

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

CV 174 of 2013

Between:

CHESTER L. SUE

Claimant

AND

WINSTON DEVONISH

First Defendant

BRIAN LINTON

Second Defendant

GARNET TECHNOLOGIES INC.

Third Defendant

Before:

The Hon. Madam Justice Elneth O. Kentish, Judge of the High Court

Appearances:

Mr. Alwyn Archer, QC Attorney-at-Law for the Claimant

Miss Mary E. Hunte, Attorney-at-Law for the First Defendant

Ms. Debra R. Gooding, Attorney-at-Law for the Second and Third Defendants

2013: May 23

2013: June 21

JUDGMENT

Nature of Application

- [1] **Kentish, J:** By applications all filed on March 28, 2013, each Defendant in this matter applied to the Court, pursuant to *Rule 69.10* of the *Supreme Court (Civil Procedure) Rules, 2008*, for a determination as to whether or not the words complained of by the Claimant in his statement of claim filed on February 7, 2013 in the substantive defamation action herein are capable as a matter of law of bearing the defamatory meanings attributed to them by the Claimant.

The Parties

- [2] The Claimant, Chester Sue, is an attorney-at-law who is duly qualified to practice law in Barbados and has been in practice for over 20 years.
- [3] The First Defendant, Winston Devonish, is employed by the Barbados Telecommunications Unit as a technical administrator. He possesses knowledge and experience in website design and hosting and also provides freelancing consulting work in that area.
- [4] The Second Defendant, Brian Linton, is a Director of the Third Defendant.
- [5] The Third Defendant, Garnet Technologies Incorporated, is a company duly incorporated under the provisions of the *Companies Act, Cap 308 of the Laws of Barbados*. The Third Defendant describes itself on its website as a “*professional IT company*” and is engaged in the provision of a variety of technological and computer services, including but not limited to the registration of domain names and the hosting and maintenance of internet websites.

Background

- [6] The Claimant and the First Defendant had a longstanding social and professional relationship. In or about the month of June, 2011, the Claimant entered into an agreement with the First Defendant under which the First Defendant agreed to construct a website for the Claimant by which the Claimant could make the public aware of the professional services which he offered in his capacity as an attorney-at-law.
- [7] Using information supplied to him by the Claimant, the First Defendant created a website for the Claimant's use on July 7, 2012. The Claimant's first and last names were selected to be the URL or web address for the created website, chestersue.com. The site was hosted by royaltyservers.com and became accessible to users of the internet sometime in July 2011.
- [8] The Claimant and the First Defendant agree that \$500.00 was paid by the Claimant to the First Defendant. The Claimant contends that this sum was paid as compensation for the time and energy expended by the First Defendant in the construction of his website. However, the First Defendant alleges that the money was used, with the knowledge and consent of the Claimant, to pay the Third Defendant for the hosting of the site and, indeed, the Third Defendant admitted that this sum was paid to it by the First Defendant for precisely that reason.
- [9] For undisclosed reasons the professional and social relationship between the Claimant and the First Defendant came to an end sometime in August 2012, as is evident from an e-mail sent by the First Defendant to the Claimant.
- [10] Subsequently in November 2012, the Second Defendant, acting on behalf of the Third Defendant, submitted an invoice to the Claimant by e-mail. This invoice detailed the fees that were to be paid by the Claimant to the Third Defendant for renewing the Claimant's domain name (chestersue.com) and hosting his site for an additional year.
- [11] The Claimant, it appears, did not settle the invoice. The Third Defendant suspended the website chestersue.com and on or about January 25, 2013 caused to be posted on the homepage of the said website what it described as a "*floating banner*" which displayed a

message directed to the Owner of the website. The message on the banner read as follows:

“Account suspended. If you are the website owner please contact our Accounts Payable Department at (246) 228-0918.”

[12] The telephone number at which queries were to be made belonged to the Third Defendant. The Third Defendant admitted that anyone visiting the website *chestersue.com* would see the message it displayed on the homepage of the site. The homepage of the website on which the message was affixed remained unchanged. This homepage displayed a photograph of the Claimant, as well as his name and business address.

[13] The Claimant responded to the placing of the banner by applying *ex parte* on February 1, 2013 for an interim injunction prohibiting the Defendants from displaying the floating banner or any other information on the site without his prior consent. His *ex parte* application was supported by an affidavit filed on the same date. At the hearing of the *ex parte* application on February 5, 2013, the Court granted the injunction sought.

[14] The Claimant then filed an action in defamation against the Defendants on February 7, 2013 in which he claimed, *inter alia*, damages for defamation. At paragraph 11 of his statement of claim, he contended that the floating banner placed on the website *chestersue.com* was defamatory of him because the words of the message displayed therein were:

“...calculated to disparage the Claimant in his profession as an attorney-at-law by imputing that:

- 1. The Claimant is indebted to the Second or Third Defendant.*
- 2. The Claimant is unable to pay his debts.*
- 3. The Claimant’s business is in financial difficulties.*
- 4. The website is suspended because of non payment to the Second or Third Defendant.”*

[15] To the claim filed by the Claimant, each Defendant filed a defence and counterclaim.

Issues

[16] The sole issue for determination by the Court on this Application is whether the words complained of in this matter are capable either of any of the meanings ascribed to them by the Claimant in his statement of claim or of any other meaning that is defamatory to him.

Submissions

[17] Ms. Debra Gooding, counsel for the Second and Third Defendant, quite helpfully set out the principles of law by which an application under **Rule 69.10** of the *Barbados Supreme Court Civil Procedure Rules, 2008* is to be determined. She directed the Court firstly to the Barbadian case of *Marina Hall-Edey and Charles Edey v. First Caribbean International Bank (Barbados) Ltd (unreported), High Court of Barbados Suit No. 24 of 2004, Decision of January 26, 2011, per Goodridge, J (as she then was)* and submitted that the test by which the Court ascertains whether the words complained of are capable of a defamatory meaning is that of the “*fair and natural meaning*” which would be given to the words in question by “*reasonable persons of ordinary intelligence in the circumstances in which the writing was published*”.

[18] Ms. Gooding also referred to *Mapp v. Newsgroup Newspapers Ltd [1998] QB 520* and observed that the role of a judge making an application under the Order 82 R. 3A of the old English Rules of the Supreme Court, which were similar but not identical to our **Rule 69.10**, was to evaluate the words complained of and to delimit the range of meanings of which the words were reasonably capable. She emphasized that the judge was required to exercise his/her own judgment and determine whether the words could convey to an ordinary man a meaning which was defamatory of the person instituting the action in defamation.

[19] She further submitted that the decision of the House of Lords in *Charleston and another v News Group Newspaper Ltd and another [1995] 2 All ER 312* is authority for the general principle that the whole of the statement or words complained of must be taken together and that these words ought not to be severed and examined in isolation.

- [20] Pointing to the decision of *Morgan v. Odhams Press Ltd.* [1971] 1 WLR 1239 at 1251-1252, which had been cited by the Court in *Mapp (supra)*, she also submitted that a judge was required to withdraw a case if the judge concluded that the words complained of were simply incapable of bearing a defamatory meaning.
- [21] Ms. Gooding argued that if the legal principles set out in the cases to which she had directed the Court were applied to the case currently before it, the only conclusion to which the Court could arrive was that the words complained of were incapable of bearing any of the meanings attributed to them by the Claimant and, further, even if the words were capable of bearing those meanings, the words in and of themselves were incapable of being defamatory.
- [22] Counsel argued that the term “*account suspended*” was a factual term and did not in itself contain a defamatory meaning. She also argued that the remaining words complained of (“*If you are the website owner, please contact our accounts payable department at (246)228-0918*”) did not sufficiently identify any specific person, but merely requested that the person who owned the website *chestersue.com* identify himself by making contact with the accounts payable department of the author of the statement. She argued that the word “*if*” was conditional and submitted that there was no offence in law known as conditional defamation.
- [23] Learned Counsel also submitted that the words “*accounts payable*” and, by extension, the words “*accounts payable department*”, represented what she described as a term of art. She argued that they were incapable of meaning anything other than accounts payable and contended, somewhat oddly, that they represented monies owed by the owner of the department in question to another person i.e. the website owner referred to in the statement. She therefore concluded that in their ordinary and natural meaning the words complained of were incapable of bearing any of the meanings attributed to them by the Claimant.
- [24] Learned Counsel for the First Defendant, Ms. Mary Hunte, adopted the submissions of Counsel for the Second and Third Defendant. She added, however, that the words complained of did not amount to a charge against the Claimant in his business and office.

She contended that the Claimant was seeking to rely on the narrow common law exception to the rule that slander was not actionable *per se*, as was set out in *Jones v Jones and another [1916] UKHL 2*. She submitted that he could not fall within this exception and that as he had provided no proof, the allegation should fail.

[25] Mr. Alwyn Archer, Q.C. Counsel for the Claimant, took no issue with the legal principles as set out by Counsel for the First Defendant. He agreed that the meaning of the words complained of was a matter of law. The meaning had to be determined by the judge who would have to consider what ordinary people accessing the site and reading the words would have thought. Like Counsel for the First Defendant, he submitted that the test was the conclusion at which an ordinary person reading those words would have arrived. Applying this test to the words at issue in the case, however, Counsel for the Claimant challenged the meaning arrived at by Counsel for the respective Defendants.

[26] He argued that the words had to be examined in their context and that when this was done it was clear that they identified the Claimant and were capable in meaning of being defamatory to him. He drew the Court's attention to **Exhibit "CL 5"** which was annexed to the Claimant's Affidavit filed on February 1, 2013. The Exhibit showed a screenshot of the homepage of the website, as it would have appeared when the words complained of were published on it. He pointed out that these words could have been seen and read by any person visiting the website *chestersue.com*, as they had been placed on the homepage of the said website. The homepage, he noted, was titled "*Chester L. Sue Law Chambers*" and contained a clear and prominently displayed photograph of the Claimant, as well as the Claimant's name and address.

[27] Mr. Archer submitted that "*payable*" was not a term of art, as Counsel for the First Defendant had contended, but meant money due or payable and referred to an outstanding debt. He submitted that these words could not be examined in isolation from the words "*Account suspended*" and that if they were examined together, their ordinary meaning was that the Claimant's website account had been suspended because money had to be and was not paid by the owner of the site. Accordingly, anyone visiting the site and seeing those words would think that the Claimant was indebted to the Defendant and

that the account had been suspended because of non-payment of moneys to the Defendant and, further, that if he was indebted to them, he was unable to pay his debt. It therefore followed that such a person was also likely to conclude that the Claimant's business was in financial difficulties and this reflected on the Claimant's credit and finances, as well as his reputation.

[28] Counsel pointed out that anyone accessing the internet could visit the site and anyone doing so would see that the Claimant's account/site had been suspended and that he had been asked to contact the accounts payable department. He therefore argued that the words were intended to, and did, lower the Claimant in the estimation of reasonable and right-thinking members of society. In making this submission, he directed the Court to specific parts of the Defence filed by the Second and Third Defendants on March 22, 2013.

[29] In response to the submissions of Counsel for the Claimant, Counsel for the Second and Third Defendant argued that the intention of the author in publishing the words was not relevant to any determination of their meaning. She indicated that while she agreed with Counsel for the Claimant that "*accounts payable*" meant money which was owed, the use of the possessive pronoun ("*our*") before these words meant that the party who had to pay the money was the author of the floating banner and not the website owner. She contended that if the Defendants had used the words "*accounts department*" instead of "*accounts payable department*", then perhaps it could be construed that money was owed by the website owner.

[30] Each Counsel for the Defendants accepted that **Exhibit "CL 5"**, to which Counsel for the Claimant had referred, was an accurate representation of the website when the floating banner had been published on it.

Law

[31] As is evident from the oral submissions of counsel for the Claimant and counsel for the Defendants, the applicable legal principles are not in dispute.

[32] There is no contention by the Claimant that the Defendants have failed to satisfy any of the procedural requirements for making an application of the kind sought under **Rule 69.10(1)**. Indeed, their application was made promptly and complied with all other procedural requirements.

The Approach of the Court

[33] Accepting the principle in **Mapp v. News Group Newspapers Ltd (supra) at p. 523, per Hirst, LJ** that it is for the judge to rule, when asked to do so, whether the words are capable of bearing a particular meaning or meanings alleged in the statement of claim, I now turn to the approach to be adopted by the Court in making that ruling.

[34] That approach is well illustrated by Lord Reid in **Lewis v. Daily Telegraph Ltd [1964] A.C. 234 at 258** that:

"What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief and a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of the natural and ordinary meaning."

[35] In the case of **Jones v. Skelton [1963] 3 All E.R. 952** (cited in **Mapp v News Group Newspapers Ltd (supra)**), Lord Morris explained at page 958 that:

*"The ordinary and natural meaning of words may be either the literal meaning or it may be an implied meaning or an inferred or indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary meaning of words (see **Lewis v. Daily Telegraph Ltd.**) The ordinary and natural meaning may therefore include any implication or reference which a reasonable reader, guided not by any special but only by general*

knowledge and not fettered by any strict rules of construction, would draw from the words."

- [36] In *Skuse v. Granada Television Limited* [1996] E.M.L.R. 278 at 285, the English Court of Appeal citing Neill, LJ in the unreported English case of *Hartt v. Newspaper Publishing PLC*, described the ordinary man from whose perspective the words were to be considered in the following manner:

"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 were available."

- [37] The Court of Appeal in *Skuse (supra)* also warned that the Court, while limiting its attention to what the Defendant has actually said or written, should *"be cautious of an over-elaborate analysis of the material in issue"* and should not be too literal in its approach.

- [38] Indeed, Sir Thomas Bingham, M.R. (as he then was) recalled the speech of Lord Devlin in *Lewis v. Daily Telegraph (op. cit.)* at 277 that:

"...The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory."

[39] Finally, the Court is cognizant that the application of the test at the pre-trial stage should be “*an exercise in generosity not parsimony*”: ***Berezovsky v. Forbes (No. 2)***[2001] **E.M.L.R. 45, per Sedley, LJ at para [16]**.

Application of the Test

[40] Applying the test set out above to the present case requires me to carefully analyze the words complained of. These words are as follows:

“Account suspended. If you are the website owner please contact our Accounts Payable Department at (246) 228-0918.”

[41] The defamatory meanings pleaded in the statement of claim are that:

“The said words of the floating banner were calculated to disparage the Claimant in his profession as an attorney-at-law by imputing that:

- 1. The Claimant is indebted to the Second or Third Defendant.*
- 2. The Claimant is unable to pay his debts.*
- 3. The Claimant’s business is in financial difficulties.*
- 4. The website is suspended because of nonpayment to the Second or Third Defendant.”*

[42] Counsel for the Defendants have argued that the words do not impute the meanings ascribed to them by the Defendant as the first two words in the statement, “*Account suspended*” are merely a statement of fact, while the subsequent sentence is a conditional statement requesting an unnamed person to undertake a particular step. They have also argued that the subsequent sentence could reasonably and logically mean that the author of the statements owed money to the owner of the website rather than the reverse.

[43] I do not accept the submissions of Counsel for the Defendants. First Counsel has sought to sever parts of the words complained of from other parts of the words complained of

and to attribute a meaning to these words as if they could be construed in a vacuum. In so doing they have jettisoned the guiding principle in *Charleston and another v. News Group Newspapers Ltd. and another (op. cit.)* that the words complained of must be taken as a whole: *See also Duncan and Neill on Defamation (2nd Edition, 1983) p. 13 at para 4.11.*

[44] Second, Counsel for the Defendants have put a very strained and unrealistic meaning on the isolated words “*If you are the website owner, please contact our accounts payable department*”. They contend that the use of the word “*if*” does not sufficiently identify anyone but seeks instead to ask the person who is in fact the owner of the website to identify himself or herself in a prescribed manner. Similarly, they have sought to construe the words “*accounts payable department*” and “*accounts payable*” as if they existed in a vacuum. This they cannot do.

[45] In contending that the words do not sufficiently identify anyone, Counsel have wholly ignored, no doubt conveniently, that on the website is prominently displayed not only a photograph of a person seated at a desk with the words “*Chester Sue Law Chambers*” printed thereunder, though not readily discernible, but also the following clearly discernible text thereon:

*“Chester Sue Law Chambers
Attorney-at-law
Arbor House
James Street
Bridgetown
St. Michael
Barbados” (See Exhibit “CL 5”)*

[46] It has not been contended that that photograph is not of the Claimant. So applying the principle in the *Charlesworth case* it is not open to the Defendants to sever the words complained of from the accompanying photograph on the website and the name and address of the Claimant’s law chambers thereon. Their argument, therefore, that the words do not sufficiently identify anyone is quite disingenuous.

- [47] A reasonable person of ordinary intelligence visiting this website would, to my mind, have readily concluded that the words complained of refer to and were directed at the Claimant, for who else could be the owner of the website but the person whose name appeared therein? I therefore find that the words complained of refer to the Claimant.
- [48] That brings me to the question of what is the fair and natural meaning which would be given to the words complained of by reasonable persons of ordinary intelligence in the circumstances in which the writing was published.
- [49] It seems to me that such persons visiting the website would have taken neither the time, nor had the inclination, to sever and analyze the words in the manner conceived by Counsel for the Defendants. They would have simply formed an impression of what the words meant, given the context in which they appeared.
- [50] And what was the context? It was the floating banner intended to capture the attention of anyone visiting the website to the words complained of. Reasonable visitors of ordinary intelligence to that website would have observed that the account of the Claimant had been suspended and their curiosity piqued as to why the account was suspended. Given the words “*Accounts Payable*” juxtaposed so closely with the words “*Account Suspended*”, they could very easily conclude that the reason for the suspension was an unpaid debt of one kind or the other.
- [51] Bearing in mind that reasonable visitors to the website are not to be imbued with any special knowledge, but must be taken with their “*general knowledge and experience of worldly affairs*”, in the words of Lord Reid in *Lewis v. Daily Telegraph Ltd. (supra)*, to such persons the term “*accounts payable*” simply connotes money owed. And to them, the money must have been owed by the owner of the website and not by the author of the words, for why else would the account be suspended?
- [52] To my mind, a reasonable fair-minded reader, who is neither unusually suspicious or unusually naïve, could certainly construe the words in the floating banner, displayed as they were on the homepage of what was clearly the Claimant’s website, as imputing that the Claimant was not only indebted to the Second and Third Defendants, but was also

unable to pay his debts, and that his website had become suspended because of non-payment of that debt. It would also not be unreasonable for such a reader to then conclude that the Claimant's business was experiencing financial difficulties.

[53] I therefore hold that in my judgment the words complained of in their ordinary and natural meaning are capable of bearing the imputations attributed to them in the statement of claim.

[54] Finally, I do not consider that the question whether the Claimant was seeking to rely on a narrow common law exception to the rule in *Jones v Jones (supra)* referred to at para 24 herein is of any relevance to the issue for determination at this stage.

Disposal

[55] For the reasons set forth above, I find that the words complained of are capable, in their ordinary and natural sense, of bearing the meanings attributed to them by the Claimant in his statement of claim filed on February 7, 2013.

[56] Accordingly, I hereby dismiss the application of the Defendants with costs to be assessed or agreed.

[57] The matter is also adjourned to September 27, 2013 for case management.

Dated June 21, 2013

Elneth O. Kentish

Judge of the High Court