Paving's plant. The additional cost for this process would however be incorporated in the unit cost that had already been agreed (see paragraphs 25 and 26 of the respondent's witness statement).

[14] The agreed documents for the hearing indicate a dramatic turn of events on 11 August 1995. On that date, the Permanent Secretary in the Ministry wrote to the managing director of Lake Asphalt advising that the letter signed by the respondent on 24 July 1995 was premature. It stated that only the Chief Technical Director had the power to authorize Surrey Paving to use the material, if they wished, and that it would then be their responsibility to acquire the material. The Permanent Secretary requested that the respondent's letter be disregarded. Lake Asphalt replied pointing out that they were under the impression that the respondent had been acting within the scope of his authority, and so had incurred significant upfront costs to satisfy the order. There followed a meeting on 16 and 17 August 1995 between representatives of Lake Asphalt and senior officers of the Ministry. The respondent was not present at this meeting. The purpose of the meeting was to discuss the Ministry's decision "to terminate the contract and the agreement on the attendant costs in so doing". On 18 August 1995, a further meeting was held between those individuals who were at the meeting held on the previous two days, and representatives of not only Surrey Paving but also of General Paving Co Ltd and Asphaltic Concrete Enterprises Ltd.

[15] On 5 September 1995, the Chief Technical Director submitted a report of the meetings to the Permanent Secretary, and added the following comments:

a) the necessary tests of the asphalt had not been completed;

b) if the decision to import the material had been properly taken, the volume would have been much less than that ordered;

c) he was convinced that there was a deliberate attempt to import the material "regardless";

d) based on discussions between the Ministry and the asphalt contractors, "it may be concluded that attempts to convert their plants would only be achieved with great difficulty and a certain degree of coercion"; and

e) the respondent's action has resulted in the Ministry being "saddled with some 1,400 drums of blended bitumen, a bill in excess of $3M for its purchase and importation and the logistics for its storage and use".

In respect of (d) above, it should be pointed out that by letter dated 18 October 1995, Surrey Paving reconfirmed that they had no objection to the modification of their plant "for the purpose of using Trinidad Lake Asphalt in [their] system".

[16] In his memorandum to the Permanent Secretary, the Chief Technical Director added that all was not lost as with proper planning, the material could still be used in the road maintenance programme islandwide. He recommended that a meeting be held with the respondent to discuss the report and any further action that may be necessary.

[17] On 11 September 1995, the respondent and the Chief Technical Officer met. The respondent informed the Chief Technical Officer that he "only acted as a medium for negotiation in having the material used as a test road section under the Contractor's Contract expeditiously out of a technical and national interest". The intent, he said, was "not to have the Ministry of Local Government and Works involved but rather the Contractor and his supplier".

[18] On 27 September 1995, the respondent addressed a memorandum to the Permanent Secretary in respect of the report that had been submitted by the Chief Technical Director. In this memorandum, the respondent said that an agreeable payment schedule having been arrived at between Surrey Paving and Lake Asphalt, he had signed on behalf of Surrey Paving, the consignee.

[19] On 19 October 1995, the Director of Personnel in the Ministry wrote to the respondent advising him that departmental leave, followed by vacation leave had been approved for him as follows: departmental from the previous day (18 October 1995) to 6 November 1995, and vacation leave from 9 November 1995 to 23 March 1996, to resume on 26 March 1996. The very next day (20 October 1995), the Permanent Secretary wrote to the Chief Personnel Officer at the Offices of the Services Commission recommending disciplinary action against the respondent for exceeding his authority by ordering material on behalf of the Ministry, and advising that the respondent had proceeded on leave with effect from 18 October 1995.

[20] As foreshadowed, disciplinary charges were laid against the respondent and he was interdicted from 25 March 1996. According to the Permanent Secretary's letter, the respondent would have resumed on 25 March, a day earlier than that stated in the Director of Personnel's memorandum. A disciplinary committee was established to hear and determine the charges against the respondent. At the end of the hearing, it found that there had been a grave and serious degree of misjudgment in the handling of the whole affair, but the respondent was not to be blamed. Accordingly, the charges were dismissed.

Summary of the judge's findings

[21] The learned judge found that the ordinary reader of the Observer would have understood the article to mean that the respondent had been suspended because the Ministry was dissatisfied with the role he had played in the unauthorized importation. The imputation from the meaning of the words in the article was defamatory, in the learned judge's view, "because it would tend to lower [the respondent] in the estimation of right-thinking members of [the] society generally". She added that the words in respect of the respondent's efforts to get a cheaper price for the asphalt, "water[ed] down any potential imputation of misconduct or disreputable, dishonest or irregular conduct, to an imputation of incompetency, or even lack of judgment, ... or lack of efficiency in the conduct of his professional activity".

[22] Mangatal J also commented that "the meaning of the offending words [in the instant case] are not completely dissimilar from the offending meaning arrived at by implication in **Bonnick v Morris and the Gleaner** [2002] UKPC 31]". Weighing the

article as a whole, she concluded that the defamatory imputation in this case was not of the highest order of gravity.

[23] As regards the defence of fair comment, the learned judge held that the statements in the article were statements of fact and so fair or honest comment would not be sustainable. In relation to the matter of qualified privilege, she found as follows:

a) the subject matter of the article was a matter of public concern;
b) the inclusion of the respondent's name and the suspension was necessary;
c) the allegation, though serious, did not fall on the higher end of the scale;
d) the writer of the article honestly believed that the respondent had been suspended;
e) the writer of the article had been told that the respondent had been sent on leave;
f) in the factual context of the case, there is no material difference between being suspended and being sent on leave;
g) responsible journalism would have demanded that further enquiries be made, especially of the respondent, about the suspension;
h) the Observer failed to take sufficient care to verify or check the reliability of the information it received; and
i) the failure to publish the respondent's side of the story was a serious flaw.

[24] The learned judge concluded the question of liability with these words:

> "Overall when I look at the article and the circumstances of publication, I find that the public interest in the material is clearly satisfied and the inclusion of the defamatory statement is justifiable. However, the Defendant did not behave fairly and responsibly in gathering and publishing the information. In all the circumstances this publication did not contain allegations which the public had a right to know, and was not a publication protected by qualified privilege."

The grounds of appeal

[25] The Observer filed six grounds of appeal, one of which was in relation to the quantum of damages. If I were of the view that the respondent's claim was justified, I would certainly have held that the amount awarded could not by any stretch of the imagination be regarded as inordinately high. The yardstick by which damages are measured on appeal is whether they are inordinately high or inordinately low. The decline in the value of the Jamaican dollar is now legendary as it is a historical fact that the Jamaican dollar has been consistently falling since the 1970's. This has been so, notwithstanding the offerings and theories of many economists. So, in my view, an award of $1,700,000.00 for libel is low, if not very low.

[26] The other grounds of appeal are as follows:

> "i. The learned trial Judge misdirected herself having regard to the evidence and her conclusions by:-
>
> a) Finding by clear implication that although allegations are true, publication of such allegations are actionable so as to form the basis of a Claim for defamation.

b) Concluding, despite the public interest in the publication being clearly satisfied and the defamation justifiable, that there be Judgment for the Claimant.

ii. The Learned trial Judge erred in law in finding for the Claimant on the basis that, although the matter of public interest was clearly satisfied and the defamation justifiable, the fact that the publication was made in what the Judge stated to be an unfair manner, made the Defendant liable, notwithstanding the truthfulness and accuracy of the publication.

iii. The Learned trial Judge misdirected herself in concluding that there was no burden of proof on the Claimant to establish malice to defeat the defence of Qualified Privilege or Fair Comment and that there was a burden on the Defendant to prove that the conditions under which the material is privileged is satisfied, despite her conclusion that the public interest in the material was clearly satisfied and the defamation justifiable.

iv. The Learned Trial Judge misdirected herself and erred in her finding that the defence of Fair Comment failed because the publication was not one of comment, but one of fact, thereby disregarding the principle and fact that the comments have to be made in respect of facts and the relevant facts were established to be well-founded. Additionally, the comments were favourable to, and supportive of the Claimant, were generous having regard to the facts, were not defamatory and were not held by the Court to be defamatory.

v. The Judgment of the Learned Trial Judge is generally unreasonable, unrelated to the clear facts of the case, and is inherently inconsistent, contradictory and unsustainable in law."

Summary of the submissions

[27] Mr Charles Piper, for the Observer, submitted that as far as the meaning of the words is concerned, the learned judge ought to have found that this was not a case of an actionable defamation. He said that "the judge ought to have addressed her mind to the question as to whether taken as a whole the article was libelous to the respondent". If she had done so, he submitted, "and had regard to her own findings she would have determined that this was not an actionable defamation". In any event, he submitted, if the learned judge had properly considered the law, she would have concluded that the defence of fair or honest comment had been made out.

[28] Mr Piper criticized the judge's condemnation of the Observer for not publishing the respondent's side of the story, and for her categorization of the publication as irresponsible. He said that the judge speculated as to what the respondent might have said had he been contacted, but nowhere in his evidence, said Mr Piper, did the respondent say what he would have said had he been asked. Given the other findings of fact, it was contradictory, Mr Piper said, for the learned judge to have found that the Observer had been irresponsible.

Reasoning and decision

[29] As I understand the nature of the tort of libel, it is committed if what is printed and published:

a) tends to lower the offended party in the view of right-thinking members of the society, and causes them to shun him; and

b) exposes him to hatred, contempt or ridicule.

In view of my understanding of the law, and taking into consideration the article as a whole, I do not find it possible to agree with the learned judge that the material published was libellous.

[30] It seems to me that right-thinking members of the society would have drawn the following conclusions from the article:

a) the Government had established a programme to repair roads;
b) the respondent played a role in the arrangements for the importation of asphalt from Trinidad and Tobago for the purpose of the road programme;
c) the respondent did not have full authority to play the role he played and, as a result, was suspended from duty;
d) the asphalt was not of the right type; and
e) the local processing facilities were not equipped to treat with the imported asphalt.

Right-thinking members of the society would also have thought that the respondent was quite eager to execute the programme. Right-thinking members of the society would also have thought that the writer of the article had received credible information from sources within the Ministry.

[31] It is noted that the Observer did not plead truth as a defence. However, that does not mean that one can ignore the facts as they existed on the date of the

publication of the article. It is not disputed that the following was the situation at the time of publication:

a) On 24 July 1995, the respondent wrote to Lake Asphalt of Trinidad & Tobago Ltd requesting the supply of 217,000 US gallons or 790 tons of lake asphalt bitumen.

b) An agreement was arrived at and a payment schedule determined.

c) On 3 August 1995, the respondent signed a letter headed with the address of Surrey Paving, and addressed to Lake Asphalt of Trinidad and Tobago setting out the payment schedule;

d) On 8 August 1995, it was learnt that the asphalt would require further processing and the contractor's plant would have to be modified.

e) On 11 August 1995, the Permanent Secretary in the Ministry repudiated the letter that had been written by the respondent on 24 July 1995.

f) On 5 September 1995, the Chief Technical Director in the Ministry wrote to the Permanent Secretary stating that the respondent had caused the Ministry to be saddled with a bill in excess of $3,000,000.00.

g) On 18 October 1995, the respondent went on departmental leave to be followed by an extended period of vacation leave.

h) On 20 October 1995, the Permanent Secretary wrote to the Chief Personnel Officer recommending disciplinary action against the respondent for exceeding his authority by ordering material on behalf of the Ministry. The

memorandum from the Permanent Secretary to the Chief Personnel Officer advised that the respondent had proceeded on leave and

i) The respondent was aware of the recommendation made by the Permanent Secretary.

That was the state of affairs on the date of the publication of the article.

[32] In my opinion, given the facts known on 1 November 1995, the article is a fair and honest comment. During the trial, much was made of the use of the word "suspension" in the article. That to my mind is really a red herring. There can be little doubt that the respondent was indeed sent on leave. Mr Paget deFreitas has described the departmental leave as an "archaic construct". And so it may well be. It is very curious that the respondent would have proceeded on departmental leave for a few days before going on vacation leave which was slated to last for several months. It is no coincidence that no sooner than the respondent had proceeded on leave, the Permanent Secretary wrote to the Chief Personnel Officer advising that the respondent had gone on leave and that he was recommending the laying of charges against him. The clear inference from the facts is that the Permanent Secretary and the Ministry's Director of Personnel had conferred and determined that the respondent should go on leave. In the circumstances, it was reasonable and fair to conclude and state that the respondent had been suspended.

[33] In her reasons for judgment, the learned judge noted that "the tenor of the memorandum dated October 19, 1995 clearly suggests that Mr Chong [sic] was being

sent on leave". She stated: "In the factual context of this case there is in my view really no material difference between being suspended and being sent on leave". She closed her discussion of this aspect of the case by saying that it was "quite reasonable to conclude that what was conveyed to Mr Powell by his source was that Mr Chong had been suspended or sent on leave, and that Mr Powell honestly and reasonably believed that to be the case".

This, to my mind, ought to have brought an end to any thought of a libel having been committed by the Observer. However, Mangatal J went on to express concern that the Observer had not taken sufficient steps to verify the story; and, in her view, enquiries ought to have been made of the respondent in particular to obtain his version of the events. The respondent was, of course, on leave and the evidence indicates that he was outside the jurisdiction. The failure to get and publish the respondent's story resulted in the finding of irresponsibility on the part of the Observer. That finding was rather harsh, I think, in view of the opinion I hold that the story that was published was substantially accurate.

[34] It has been observed that the learned judge stressed the difference between a statement of fact and a comment. She noted that the Observer had not pleaded justification or truth, and had published statements of fact, instead of comment. In the instant case, in my opinion, there is a very thin line between the two. The situation is such that there is a need to consider section 8 of the Defamation Act which reads as follows:

> "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such facts alleged or referred to in the words complained of as are proved."

I think this case is ideal for the application of this section.

[35] Complaint was made by the respondent that he had not imported the asphalt. The letter of 24 July 1995 written by him nullifies that complaint. The subsequent telephone conversations and correspondence confirm that he was indeed an integral player in the importation process.

[36] In her conclusion on the question of liability, the learned judge said that the public interest in the material is clearly satisfied. However, later, she said that the article did not contain allegations that the public had a right to know. There seems to be a contradiction here: if there was public interest in the material, surely it would follow that they would have had a right to know the details that were published in the article.

[37] In view of the reasons I have advanced, I am of the opinion that the learned judge erred in finding that the Observer had libelled the respondent. I would allow the appeal, set aside the judgment of Mangatal J and award the costs of the appeal and the trial to the appellant, such costs to be taxed if not agreed.

[38] Finally, on behalf on the court, I must tender profuse apologies for the long, but unavoidable delay, in producing this judgment.

DUKHARAN JA

[39] I have read in draft the judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[40] I too have read the draft judgment of the learned President and agree with his reasoning and conclusion. There is nothing I wish to add.

PANTON P

ORDER

Appeal allowed. Judgment of Mangatal J set aside. Judgment entered for the appellant. Costs of the appeal and the trial to the appellant, to be taxed if not agreed.