BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATUR

HIGH COURT

CIVIL DIVISION

No. 1278 of 2006

BETWEEN:

PHILIP PILGRIM **PLAINTIFF**

AND

ROYAL BANK OF CANADA **FIRST DEFENDANT**

DARRELL WILSON **SECOND DEFENDANT**

Before the Honourable Madam Justice Kaye Goodridge, Judge of the High Court

2007: September 18,

October 19, 24

2011: January 26

Mr. Olson Alleyne and Mr. Philip Pilgrim for the Plaintiff

Mr. Ramon Alleyne and Ms Faye Finisterre of Clarke Gittens & Farmer for the defendants.

DECISION

Introduction

[1] In this action the Plaintiff claims (i) damages for breach of contract including aggravated damages, and (ii) damages for defamation for the dishonour of certain cheques by the Defendants.

The Parties

[2] The Plaintiff is an attorney-at-law who was admitted to practice in

Barbados in October 1985 and carries on a private practice at Pinfold Street, Bridgetown.

[3] The First Defendant (the Bank) carries on banking business in Barbados and has its principal office at Broad Street in the city of Bridgetown.

[4] The Second Defendant is the Manager, Personal Banking, at the Hastings branch of the Bank and was at all material times the servant and/or agent of the Bank. He took up duties at the Hastings branch in May 2005.

The Background

[5] In June 2001 the Plaintiff opened a checking account numbered 095445-100-297-1 at the Hastings branch of the Bank and applied for an overdraft facility in the sum of fifteen thousand dollars ($15,000) which was granted.

[6] Under the terms of the facility, the Plaintiff was authorized to write

cheques and it was the Bank's duty to honour cheques drawn on the Plaintiff's account provided that the cheques were within the agreed overdraft limit of $15,000.

[7] Between June 2004 and April 2005 the Plaintiff made the following deposits to the account:

1. 9 June 2004 $2,514.25
2. 6 October 2004 $4,000.00
3. 26 January 2005 $1,488.18
4. 22 April 2005 $3,000.00

None of these deposits was credited to the Plaintiff's account at the date of deposit.

[8] The Plaintiff drew nine cheques on the account between 18 October, 2005 and 8 May, 2006 payable to the following merchants or persons:

1. Ernest S Vieira and Co (B'dos) Ltd. (the Landlord) $1,265
2. RBTT Bank (Barbados) Ltd. $1,500
3. Philip A Pilgrim. $1,200
4. JB's Supermarket. $448
5. Carters General Stores $185.77
6. Butterfield Bank (B'dos) Ltd. $2,638.46
7. Shell Six Roads service station. $57.01
8. CLC Medical Services Inc. $90.00
9. Insurance Corporation of Barbados Limited. $788.28

These cheques were dishonoured and returned to the payees with the words "Refer to Drawer" by the Bank.

[9] On 28 October, 2005 when the Plaintiff became aware that the first cheque had not been honoured by the Bank, he telephoned the Second Defendant about the matter. The Second Defendant wrote to the Plaintiff and advised him that their records showed that the overdraft limit was being exceeded constantly and that the overdraft must be liquidated monthly. The Plaintiff's attorneys at law then sent a letter to the managing director of the Bank.

[10] On 22 June, 2006 the Second Defendant wrote to the Plaintiff and advised him that the deposits of $2,514.25, $4,000 and $1,488.18 were inadvertently deposited to the incorrect account and that on 30 May, 2006 the amounts were credited to his account. The Second Defendant apologized for the error.

In the meantime, the other 8 cheques were presented and dishonoured.

[11] The Plaintiff responded to this letter on 27 June, 2006 and invited the Bank to undertake an audit of his account. The Plaintiff also stated that it was not enough for the Bank to simply credit his account as at 30 May, 2006. He requested the Bank to write to all of the nine parties, suitable letters of apology in terms approved by him on or before 30 June, 2006.

[12] On 21 July, 2006 the Bank credited the Plaintiff's account with the fourth deposit.

[13] On 13 July, 2006 the Plaintiff sought injunctive relief which was granted on 31 July, 2006. On 15 September, 2006 the Plaintiff filed his statement of claim in which he sought damages from the Defendants.

[14] On 12 October, 2006 the Second Defendant provided a draft apology to the Plaintiff's attorney-at-law but the same was rejected by the Plaintiff.

[15] The Defendants filed no defence to the action and judgment in default for unliquidated damages was entered against the Defendants on 6 February, 2007.

The Plaintiff's Case

[16] The Plaintiff gave evidence and called one witness in support of his case. He also relied on the affidavits which were filed.

[17] The Plaintiff's witness Mr. David Harewood testified that he has been practicing in the accounting profession for over 20 years but he is not the holder of an accounting designation. He is the Financial Controller at Sea Freight Agencies and also runs a company called Comprehensive Management Services.

[18] Mr. Harewood stated that he obtained certain documents from the Plaintiff, namely his cheque books, all the cheques issued by the Plaintiff during the period March 2004 to August 2006, bank books and bank statements. He examined these documents and prepared an account for which he received the sum of $5,750 as payment for his services.

[19] According to Mr. Harewood , from his analysis, when the nine cheques were presented the overdraft figure was less than $15,000 and there were sufficient funds in the account to cover the proceeds of the cheques.

[20] The witness testified that the cheques were marked "Refer to Drawer" and that this term can have a number of meanings, including not

sufficient funds. In this case the Plaintiff's cheques had none of the challenges he identified, besides insufficient funds. Mr. Harewood stated that when a person writes a cheque and he does not have sufficient funds to meet it he is viewed as dishonest.

[21] Under cross-examination, the witness stated that he did not receive any information as to the nature of the chequing account which the Plaintiff had with the Bank but he was aware of the overdraft limit. He agreed that his examination revealed that there were periods when the account exceeded the overdraft limit.

[22] The Plaintiff then testified that as an attorney-at-law, reputation was everything and involved making sure that in your personal and professional life, integrity is paramount. He considered financial integrity to be of vital importance.

[23] The Plaintiff stated that the fact that the cheques were dishonoured by the Bank troubled him significantly because he lives in a very small society and it exposed him to harm which he had never been exposed to in his life.

[24] The Plaintiff testified that it was in October, 2005 when he got notice through his landlord, about the return of his first cheque (No. 1). He immediately contacted the Second Defendant because, since the start of the account in 2001, a relationship had developed between the Bank and himself whereby if any cheques went over the overdraft limit inadvertently, the Bank would call and inform him of this and funds were put on the account the same day or not later than the following day.

[25] He stated that between 2001 and 2005, none of the cheques which went over the limit was ever dishonoured by the Bank. So he spoke to the Second Defendant and in the course of that conversation informed him that to dishonour the cheque of an attorney-at-law in Barbados has very bad consequences.

[26] The Plaintiff continued that one of the cheques which had been returned was written to the Six Roads Shell Service Station, and that he had been dealing with that station since 1985. He was asked about the returned cheque by the manager and he indicated that the problem would be rectified with the Bank. The Plaintiff said that there has not been any fallout between the station and himself and he has still been allowed to do business there.

[27] However, the Plaintiff spoke of having to endure certain comments from low level staff which he found awful to deal with, comments such as since he had written a bounced cheque, he should ensure that he had money in the bank in future. He also spoke of receiving anonymous phone calls imputing impecuniosity to him

[28] The Plaintiff stated that his medical doctor and his receptionist brought the matter of a returned cheque to his attention and he was hurt by the entire affair even though he was not castigated by the doctor.

[28] The Plaintiff said that when his cheques were bounced he understood this to be saying that he had no integrity, did not have sufficient funds in the bank and he should have known better than to present that cheque and that he was not a person who could be trusted on another occasion.

[29] The Plaintiff then stated that he had received a letter in June 2006 in which the Second Defendant purported to apologise to him. He also received a draft apology which he felt did not express any sorrow or regret for the fact that the cheques were bounced. He stated that there was one feature of the draft which he liked and this was that a draft apology was to be sent to the merchants involved.

[30] Under cross-examination, the Plaintiff said that, at the time of making the application, an officer of the Bank explained the nature of the account and what was expected of him. He said that he understood that there was an overdraft limit set on the account but he did not understand that he should not go over that limit. According to the Plaintiff, his understanding was that it had a limit beyond which he should not ordinarily exceed but there was a clear understanding between himself and the Bank that if the over draft limit was exceeded and he was so informed, whatever excess there was would be replaced within 24 hours.

[31] On further questioning, the Plaintiff agreed that it was totally within the discretion of the Bank to allow him to exceed the limit and that it

was not a contractual right or obligation but a discretion on the part of the Bank. The Plaintiff also agreed that at the time of the bouncing of the cheques, the Bank's accounts reflected that his account was over the overdraft limit. However he stated that he assumed that there was malice because the Bank dishonoured the cheques because money was there.

[32] The Plaintiff said that he had not seen the notation made by Ms. Walters, the previous Personal Banking Manager, that he was constantly exceeding his overdraft limit and that he had been cautioned on the need to pay closer attention to the management of the account but agreed that this was what the Second Defendant would have seen when he looked at the file. The Plaintiff maintained that the Second Defendant acted with reckless disregard or maliciously.

[33] When questioned about the account, the Plaintiff said that all the deposits have been accounted for and replaced but not all the bank charges have been reversed. He accepted that it was the Bank which made him aware of the problem of wrong deposit. He did not recall the Second Defendant apologizing to him when they spoke but he did apologise in writing.

[34] Under re-examination, the Plaintiff said that the account was a personal account. He insisted that there was an arrangement whereby the Bank would honour cheques which were over the overdraft limit and that this occurred on a number of occasions during the operation of the account. He agreed that the evidence showed that he had exceeded the limit on some occasions.

The Defendants' Case

[35] In his affidavit, the Second Defendant deposed that the Plaintiff's funds were deposited to the wrong account due to a posting error. He stated that reliance was placed on the balance shown on the Plaintiff's account which did not reflect the deposits.

[36] As a consequence, on the dates the cheques were presented, the Defendants regarded the Plaintiff's account as not having sufficient funds available to satisfy payment of the cheques. In accordance with its normal practice, the Bank dishonoured the cheques and marked "Refer to Drawer" on each of them.

[37] In May 2006 the Bank realized that the first three deposits had not been credited to the Plaintiff's account and this error was rectified. On 12 June, 2006 the Second Defendant contacted the Plaintiff by telephone, made him aware of the error and apologized for the same. A letter was also sent on 22 June, 2006 in which an apology was tendered.

[38] The Second Defendant further deposed that at the time that the cheques were dishonoured, the Defendants innocently believed that the words "Refer to Drawer" were warranted and did not intend that the words were false or defamatory of the Plaintiff.

[39] During a telephone conversation on 21 June, 2006 the Second Defendant offered to send letters of apology to the payees citing a bank error as the reason why the cheques were returned. The draft was to be settled by the Bank and to be subject to the Plaintiff's approval, however the Defendants did not settle and provide a suitable draft within the time stipulated by the Plaintiff.

[40] Upon becoming aware that the fourth deposit had not been deposited the Bank credited the sum of $3,000 to the Plaintiff's account. The Bank is prepared to refund to the Plaintiff all overdraft interest and overdraft charges which were wrongfully incurred as a result of the incorrect account balance.

[41] The affidavit concluded by referring to the draft of the apology which the Bank provided to the Plaintiff's attorney-at-law on 12 October, 2006 and which was rejected by the Plaintiff and attached an offer of amends.

The Submissions

[42] The Plaintiff and the Defendants submitted extensive written submissions and authorities to the court.

The Plaintiff's Submissions

[43] The Plaintiff submitted that it was a term of the contract that the Plaintiff would be able to write cheques and that the Bank would honour those cheques provided that the cheques were within the agreed overdraft limit.

[44] After the first cheque was returned, the Plaintiff maintained that the Defendants were warned that to dishonour the[= Plaintiff's cheques would cause harm and they should have checked the accuracy of the Plaintiff's account before dishonouring his cheques. He stressed that at all material times the Plaintiff's account was well within the overdraft limit so as to be able to meet and or honour any or all of the said cheques.

[45] The Plaintiff submitted that in their natural meaning, the words "Refer to Drawer" were understood to mean that the Plaintiff at all times on

the presenting dates was without funds and or did not have sufficient funds in his account or sufficient overdraft facility to meet payment of the said cheques.

[46] It was the further submission of counsel that by innuendo the words were understood to mean that the Plaintiff, (i) was a dishonest person who could not be trusted to competently manage his financial affairs especially with respect to the honouring of his cheques; (ii) was in dire pecuniary difficulties and not even in a position to be able to pay for low costing services; (iii) did not have sufficient funds standing to the credit of the said account to meet the cheques; (iv) was attempting to perpetrate a fraud on the payees; and (v) had committed the criminal offence of fraud.

[47] As a direct consequence of this, the Plaintiff's reputation in society had been defamed significantly and he should be awarded substantial damages.

[48] In support of his claim in malice, the Plaintiff urged the court to look at the Defendants' conduct which increased the hurt to him.

[49] The Plaintiff maintained that the Defendants had continued to act in a capricious manner and had failed to apologise to any of the merchants to whom the cheques were written. The Defendants' reference to an apology was not to be taken seriously because of their earlier contention that the term "Refer to Drawer" did not harm the Plaintiff.

[50] The reference by the Defendants to an apology where they simply "cited a bank error" was meaningless and would only have served to aggravate the hurt which the Plaintiff felt.

[51] The Plaintiff submitted that during the relevant period, the Second Defendant had the opportunity to investigate his account and the fact that he did not do so results in recklessness which translated into malice.

[52] In his view, the Second Defendant was reckless in the discharge of his duties which caused the Plaintiff to suffer immensely and the court should take this into account in assessing damages.

[53] The Plaintiff then dealt with the issue of an offer of amends. He drew the court's attention to **section 16(6) of the Defamation Act** (the **Act**) which provides:

> "16 (6) An offer of amends under this section may not be made by a person after serving a defence in proceedings for defamation brought against him by the party aggrieved in respect of the publication in question".

The Plaintiff submitted that the Defendants had ample time to file their defence and did not do so nor did they seek to upset the default judgment. The Defendants had not complied with the requirements of the **Act**.

[54] In the alternative, the Plaintiff suggested that if the court was minded to consider the Defendants' offer of amends, the content of the offer was in violation of **sub- sections (2)** and **(3)** of the section.

[55] The Plaintiff submitted that nowhere in the Second Defendant's affidavit is there any acknowledgment of the fact that the dishonour of the Plaintiff's cheques was defamatory of him, but that the publication was unintentional.

[56] The Plaintiff further submitted that the purpose of the apology is to appease the injured feelings of the person defamed and to undo the harm done to his reputation in consequence of the publication. Its terms will depend upon the nature of the defamatory statement, but should invariably include a full and frank withdrawal of the charges or suggestions made and an expression of regret that such charges or suggestions were ever published.

[57] Having examined the draft apology against that background, it clearly falls short of the required expectations and the court ought not to take it into account since no sufficient apology was forthcoming from the Defendants.

[58] The Plaintiff submitted that the Defendants' actions also caused a republication of the defamatory material to third parties for which they were liable. These third parties included members of the Bank's working environment, workers employed by the Plaintiff and the collecting banks.

[59] Further, counsel submitted that having regard to the community in which we live, the Bank's dishonouring of the cheques has a propensity to percolate thus enlarging the number of persons to whom the libel was published. In this regard the Plaintiff had to endure harsh comments which were made to him concerning these bounced cheques by other persons than those to whom the defamatory words were published.

[60] The Plaintiff also submitted that the malicious behaviour of the Second Defendant, the conduct of the Defendants- in particular their conduct of the matter before the court, are all factors which support his claim for aggravated damages.

[61] The Plaintiff pointed out that the extent of a defamatory publication is always a relevant consideration in computing damages for defamation. In his case, he submitted, the defamatory comments do not involve wide circulation as in a newspaper nor are they confined to being published to a limited number of persons. The defamatory comments were published to his landlord, two of his bankers, a major supermarket, a leading hardware store, a gas station, a medical company and a major insurance company. These are business places where hundreds of workers are employed.

[62] Counsel then cited the following cases for the court's consideration:

(i) **Phillips et al v.Boyce and PSMT (Barbados) Inc. Civil Appeal No. 9 of 2005** – defamatory comments made by one employee to other employees at a staff meeting. Award of $10,000 to each appellant upheld;

(ii) **Jordan v. The Advocate Co. Ltd., High Court Suit No. 727 of 1996 –** A few persons were aware of extrinsic facts which were published in a newspaper – Award of $20,000;

(iii) **Rawlins v. Harper (1988) Barb.Law Reports 65** – defamatory comment made to persons in the police canteen which concerned the Plaintiff in his capacity as attorney-at-law. Award of $20,000;

(iv) **Sir Denys Williams v. Best & The Advocate Co. Ltd. High Court Suit No. 1414 of 1992 –** An award of $60,000 to the then Chief Justice of Barbados for certain defamatory comments which were made in a newspaper article.

[63] In the circumstances, the Plaintiff submitted, that an award of $85,000 as general damages would be fair and reasonable to compensate him for the harm he has been caused.

The Defendants' Submisions

[64] Mr. Ramon Alleyne, attorney-at-law for the Defendants accepted that the Defendants had breached the contract with the Plaintiff and were liable for that breach. He submitted that the Plaintiff is entitled to recover nominal damages.

[65] Mr. Ramon Alleyne stated that in this case, special damages claimed were to the extent of all charges wrongfully debited to the Plaintiff's account between 19 May, 2004 and 16 June, 2006. These amounts were all refunded on 7 August, 2007, regardless of whether they were wrongfully incurred. The amounts are as follows:

(i) $910.00 representing all overdraft handling charges from 16 June, 2004 to 8 August, 2006.

(ii) $3,431.93 a complete reversal of all overdraft interest from 16 June, 2004 to 8 August, 2006.

Therefore the issue of special damages does not arise.

[66] Counsel then submitted that there is an exception to the normal measure of damages in contract whereby a Plaintiff who is a trader may recover substantial damages from a bank for injury to his credit without proof of special damage. However, a non-trader Plaintiff may only recover substantial damages where he alleges and proves special damage – **Marzetti v. Williams [1824-34] All ER 150, Wilson v. United Counties Bank Ltd & Anor [1920] AC 102 (HL).** In the present case, the Plaintiff who is a non trader should recover only such loss as he is able to prove.

[67] Mr. Alleyne continued that the issue of whether a professional such as a Solicitor or Accountant is in fact a trader was discussed (obiter) in the case of **Kpohraror v. Woolwich Building Society [1996] 4 All ER 119 C.A.** where the Court of Appeal and more particularly **Evans L.J** purported to extend the trader exception to non traders alike.

[68] Counsel submitted that **Kpohraror** is an unsafe decision both in law and in principle. It is out of line with the principle on which the trader exception is founded i.e. if the Plaintiff is a trader it is presumed that his credit must suffer substantially. Counsel urged the court to follow the decision of **Wilson** rather than that of **Kpohraror**.

[69] Mr. Alleyne dealt next with the claim for damages for defamation. He referred to the fact that the Plaintiff's cheques were not honoured when presented for payment and that they were marked with the words "Refer to Drawer" and returned to the collecting banks.

[70] Mr. Alleyne submitted that the wrongful dishonour of cheques is not itself defamatory. The question is what imputation is conveyed by the use of the words "Refer to Drawer" written on the cheques.

[71] Counsel referred to the allegation of the Plaintiff that the words in their natural and ordinary meaning meant and were understood to mean that the Plaintiff was without funds and or did not have sufficient funds or overdraft facility to meet the cheques and to the innuendoes pleaded in the Statement of Claim [see para 46].

[72] Mr. Alleyne submitted that the Plaintiff's testimony and that of his witness do not coincide with the law. He cited the case of **Hill v. National Bank of New Zealand [1985] 1NZLR 736** where it was held that the imputation reasonably conveyed by the words "Refer to Drawer" is insolvency or want of funds and not dishonesty as alleged by the Plaintiff.

[73] Mr. Alleyne submitted that, in seeking to arrive at an appropriate sum for general damages the court may take into account factors such as the nature of the defamation and the circumstances and extent of its publication.

[74] Mr. Alleyne further submitted that the cases of **Scantlebury v. the Advocate Co. Ltd. High Court Suit NO. 2017 of 1993 and Blackman and Ishmael v. The Nation Publishing Co. Ltd., High Court Suit No. 474/475 of 1990** are distinguishable from the Plaintiff's case both in nature and extent of the publication and gravity of the defamatory statement. In **Scantlebury's** case the award was $40,000 for publication of defamatory comments in a newspaper and in **Blackman's** case, an award of $25,000 for each Plaintiff also for a newspaper's defamatory publication.

[75] Mr. Alleyne submitted that in the instance case, the words were originally published to the collecting Banks – First Caribbean International Bank, RBTT Bank, Royal Bank of Canada, Butterfield Bank, the Bank of Nova Scotia and the Barbados National Bank. The words were republished to the persons to whom the debit advices were presented by the collecting banks.

[76] Mr. Alleyne argued that the court must ignore the anonymous phone calls received by the Plaintiff making reference to his cheques being dishonoured and suggestions that he was acting in breach of the criminal law and the comments of overly inquisitive persons or to use the Barbadian parlance "malicious" service station attendants.

[77] Mr. Alleyne noted that malice is an aggravating factor in a defamation action as it is reasonable to regard such malice as increasing the suffering and humiliation of the Plaintiff and the court may grant additional exemplary damages if it considers that the circumstances warrant it.

[78] However, Mr. Alleyne stated that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of the defamatory matter.

[79] In the instant case, Mr. Alleyne submitted that although the honest belief by the Defendants in the truth of what was published does not itself provide a defence to the action, it is a relevant factor in assessing damages.

[80] Mr. Alleyne submitted that there was no evidence of malice or aggravating behaviour by the Defendants, however, the evidence of lack of malice was substantial namely:-

(a) Bank by letter of June 2006 brought the issue of wrongly deposited sum to the Plaintiff's attention and apologises.

(b) The Plaintiff at paragraph 4 of his affidavit of 15 June, 2007 stated that he felt that the Second Defendant's actions were out of a "not careful examination of the Plaintiff's account and history". That is, mistake or negligence, not malice.

(c) Reasonable reliance of the Defendants on their accounts is a requirement of business practice. The fact of these mistakes is to be condemned but the reliance is a natural reasonable action, which disproves any element of malice.

[81] Mr. Ramon Alleyne also submitted that damages may be mitigated on proof of the publication of an apology. The offer of amends made on 18 June, 2007 could be disclosed and relied on in the circumstances irrespective of whether it was relied on as a defence – **Section 18(3)** of the **Act.**

[82] It was further submitted that another mitigating factor would be the conduct of the Plaintiff towards the Defendants so that the Plaintiff's rejection of the numerous apologies as insincere or insufficient and the Plaintiff's failure to cooperate by giving the Second Defendant the names and addresses of persons to whom he wished the Bank to apologise and give a written explanation became relevant.

[83] Mr. Alleyne concluded his submissions by stating that in the Defendants' view, an award of $7,500 to the Plaintiff for General Damages is reasonable.

Discussion

[84 In the case of **Sealy v. FirstCaribbean International Bank (Barbados) Ltd. 75 WIR 102,** the Court of Appeal dealt with a case which concerned the wrongful dishonour of the Claimant's cheques for which she claimed damages for (i) breach of contract and (ii) 'libel' (now defamation by virtue of the **Act**). The trial judge dismissed her claim, finding that the Claimant had insufficient funds in her current account to cover two cheques in the sums of $150 and $105 respectively and that in the circumstances, the Bank had been under no contractual duty to honour the cheques. On appeal, the court held:-

(i) Upon a proper construction of the evidence, on a balance of probabilities, it had been the Bank's error which had caused the Claimant's current account to appear to be overdrawn and accordingly the Bank was liable for the dishonour of the cheques.

(ii) Dishonour of a cheque when there were sufficient funds in a customer's account to honour the value of the cheque was a breach of the Bank's contract. Further, a person who was not a trader could receive substantial rather than nominal damages in contract for loss of credit or business reputation resulting from the wrongful dishonour of a cheque by a Bank.

(iii) The words "Refer to Drawer" were reasonably capable of a defamatory meaning. The meanings ascribed to the words in the innuendos pleaded in the instant case were reasonably capable of bearing those imputations and would tend to lower the Claimant in the estimation of right-thinking members of a society generally.

[85] In construing the negative impact those words could have on a person's reputation **Simmons CJ** said:

> 'We desire to say, that in most societies a bank's dishonour of a cheque is a serious matter. In affects a person's ability to use the banking system. Issuing a cheque knowing that an account has insufficient funds to cover the value of the cheque

> offends the criminal law, such action also reflects adversely on the credit worthiness of the drawer. In a small society such as Barbados, "bouncing" a cheque as dishonour is colloquially characterized, exposes the drawer to opprobrium and ridicule. We think that the average, ordinary person in Barbados would think less of one who draws cheques knowing that he/she had insufficient funds in a bank account to meet the cheques".

We agree with **Eichelbaum J.** in **Hill v. National Bank of New Zealand** at **p. 750** that "the majority of reasonable people would think that in all probability the bank had done so [i.e. dishonoured a cheque] on good grounds founded on some circumstance discreditable to the drawer of the cheque". Accordingly, the publication in that case was defamatory as it imputed dishonesty to the Plaintiff.

The court concluded that an award of $15,500 met the justice of the case, having regard to the humiliation she suffered, the persons to whom the defamation was published and the position held by the Plaintiff **Sealy** in her place of employment.

Damages for breach of Contract

[86] It was the contention of counsel for the Defendants that the Plaintiff was not a trader and could only recover nominal damages. However, the Court of Appeal in the **Sealy** case made it clear that the distinction between a trader and an ordinary person is no longer valid and that the latter could recover substantial damages in contract for loss of credit or business reputation resulting from the wrongful dishonour of a cheque by a bank. Accordingly, that submission by counsel for the Defendants is dismissed.

[87] In the instant case when one considers the Plaintiff's position and standing as an attorney-at-law and the extent to which the dishonour became known, the court considers that the sum of $30,000 would be an appropriate award as damages for breach of contract. However, the court must also consider the issue of damages for defamation.

Damages for defamation

[88] Undoubtedly, the main purpose of an award of damages in defamation is to compensate the Plaintiff for the damage done to his reputation. As is aptly stated in Gatley on Libel and Slander 10th Edition at paragraph 9.2.

> "General damages serve three functions. To act as a consolation to the claimant for the distress he suffers from the publication of the statement, to repair the harm to his reputation (including where relevant, his business reputation); and as a vindication of his reputation…"

[89] A person's reputation is paramount. **Williams CJ.** in the case of **Craig v. Miller (1987) 22 Barbados Law Reports 131** stated:-

> "The law recognises the right of each man during his lifetime to the unimpaired possession of his reputation and good name. Reputation depends on opinion and opinion in the main on the communication of thought and information from one man to another or others. He who communicates to the minds of others anything which is untrue and likely in the natural course of things substantially to disparage the reputation of a third person, is, on the face of it, the perpetrator of a legal wrong for which the remedy is an action in defamation."

[90] In assessing damages for defamation, a judge is entitled to take into account the conduct, position and standing of the plaintiff; the nature of the defamation, the mode and extent of publication; the absence or refusal of any retraction and apology; the whole conduct of the defendant from the time when the defamatory statements were published down to the moment of the verdict.

[91] According to the evidence, the Plaintiff is an attorney-at-law who has been in private practice since 1985. He had been a customer of the Bank since 2001.

[92] This was the wrongful dishonour of nine cheques written by the Plaintiff to various parties. While none of the payees testified, the Plaintiff's evidence was that he was asked about the returned cheque written to the Six Roads Shell Station by its manager but there was no fallout between the station and himself because of the matter.

[93] Nevertheless, the Plaintiff's evidence was that he had to endure certain comments from low level staff at the station which were less than complimentary. The 'bouncing' of his cheques caused the Plaintiff severe embarrassment and hurt.

[94] The entities to which the defamatory comments were published include two of the Plaintiff's bankers, a major Supermarket, a Hardware Store, the Plaintiff's Landlord, Insurance Company and naturally, the employees who dealt with the cheques.

Malice

[95] What was the conduct of the Defendants? It has been argued that there was malice on the part of the Second Defendant. A consideration of the evidence leads me to the opinion that the Second Defendant relied on the Bank's accounts which is a usual business practice and came to the incorrect conclusion that the Plaintiff had exceeded the overdraft limit.

[96] This mistake led to the wrongful dishonour of the Plaintiff's cheques but it is my finding that the Second Defendant did not act recklessly or irresponsibly having regard to all the circumstances. I therefore hold that there was no malice on the part of the Second Defendant.

[97] I turn to the offer of amends dated 18 June, 2007 by the Defendants. By virtue of **section 16(1)** of the **Act,** a person who has published a statement alleged to be defamatory of another may, if he claims that he did not do so intentionally, make an offer of amends. **Section 16(4)** sets out what should be contained in an offer of amends and **subsection (6)** provides that an offer of amends may not be made by a person after serving a defence in proceedings for defamation brought against him by the party aggrieved in respect of the publication in question.

[98] No defence was filed by the Defendants and judgment was entered by default. In any case considerable time had elapsed before an offer of amends was made. Even if the court was minded to examine the offer of amends, what has been proferred by the Defendants does not meet the statutory requirements. The evidence discloses that a draft apology was submitted to the Plaintiff by the Defendants but this was rejected as being inadequate. In summary, the Defendants did not apologise to the Plaintiff.

[99] The authorities cited by counsel have been examined but may be distinguished and are of general guidance only in the determination of an appropriate award. For the most part, the cases involved the publication of defamatory statements in newspapers. Every case stands on its own facts.

Damages

[100] Counsel for the Defendants urged the court to make an award of nominal damages only and not substantial damages. Such an award would be merited if there was an infringement of the right to one's reputation but no substantial damage done to it. In the light of the Plaintiff's evidence of the comments he had to endure in the Service Station and the anonymous calls he received, it is inconceivable that an award of nominal damages could be appropriate. There was no challenge to Mr. Pilgrim's evidence on the humiliation he endured and I accept his evidence as true. As an attorney-at-law of several years standing, the damage done is great, a lawyer's reputation is one of his most valuable assets. In addition, the **Act** makes defamation actionable without proof of special damage – **S. (3)** of the **Act**. Most if not all of the payees of these cheques are persons with whom the Plaintiff has an ongoing professional relationship, e.g. his landlord, service station, insurance company and his doctor. There is no doubt that the imputation of dishonesty inherent in dishonouring the Plaintiff's cheques is great. The publication was likewise great. Having regard to the number of dishonoured cheques, I consider that only a substantial award would meet the justice of this case.

[101] Having regard to all of the facts of this case including the nature and extent of the publication, the Plaintiff's standing in society and the absence of an apology, it is considered that an award of $40,000 as general damages is fair and reasonable compensation for the harm suffered by the Plaintiff as a consequence of the Defendants' actions.

Disposal

[102] The claim is against the First and Second Defendants jointly and severally and there has been no challenge to such liability if defamation or breach of contract is found by the court. Judgment is entered for the Plaintiff against the Defendants jointly and severally in the sum of $40,000 and special damages of $5,750.00. General damages shall bear interest at the rate of 6% per annum from today's date until payment. Special damages shall be at the rate of 6% from the date of issue of the writ until payment.

[102] The Plaintiff shall have his costs certified fit for one attorney-at-law to be agreed or taxed.

KAYE GOODRIDGE

Judge of the High Court