[2014] JMSC Civ. 43

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2012 HCV 04259**

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| **BETWEEN** | **MICHAEL BURGESS** | **CLAIMANT** |
| **AND** | **J WRAY & NEPHEW LIMITED** | **FIRST DEFENDANT** |
| **AND** | **COLLIN McCALLA** | **SECOND DEFENDANT** |
| **AND** | **CONROY CROSDALE** | **THIRD DEFENDANT** |

**IN CHAMBERS**

**Leonard Green instructed by Chen, Green & Company for the claimant**

**Conrad George and Adam Jones instructed by Hart Muirhead Fatta for the defendants**

**February 25, 28, March 7, 11 and April 7, 2014**

**CIVIL PROCEDURE – APPLICATION TO STRIKE OUT – SUMMARY JUDGMENT – APPLICATION TO AMEND STATEMENT OF CASE**

**SYKES J**

**[1]** It was June 8, 2012 at approximately 11:30pm when Mr Collin McCalla and Mr Conroy Crosdale invited Mr Michael Burgess into a room at the offices of J Wray & Nephew Limited ('J Wray'). Also present were Mr Eucline Mills and Mr Andrew Lamb. Messieurs McCalla, Crosdale, Mills and Lamb are loss prevention officers employed to J Wray in the Loss Prevention Unit ('LPU'). This is a euphemism. They are employed to prevent theft of rum, other liquors and company property. The unit was conducting investigations into theft of rum.

**[2]** At this meeting Mr McCalla is alleged to have spoken these words:

> *Burgess mi get information that you receive two bottles and I believe is rum in it.*

**[3]** Mr Crosdale is alleged to have added:

> *We believe is rum in it*

**[4]** Mr McCalla is alleged to have added:

> *One night you sent your girlfriend to park your Hiace on the compound and came back for it on the following morning. Why you mek your girlfriend travel so late by herself. If you have any vehicle park on the compound (meaning J Wray & Nephew compound) you should remove them because after leaving tonight, it will be the last time you will be coming back on the compound.*

**[5]** These statements, it said, are defamatory, untrue and were made negligently and/or recklessly, that is, not caring whether they were true or not. A claim was filed alleging slander, negligence, wrongful dismissal or breach of contract.

**The defendants' application**

**[6]** In this case, there are three applications before the court. Two of the applications are Mr Burgess and one by the defendants. The current hearing was precipitated by the defendants' application for summary judgment and to strike out the claim on the following bases:

a. frivolous and vexatious;

b. an abuse of process

c. discloses no reasonable cause of action

**[7]** Mr Burgess' response was to file two applications. One was an application to file a reply and the other was to apply for permission to file an amended particulars of claim. All three applications were decided in the defendants' favour with costs of all three to the defendants to be agreed or taxed.

**[8]** The defendants say that the pleaded case does not disclose any cause of action with any real prospect of success. They say that the words, if spoken by the persons alleged and in the manner pleaded, are protected by qualified privilege. Mr George submitted that Mr Burgess has not pleaded that he had any contractual relationship with J Wray and what kind of contractual relationship existed. Mr Burgess has not said he was an employee of J Wray. Mr George added that, even if Mr Burgess had pleaded that he was an employee of J Wray, such a pleading would be at variance with the allegation of being a haulage contract since such an expression connotes that he was an independent contractor. Finally, it was submitted that the pleadings are deficient because they do not explicitly say what crime Mr Burgess was accused of despite the allegation that he is accused of a crime. According to Mr George, the rules of pleading in defamation cases require that where the case is based on or alleging

that the claimant has committed a crime then the claimant must state what crime he is being accused of.

**[9]** The defendants also say that where the form of defamation is the spoken word (slander) the claimant must show that the words were actionable per se or that special damage flowed from the words. The claimant has failed to detail any claim for special damages suffered as a result of the publication of the statements.

**[10]** The court will summarise the original particulars of claim and indicate those parts of the claim that purport to plead the various causes of action. The court will next examine the causes of action and indicate its conclusion. Finally, the court will examine the applications made by Mr Burgess and demonstrate why they were unsuccessful.

**Details of the claim**

**[11]** The first four paragraphs introduce the litigants and their roles. Paragraph 5 of the particulars states that the defendants made statements knowing that they were not true or were negligent or reckless in that the defendants failed to carry out any or any proper investigation or enquiries to determine whether those statements were true. It is also said in paragraph 6 that fellow workers have told the claimant that they understand that he was stealing rum. Paragraph 7states that because of the serious nature of the allegations some former employees have ceased to communicate with Mr Burgess. Mr Burgess alleges that he has not been able to give any credible explanation to persons he has contacted for future contractual engagements indicating why he is no longer engaged by J Wray. Paragraph 8 alleges that requiring Mr Burgess to leave the compound and his job as a haulage contractor breached the contract of engagement (the actual words used) and has caused him loss.

**[12]** The particulars of negligence were said to be:

a. failure to conduct any or any proper investigations so as to determine whether the claimant had his employer's property in his possession;

b. failed to ensure that bottles that the claimant might have had in his possession or at any time prior to making allegations against the said claimant's character, had rum or spirits illegally obtained from the J Wray;

c. failed to conduct an operation capable of determining beyond peradventure that the claimant had stolen or was party to the stealing of J Wray's property;

d. made utterances and accusations without first establishing that those utterances were in fact true.

**Analysis of the particulars of claim**

**Negligence**

**[13]** What has been set out at paragraph 12 above is said to be the negligent conduct of the defendants. This court is not convinced that what has been stated there can establish the three-fold requirement of the tort of negligence, namely, duty owed to the claimant, breach of duty and consequential damage to him. The context in which the words were spoken cannot amount to any breach of duty. The four persons present were member of the LPU. They were conducting investigations into rum alleged to have been missing from J Wray's property. They had a suspect in mind. This court cannot see anything wrong with the investigators letting the suspect know of their suspicions in the manner and context in which they did. On the pleadings, only the investigators and Mr Burgess were present and so no liability can attach in the circumstances. For any duty to exist in the circumstances, it would have to be framed as follows: the

investigators had a duty not to speak to Mr Burgess about their suspicions until they had a clear proof that he had committed an offence or a breach of his contract of employment. Mr Burgess has framed the matter differently. This court confesses that it is unable to appreciate what possible duty the investigators could have to Mr Burgess in the way they conducted the investigation in this case. As understood by the court, the problem raised by Mr Burgess is not the investigation per se but rather the accusation leveled against him and the alleged disclosure of the accusation to others. His complaint is that it is the accusations that have caused the problem and not the fact of the investigation. He is not saying that the fact of an investigation in and of itself caused him harm once that fact of an investigation became known to him and others. Thus whether the investigation was excellent or poor is irrelevant. The crux of the matter is the allegations of theft which he says are untrue and these allegations had no basis in fact. His position would still be the same even if the best investigations possible were conducted because his point is that he did nothing wrong. If the court has understood his claim, then clearly the way in which the investigations were done is neither here nor there. Thus there is no causal connection between the investigation and the damage he claims resulted to him because the conduct of the investigations per se is not alleged to have caused him harm. To put it another way, if the investigations were conducted and nothing said, he would not have suffered any damage. However, once the words were uttered and allegedly repeated, then harm followed. For these reasons, the pleaded claim does not disclose any basis for bringing a claim in negligence. This court is not convinced J Wray owed Mr Burgess any duty of care to conduct the investigations in the manner suggested by the claim.

**[14]** In **Taylor v Director of the Serious Fraud Office** [1999] 2 AC 177, the House of Lords extended absolute privilege to cover police investigations. The claim arose in this context. A solicitor was named in a letter to the Attorney General of the Isle of Man as someone who might have been involved in a fraud. The matter came to the solicitor’s attention because disclosure had been made to the

defendant in the criminal case. The solicitor was contacted by the defendant's lawyers as a possible witness and this was how he came to know about the letter in which he was named. He brought a defamation action against the letter writer and the Director of the Serious Fraud Office. The House held that the public interest in the investigation and prosecution of crime demanded that absolute privilege be extended to circumstances of investigations of crime provided that the communication is for the purposes of the investigation. Lord Hoffman said pages 214 – 215:

> *When one turns to the position of investigators, it seems to me that the same degree of necessity applies. It would be an incoherent rule which gave a potential witness immunity in respect of the statements which he made to an investigator but offered no similar immunity to the investigator if he passed that information to a colleague engaged in the investigation or put it to another potential witness. In my view it is necessary for the administration of justice that investigators should be able to exchange information, theories and hypotheses among themselves and to put them to other persons assisting in the inquiry without fear of being sued if such statements are disclosed in the course of the proceedings. I therefore agree with the test proposed by Drake J. in Evans v. London Hospital Medical College (University of London) [1981] 1 W.L.R. 184, 192:*
>
> > *"the protection exists only where the statement or conduct is such that it can fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or a possible prosecution in respect of the matter being investigated."*

> *This formulation excludes statements which are wholly extraneous to the investigation - irrelevant and gratuitous libels - but applies equally to statements made by persons assisting the inquiry to investigators and by investigators to those persons or to each other.*

**[15]** The court is fully aware that **Taylor** was a case of absolute privilege and the instant case is one of qualified privilege but the passage provides useful ideas in analysing the present case. While **Taylor** was a case of a public investigation, surely, similar considerations apply to private investigators. It must be in the public interest to encourage private citizens to do what they can to prevent crime and detect crime. Surely, private corporate citizens should be encouraged to do what they can to minimise crime in respect of their property and to conduct appropriate investigations where necessary. In the course of their investigations private investigators uncover a lot of information. What could possibly be wrong with colleagues of the same private investigative unit exchanging information, theories and hypotheses among themselves provided they exchanged the information among themselves in a context where they were under a duty, legal or moral, to make the disclosure persons who had a corresponding duty to receive it?

**[16]** In the circumstances here, the members of the LPU had an interest in seeing that rum was not taken, unlawfully or illegally, from J Wray's properties. They were under a legal obligation, arising from their employment, to detect and prevent unlawful or illegal removal of rum. They were under a legal duty to conduct such investigations as they saw fit to give effect to their employment obligations. Consequently, it necessarily follows that they were entitled to exchange information with each other, develop hypotheses and discuss the nature and extent of any investigation they were conducting. How else can the

LPU function effectively unless its members can exchange information with each other even if this means doing so in the presence of the suspect alone?

**[17]** It seems to this court that sheer common sense would indicate that if a suspect is being interviewed by the investigators, then it would be prudent to have other persons present so that in the event of a dispute about what took place during the interview, there are other witnesses who can speak to what took place. In this case, the investigators took the obviously sensible step of having two other members of the LPU present and no other persons. Nothing is wrong with that. Also there is no rule that says that a private investigator should only speak to a suspect when he has an iron clad case. If that were so, then the suspect need not be spoken to at all; he would simply be arrested and handed over to the police. From this analysis there is no breach of any duty to Mr Burgess. Indeed, the court would go further to say that in the circumstances, J Wray acting through the LPU owed no duty to Mr Burgess.

**Wrongful dismissal and breach of contract**

**[18]** The claim has not pleaded explicitly that there was a contract between J Wray and Mr Burgess. The closest one gets are paragraphs 7 and 8 where Mr Burgess speaks to no longer being engaged by J Wray and he left his job as a haulage contractor. Damages are then claimed for wrongful dismissal or breach of the contract of engagement. From this, it is obvious that Mr Burgess chose the path of deliberate vagueness. Was he an independent haulage contractor? If he was, then there is no such thing as wrongful dismissal of an independent contractor. Wrongful dismissal, as this court understands it, applies only to employees. One can speak to wrongful termination of a contract in general but when one narrows it down to the species of wrongful dismissal then the unique features of this specifies of wrongful termination must be identified. The unique feature is that the claimant must be an employee of the person accused of the wrongful dismissal. This unique feature has not been pleaded. At no time does Mr Burgess allege that he was under a contract of employment. If he were, why not say so?

**[19]** As the court understands it, to sustain a claim for wrongful dismissal the employee has to show either that he was engaged for a fixed time or on contract terminable by notice and he was dismissed either before the time or without notice and that he was dismissed in circumstances that would not permit his employer to dismiss him summarily. None of these matters has been pleaded.

**[20]** The vagueness of the pleadings and the curious way of putting the matter leads the court to conclude that Mr Burgess was in fact an independent contract and therefore the concept of wrongful dismissal does not apply to him. The court concludes that the part of the claim framed on the basis of wrongful dismissal is not sufficiently pleaded and ought to be struck out. However, the final decision must await further developments and their assessment.

**[21]** Mr Burgess' initial response to these submissions was that the allegations were made in the presence of other staff members in circumstances that made the termination unfair. Reference was also made to rule 8.9 (1) states that the claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant intends to rely. The claimant also said that the statement of case has complied with rule 8.9 (2) of the Civil Procedure Rules ('CPR') which states that the statement must be as short as practicable. In short, Mr Burgess was saying that the pleaded case is legally sufficient

**[22]** As short as practicable does not mean that there is to be imprecision in what is being alleged. The claimant has not pleaded any contract between himself and J Wray or the nature of the contract. This, to my mind, is a serious omission. The defendants have the right to know the nature of the case that is being alleged against them. The court is not aware that the concept of wrongful dismissal applies outside of a direct employer/employee contract of employment. This claim has not been so pleaded.

**Slander**

**[23]** Turning now to the claim for slander. The claimant concedes that all four persons present were part of the LPU. They have done some investigation. Clearly, in their view, they had reached the point where they felt they could speak directly to Mr Burgess. It seems to this court that the defence of qualified privilege operates here. The defence is based on the idea that the words are in fact defamatory but the circumstances of their communication are protected by law and thus are not actionable. To establish the defence of qualified privilege the defendants need to establish that the person who delivered the defamatory communication had a duty to make that communication and the person to whom it was made had a reciprocal duty to receive the communication. On the assumption that Messieurs McCalla and Crosdale made the utterances in the presence of other members of the LPU at a meeting with Mr Burgess, it is difficult to see why qualified privilege would not apply. All persons present, other than Mr Burgess, who was the suspect, were involved in the investigation. Surely, it must be appropriate for those who had information that the others might not have to share that information and that information may include suspicions. To say that Messieurs McCalla and Crosdale could only speak when they were sure of Mr Burgess' 'guilt' would be intolerable. This would mean that if an investigator in a company has a suspect in view and another member of the investigative team, unknown to the first investigator, has information that may exonerate the suspect, the second investigator could not mention this to the first investigator. By not mentioning the exonerating information to the first the investigator, the investigations may be pursued longer than necessary with the consequential waste of resources. Worse, it would mean that private investigators would not be able to collaborate or pool their information since the argument could always be made that those who had incomplete information may be guilty of making false statements about the suspect. It is the view of this court that provided the investigators met either among themselves or with persons who had a duty to receive the information about the suspect and they exchanged information for the purposes fairly connected to the investigation qualified privilege applies.

Provided they did this and it was not noised to persons who had no duty or interest in the matter they are protected by qualified privilege.

**[24]** Had Mr Burgess been absent from this meeting this court does not see how the investigators thinking that he was a suspect and giving voice to it among fellow investigators would fail to attract qualified privilege. If this is so what difference does the presence of Mr Burgess makes? In the view of this court, his presence added nothing save the opportunity for him to know that he was a suspect. Mr Burgess was simply being told that he was a suspect in the removal of rum by persons who were charged with the duty of investigating losses of rum. It is the view of this court that what the investigators did was perfectly in order and they did nothing wrong.

**[25]** The particulars of claim do not allege malice. Malice here means spite or ill-will. Malice is usually raised to defeat a plea of qualified privilege. Since the particulars of claim did not alleged malice and the defendants have raised the issue of qualified privilege, which can be decided in this application, the question is whether Mr Burgess' claim, as pleaded, is defeated. The court has formed the view that it is. Even Mr Burgess' claim indicated the limited nature of the publication. He was the only person there along with four members of the LPU.

**Mr Burgess' applications**

**[26]** Mr Burgess filed an application to be permitted to file a reply. He has also sought to file an amended statement of case. There are two issues here. First, the Jamaican CPR requires malice to be raised in the statement of claim and not in the reply. In England, it appears to be the case that the claimant in a defamation action is not required to plead malice in his particulars of claim. He simply sets out his case. If the defence raises qualified privilege, then the reply counters by pleading malice. Second, the proposed amended statement of case uses the word malice but no particulars of malice are set out. The consequence is that the proposed amendments do not meet what is required under the

Jamaican CPR. This court is bound by the Court of Appeal's decision of **DeFreitas v Blythe** SCCA No 43 of 2008 (unreported) (delivered March 11, 2009). That case made the point that malice has to be pleaded in the particulars of claim. The court also observed that Part 69 of the CPR made no provision for the filing of a reply in defamation cases.

**[27]** The lesson from the Court of Appeal is this: claimants in Jamaica who wish to allege malice must do so in the particulars of claim. They are not to follow the English practice of waiting on the defendant to plead qualified privilege and then reply by alleging malice.

**[28]** In a plea of malice, generalised formulations are not permitted because it is vital to know whose mind is said to be infected by malice. This becomes all the more important because a corporate entity is being sued. The rules of attribution become important here. Whose state of mind on the issue of malice is to be attributed to J Wray? This has not been particularised. Who was it that repeated or republished the alleged defamatory remarks?

**[29]** It may be said that the proposed amendments add details which were absent from the initial statement of case. The proposed amended particulars of claim plead that Mr Burgess was further defamed by the 'posting of signs and notices on the 1st defendant's compound with specific reference to the claimant to give the general impression that the statements were true and that the claimant was engaged in stealing the company's property.' This pleading falls woefully short of what is required. Defamation actions require the claimant to set out what the alleged defamatory words are. Mr Burgess has done this in respect of the meeting but has failed to do so in respect of the signs and notices. The proposed amendment, as framed, does not inform the defendants of the content they are alleged to have placed on or caused to be placed on the signs. Effective pleading requires that the content of the signs be stated and the pleader then states what meaning he believes can or ought to be placed on the content of the signs. The claimant must say what the signs said. He has given his interpretation of the

signs and notices. What is required is (a) state what the signs and notices say and (b) the meaning which he claims the signs and notices conveys. The proposed new particulars are still very deficient and so there is no point in exercising the court's discretion to grant permission to amend the particulars of claim.

**[30]** Finally, the proposed amendments also clear up whether the contract referred to was a contract of employment or contract for services. It seems that Mr Burgess is alleging that he was an employee. Was it a fixed term contract? Was it a contract terminable by notice? Is Mr Burgess saying that he received notice but the notice did not comply with the terms of the contract? None of these things has been pleaded and so Mr George has submitted that there is no basis for a claim of wrongful dismissal.

**Disposition**

**[31]** The conclusion is that the application to file a reply is refused. The application to file an amended particulars of claim is refused. The shortcomings of the initial particulars of claim have been identified. The application to strike out is granted on the basis that the pleadings do not disclose a reasonable cause of action. Judgment is entered for J Wray with costs to be agreed or taxed.

**Order**

**[32]** The claimant's application to extend time to file reply is refused. The claimant's application to amend the particulars of claim is refused. Costs of these two applications to the defendants to be agreed or taxed. The defendants' application to strike out the claim is granted. Costs of this application to the defendants to be agreed or taxed. Summary judgment is entered for the defendants.