**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. CV 925 of 2018**

**BETWEEN:**

**ELLIOTT DEIGHTON MOTTLEY** **CLAIMANT**

**AND**

**OWEN SEYMOUR ARTHUR** **DEFENDANT**

***Before the Honourable Mr. Justice Barry L. Carrington, Judge of the High Court***

**Dates of Hearing:**

**2019: November 21**
**December 9**

**Date of Decision:**

**2020: February 10**

**Appearances:**

**Mr. Roger Forde Q.C. in association with Ms. Lyn-Marie Simmons, Mr. Stewart Mottley and Ms. Faye Finisterre, Attorneys-at-Law for the Claimant.**

**Mr. Vernon Smith Q.C. and Mr. Hal Gallop Q.C. Attorneys-at-Law for the Defendant**

## WRITTEN DECISION

### Introduction

[1] This is a defamation matter and the issue for determination by the court is to make a ruling on whether or not words used by the Defendant about the Claimant are capable of having a meaning or meanings attributed to them in the Claimant's Statement of Claim.

### Background

[2] Post-election periods in Barbados often result in actions for defamation and the 2018 election was no exception. The Defendant, a former Prime Minister of Barbados from 1994 to 2008 spoke at a press conference on May 14, 2018, approximately 11 days prior to the 2018 General Election and made certain statements. Those statements were in response to an allegation made by the then Prime Minister, Mr. Freundel J. Stuart Q.C. at a public meeting some days earlier. A reporter at the press conference questioned the Defendant about the statement attributed to Prime Minister Stuart and his response resulted in the filing of action for defamation against the Defendant by the Claimant Mr. Elliott Mottley Q.C. (now Sir Elliott Mottley), who is the father of the present Prime Minister, Miss Mia Amor Mottley Q.C.

[3] By Claim Form and Statement of Claim, the Claimant commenced an action against the Defendant seeking the following relief:

(i) damages, including aggravated and/or exemplary damages for defamation spoken and published by the Defendant on May 14, 2018 and a press conference/briefing;

(ii) an injunction to restrain the Defendant whether by himself, his servants or agents or otherwise howsoever from further publishing or causing to be published the same or similar defamatory statements and/or comments of and concerning the Claimant;

(iii) costs;

(iv) such further or other relief that the court deems fit.

[4] The Defendant filed his Defence which included particulars of 'Fair Comment' and 'Justification' which, in summary, he claims that the said words/statements were fair comment on matters of public, national and historical interest and importance. The Claimant filed an Application to strike out the Defence in its entirety.

[5] Thereafter, the Defendant filed a 'Notice of Application for a Ruling on Meaning' and a supporting affidavit. The 'Notice of Application for a Ruling on Meaning' was made under **Part 69.10 of the Civil Procedure Rules, 2008 ("the Rules")**, for an order

(i) to determine whether or not the words spoken and published by the Defendant complained of in the Claimant's Statement of Claim filed the 23rd day of July 2018 bear and/or are capable of bearing the meaning or meanings attributed to them in paragraph 6(i)(ii)(iii)(iv) and (v) of the Claimant's Statement of Claim; and

(ii) if it appears to the court on the hearing of the application above that none of the words complained of bears or is capable of bearing of the meaning or meanings attributed

to them for an order that he Claimant's claim be dismissed or alternatively for such other order or judgment in the proceedings as may be just.

[6] Paragraph 6 of the Statement of Claim states as follows:

> *"In their natural and/or innuendo meanings the words meant and were understood to mean that the Claimant:*
>
> *(i) requested the Defendant, as Minister of Finance to act ultra vires and unlawfully and grant the Claimant a waiver of income tax arrears on income of millions of dollars under the provisions of the Duties, Taxes & Other Payments (Exemption) Act, Cap. 67B of the Laws of Barbados in circumstances where the Claimant knew or ought to know that the said request required the Defendant to act ultra vires or unlawfully;*
>
> *(ii) made an outrageous, egregious or highly improper request of the Defendant;*
>
> *(iii) made a request of the Defendant which was corrupt and/or unethical in that it would have been necessary to take the Claimant's request to the Cabinet of which his daughter, Ms. Mia Amor Mottley, was a member and thereafter to Parliament of which she was also a member for its approval subject to negative resolution;*
>
> *(iv) was inviting the Defendant to commit a crime, namely, conspiracy to defraud the revenue;*
>
> *(v) was able to have arrears of tax waived probably as a result of a conspiracy involving a public officer.*

[7] Part 69.10 of **the Rules** states:

> (1) At any time after the service of the statement of claim, either party may apply to a judge for an order determining whether or not the words complained of are capable of having a meaning or meanings attributed to them in a Statement of Case.

(2) An application for a ruling on meaning may be made at any time after service of the particulars of claim and should be made promptly.

(3) Where an application is made for a ruling on meaning, it must state that it is an application for such purpose made in accordance with this rule.

(4) The application must identify clearly the statement and the meaning attributed to it which the court is being asked to consider.

**The Defendant's Comments**

[8] The Defendant's comments were lengthy and covered many topics. He addressed statements made by the former Prime Minister Mr. Freundel J. Stuart Q.C., the state of the economy, commented *inter alia,* on Venezuela and Petro Caribe and the IMF. So far as is relevant, the comments made by the Defendant which the Claimant alleged are defamatory are as follows:

> *"Now the matter pertaining to Ms. Mottley's father waiver, I just want to make two categorical statements. In my whole experience as Prime Minister and Minister of Finance there was no circumstance under which I would have waived tax payable on millions of dollars for any person including and especially the father or a member of my Cabinet... there are Laws of Barbados in respect of the manner in which a Minister of Finance and the Cabinet and the Parliament should manage the process of the grant of a waiver. Chapter 67-67B or 67C of the laws, the duties, taxes and other payments, exemptions or the Act requires that a Minister of Finance can with the approval of Cabinet, waive any tax ... I am in a position to say that I am aware of the fact that Miss Mottley's father would have applied to me for a waiver of the tax... I never did nor would have agreed to a waiver on a tax on income running into millions of dollars. You are liable to tax of $500,000 if your income is in the millions. And we couldn't possibly live in a country where people earning millions of*

*dollars can want to enjoy the benefit of what Barbados provides and not pay a cent in tax. So I remember it because of its outrageous nature. It truly was outrageous for Mr. Elliott Mottley with a daughter in Cabinet to apply to me to waive that kind of tax for him. So as I said, I can only confirm the first part. That I was in fact asked by Miss Mottley's father to waive the tax ... and I want to stress this point, it was outrageous for Elliott Mottley to put me in a position where I am the Prime Minister of the country, his daughter was in the cabinet and he's asking me to waive that kind of tax on that kind of income...so that it is for her...if she is involved in it, to explain how it happened...perhaps it might have been a conspiracy between some public officer. I do not know but this was not done with my knowledge."*

**The Defendant's Submissions**

[9] In making his submissions counsel for the Defendant said that the words are true and argued 'justification' based on the truth of the statement. He contended that the Defendant has not denied using the alleged words. He argued that the Defendant did not impute or imply any motive on the part of the Claimant, rather, he gave his reasons why he did not entertain the Claimant's application for a waiver.

[10] Counsel examined aspects of the statement and sought to highlight, how, in the context they were used that the Claimant asked the Defendant to waive the payment of a tax and opined that in the process, he did not impart anything that is capable of being defamatory. He indicated that the reference to a conspiracy did not mean or suggest that there was one. Further, in relation to the use of the word 'outrageous', counsel submitted that it did not refer to the

Claimant's character or reputation, rather, it was used in reference to the Claimant's application for a waiver of tax.

[11] Counsel strongly contended that overall the statement does no more than set out the basis for the Defendant's decision to refuse the application for a waiver of taxes due and owing by the Claimant.

**The Claimant's Submissions**

[12] Counsel for the Claimant strongly urged that the Defendant's arguments were misconceived from the point of view that the defence of justification raised in the arguments in the application are only relevant when the words are deemed to be defamatory, and not before. Counsel argued that the intention or motive of the publisher is irrelevant in an application for meaning. He stated that determining meaning is a question of law, and cited the case of **Javanshir Feyziyev v The Journalism Development Network and Paul Radu [2019] EWHC 957 ("Feyziyev")** in support.

[13] He further submitted that what is important is what the words would convey to the ordinary man. Counsel stated that in defamation matters, whether words are defamatory or not is a question of law, not fact and that no evidence is taken from anyone to aid in that determination.

[14] Counsel contended that it was untrue that the Claimant asked for a waiver of taxes. Rather, he argued, the Claimant applied or a waiver of penalties and

interest under the **Income Tax Act, Cap. 73** and not for a waiver of tax under the **Duties, Taxes and Other Payment (Exemption) Act, Cap. 67B**, to which reference was made by the Defendant in his statement.

**Discussion**

**Law and procedure**

[15] There are two (2) matters which have no bearing on this application that are worthy of note. **Firstly**, Counsel for the Defendant has made reference in his submission to the defences of 'justification' and 'comment on a matter of public interest'. Those defences formerly were used in relation to libel and slander but have been replaced by the defence of 'truth' and 'comment', respectively both in the Defamation Act, Cap. 199 and the Supreme Court Rules, 2008. As this matter relates to a ruling on meaning, the issue of the defence is irrelevant at this stage but as it was raised, and incorrectly so, I am merely highlighting the error.

[16] **Secondly**, while Part 69.10(1) states that an application for a ruling on meaning can be made at any time after the filing of the statement of claim, conventional wisdom suggests that the application should be made before a defence is filed. A corpus of authorities has emerged within recent times to illustrate that, if meaning is an issue in dispute in a defamation action, there

should ordinarily be a trial of meaning as a preliminary issue before the service of the defence.

[17] The case of ***Morgan v Associated Newspapers Ltd [2018] EWHC 1850 QB*** dealt with – as preliminary issues – the questions of (1) the meaning of the words complained of; and (2) whether any defamatory imputations conveyed by the article were allegations of fact or opinion. A Defence had been served which raised, amongst other things, a defence of honest opinion and the meaning which the Defendant sought to justify as opinion. Nicklin J noted that this was the second case that month in which a fully pleaded defence had been filed before meaning had been determined by the court. He went on to criticise this approach as *"potentially ... hugely wasteful of costs"* as it may result in a Defence needing amendment depending on the ruling as to meaning. He observed that:

> *"It is not my place to issue practice directions, but consistent with the overriding objective the parties must consider whether the expense of a defence is justified before the Court has ruled on meaning, if meaning is disputed...the overriding objective is to deal with cases justly and at proportionate cost. All of those point, clearly, to disputes as to meaning being determined as a preliminary issue sooner rather than later"*

[18] In **Poroshenko v BBC [2019] EWHC 213** the defendant sought an extension of time for service of the Defence pending determination of meaning as a preliminary issue. It did so very close to the deadline for service of the

Defence and the claimant's solicitors responded in strong terms rejecting their proposal. There followed further correspondence and ultimately, the defendant was forced to make an application to the court. Nicklin J was extremely critical of what he termed the *"obstructive" response of the claimant's legal representatives to the BBC's "obviously sensible"* suggestion that meaning be determined before service of the Defence. Ordering that the claimant pay the defendant's costs of and occasioned by their application, the judge observed that:

> *"whilst [trials of preliminary issues of meaning] are not mandatory, once it is clear that meaning is in dispute, the issue should be considered by all parties, and a burden will normally fall on any party who contends that the issue should not be resolved by determination at a preliminary issue trial to present cogent and case-specific reasons why not. The disadvantages of ploughing on, not only to the parties in terms of potentially wasted costs, but also in disproportionate drains on the resources of the Court mean that that burden may be difficult to discharge".*

[19] Nicklin J further elaborated on the desirability of determining meaning – if in dispute – before service of a defence in **Bokova v Associated Newspapers Ltd [2018] EWHC 2032 (QB).** He noted that while a defendant who seeks to justify as true the words complained of must plead their own **Lucas-Box** meanings (the meanings which the defendant is setting out to justify), there was no obligation on a defendant to plead the meaning they said the words bore and there may even have been a rule preventing such a pleading.

However, the judge went on to note the remarks of Mustill LJ in **Viscount de L'Isle v Times Newspapers Ltd [1988] 1 WLR 49, 58C-D:**

> *"...defendant is not yet permitted to set out in his defence what he contends the words complained of mean, although I respectfully agree with the editors of* Duncan and Neill on Defamation, *2nd ed. (1983), p. 53, para. 11.11, where they suggest that this rule needs re-examination".*

[20] Noting that this "eminently sensible point" had "*still not been embraced even after the advent of the CPR and the increased importance of identification of the disputed issues at the earliest stage*", Nicklin J concluded that while it might "*represent a culture shift in defamation pleadings*", if meaning is in dispute and the intention is that it be tried as a preliminary issue by a judge "*defendants would be well-advised to make very clear what meaning they contend the words bear, including any 'common sting' meaning."*

[21] This point was not raised in argument before me but I nonetheless commend the approach to determine a ruling on meaning as a preliminary issue. Consideration should be given to reviewing **Rule 69.10** to determine if, with minor adjustments it can permit parties to request a ruling on meaning as a preliminary issue and also allow a Defendant to indicate the meaning which he intends the words complained of to bear. Such an approach will redound to the benefit of the parties by way of cost savings and an early indication of the

course of proceedings. Additionally, it will result in more beneficial use of judicial time.

**Ruling on meaning**

[22] The application for a ruling on meaning requires the court to make a determination whether or not the words used 'are' or 'are capable of bearing' a defamatory meaning. What is the meaning of 'defamatory'? There are several authorities from which the meaning can be found, as well as useful guidance to aid in that determination.

[23] The authors, **Carter and Ruck on 'Libel and Privacy', Sixth Edition ("Carter and Ruck")** examined the meaning of 'defamatory' and opined that there is no single theoretically coherent definition of what the law regards as defamatory. They state that at their core, the definitions seek to express the central condition that the imputation must adversely affect the Claimant's reputation. Very usefully, the case of **Berkoff v Burchill and Another [1996] 4 All ER 1008 ("Berkoff")** examined several definitions of 'defamatory' and drew on the central themes to formulate what may be regarded as a composite definition which, over the years, there has not been any substantial departure.

[24] Some of those definitions include:

(i) *"...a publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule...."* per Parke B in **Parmiter v Coupland (1840) 6 M & W 340, 341, 342,**

(ii) *"Speaking generally the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action." Per Cave J in* **Scott v Sampson (1882) 8 QBD 491;**

(i) *"...after collating the opinions of many authorities I propose in the present case the test: would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?" per Lord Atkin in* **Sim v Stretch [1936] 2 ALL ER 1237, 1240;**

(ii) *"...words may be defamatory of a trader or business man or professional man, although they do not impute any moral fault or defect of personal character. They [can] be defamatory of him if they impute lack of qualification, knowledge, skill, capacity, judgment or efficiency in the conduct of his trade or business or professional activity...",* per Lord Pearson in **Drummond-Jackson v. British Medical Association [1970] 1 ALL ER 1094, 1104;** and

(iii) *"...not only is the matter defamatory if it brings the plaintiff into hatred, ridicule or contempt by reason of some moral discredit on [the plaintiff's] part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on [the plaintiff's] part...." Per Slessler LJ in* ***Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd (1934) 50 TLR 581, 587.***

[25] After that thorough review of the authorities, Neill LJ in **Berkoff** opined that

*"...words may be defamatory, even though they neither impute disgraceful conduct to the plaintiff nor lack of skill and efficiency*

*in the conduct of his trade or business or professional activity, if they hold him up to contempt, scorn or ridicule or tend to exclude him from society."*

[26] I accept that as a fair, well-reasoned description of the meaning of 'defamatory', distilled from the assessment of the many popular definition and descriptions that went before. Having settled the issue of what is 'defamatory', I now turn to the criteria for determining meaning.

**Criteria for determining meaning**

[27] The question of whether words are capable of bearing a particular meaning has always been a question of law at trial and within recent times, beforehand. Several cases have dealt with the criteria for determining meaning (**Mapp v News Group Newspapers [1998] Q.B. 520, Gilick v BBC [1996] E.M.I.R. 267, Skuse v. Granada [1996] E.MI.R. 278, Cruise v Express Newspapers [1999] Q.B. 932**). The principles to be applied when deciding the natural and ordinary meaning of allegedly libelous words are well-established and uncontroversial. Over the years, courts have compiled a list of principles that should govern the court in its task. Those principles **("the principles")** were highlighted in **Jeynes v News Magazines Ltd [2008] EWCA Civ 130**, re-stated in a recent judgment of Nicklin J in **Koutsogiannis v. The Random House Group Ltd [2019] EWHC 48** and quoted with approval in **Feyziyev**. They are

(i) The governing principle is reasonableness.

(ii) The intention of the publisher is irrelevant.

(iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.

(iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.

(v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.

(vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.

(vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

(viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (e.g. bane and antidote cases).

(ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is

necessary to take into account the context in which it appeared and the mode of publication.

(x) No evidence, beyond the publication complained of, is admissible in determining the natural and ordinary meaning.

(xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

(xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

(xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning)."

[28] The court's task is to determine the single natural and ordinary meaning of the word complained of, which is the meaning that the hypothetical reasonable reader would understand the words to bear. This will the assist the court in making the determination whether the words bear or are capable of bearing a defamatory meaning. Lord Kerr, in **Stocker v Stocker [2019] UKSC 17 ("Stocker")** said:

> "Clearly, therefore, where a range of meanings is available and where it is possible to light on one meaning which is not defamatory among a series of meanings which are, the court is not obliged to select the non-defamatory meaning. The touchstone remains what would the ordinary reasonable reader consider the words to mean. Simply because it is theoretically

> possible to come up with a meaning which is not defamatory, the court is not impelled to select that meaning. All of this, of course, emphasises that the primary role of the court is to focus on how the ordinary reasonable reader would construe the words. And this highlights the court's duty to step aside from a lawyerly analysis and to inhabit the world of the typical reader of a Facebook post. To fulfil that obligation, the court should be particularly conscious of the context in which the statement was made…"

[29] In that regard, I have concluded that the words bear the following natural and ordinary meaning:

> 'That the Claimant wrongly made an unreasonable request of the Defendant to waive the payment of taxes on millions of dollars of income earned by the Claimant that involved a process where Cabinet and Parliament approval were necessary and thereby placed the Defendant in an invidious position since the Claimant's daughter was a member of Cabinet and parliament. Further, if the Claimant was granted the waiver it was possibly through a conspiracy with a public officer.'

[30] I arrived at that meaning from my overall assessment of the entire comment without any over-elaborate analysis of the words and conducting too detailed analysis of the comment. The comment was presented as a factual account of what transpired. There was an obvious 'bane' but there is no discernible 'antidote'. The Defendant in his written and oral submissions focused his attention on arguing the truthfulness of the comments rather than what the words meant, in light of his application for a ruling on meaning.

[31] I considered the context and the medium for the broadcast and note the Defendant's response to the allegations made by former Prime Minister

Stuart, disregarding the Defendant's intention in the process and any evidence other than what was contained in the passage. The setting was a press conference that was covered by the print and electronic media and the comment was broadcast locally and potentially regionally and internationally as the media has wide international reach. I did not place reliance on any evidence apart from the published comments to assist me in making this determination on the meaning of the comments.

[32] Taking into consideration the impact that the comment has had on me, I also examined its impact on the hypothetical reasonable reader. That reader is neither naïve or overly suspicious, rather he is regarded as one of the regular everyday persons who would listen to the comment on the electronic media or read it in the print media. That reader is not one who seeks to go out of his way to impute improper motive in circumstances where none exists.

[33] That reader would also readily understand the comment made in its context as highlighting the request of the Claimant to have taxes waived on millions of dollars earned by him. It would not have escaped that reader that the use of the word 'outrageous' on at least three (3) occasions suggested that the request was beyond what was reasonable.

[34] Even as I considered the use of the word 'outrageous' by the Defendant, I was precluded from resorting to a dictionary meaning based on the persuasive

authority of the case of **Stocker** where the court held that it is impermissible for a judge to resort to a dictionary definition of words or phrases in the offending comments while seeking to make a determination on meaning. I am guided by the comment of Sharp LJ in the Court of Appeal decision in **Stocker** who said

> "The use of dictionaries does not form part of the process of determining the natural and ordinary meaning of words, because what matters is the impression conveyed by the words to the ordinary reader when they are read, and it is this that the judge must identify."

[35] In recent times the courts have recognized a nuanced type of reader, different in some respects from the hypothetical reasonable reader. In **Stocker** the court held that the words '*...tried to strangle me....*' have a different meaning to a person using Twitter or Facebook than the hypothetical reasonable reader. No such considerations arise in this matter since the audience was the more traditional, reasonable reader/hearer.

[36] The hypothetical reasonable reader is likely to understand the reference to the possibility of a conspiracy involving a public officer, as something very serious, deliberate and wrong.

[37] In my opinion, the hypothetical reasonable reader, not avid for scandal, could conclude that the Claimant made an extremely unreasonable request to avoid

payment of taxes on millions of dollars of income and may have engaged in a conspiracy to facilitate his tax ease.

**Disposal**

[38] In the circumstances, taking guidance from the principles and noting what constitutes 'defamatory', I hold that the words used by the Defendant are capable of having the meaning attributed to them in paragraph 6(i)(ii)(iii) and (v) of the Claimant's Statement of Claim.

[39] I shall hear the parties on costs.

**BARRY L. CARRINGTON**
**High Court Judge**