[2013] JMSC Civ. 108

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 04315

BETWEEN	**CAREIF LTD**	**1ST CLAIMANT**
AND	**ANTHONY THARPE**	**2ND CLAIMANT**
AND	**JAMAICA OBSERVER LIMITED**	**DEFENDANT**

Mr. Anthony Tharpe – self represented litigant for 1st and 2nd claimants.

Mr. Charles Piper and Mr. Wayne Piper instructed by Charles E. Piper & Associates for the defendant.

Heard: 8th May 2013 and 30th July 2013

Interlocutory Application - Defamation – Whether Words Capable of Defamatory Meaning – Whether Defence Statement of Case Properly Pleaded – Qualified Privilege

Straw, J.

[1] Mr. Anthony Tharpe, the claimant, is a self represented litigant who has taken on the herculean task of this action, claiming damages on behalf of himself and Careif Ltd, the 1st claimant, against Jamaica Observer Limited, the defendant. In the forty odd page particulars of claim, he alleges that the Jamaica Observer published defamatory words on the 7th May 2008 contained in a story concerning both claimants bearing the headline "CAREIF CRASHES".

[2] The Jamaica Observer filed a defence to this action on the 27th October 2010. A case management date was scheduled for the 29th June 2011 and further adjourned to the 19th October 2011. On the 29th of September 2011, the claimants filed an Amended notice of application requesting several orders from the court as follows:

> 1] An order pursuant to rule 69.4 of the Civil Procedure Rules 2002 [CPR] as to whether the words complained of in the publication are capable of bearing the meanings attributed to them in the particulars of claim, whether they are capable of being defamatory of the claimants or capable of bearing any other meaning defamatory of the claimants.

2] That the defence be struck out for failure to comply with Part 10.5 of the CPR and for failing to disclose any reasonable grounds for defending the claim, in particular, whether the defences of justification, fair comment and qualified privilege are properly pleaded in accordance with rule 10.5 of the CPR.

3] That the pleas of justification and fair comment on a matter of public interest in general and paragraph 37 in particular be struck out for failure to comply with rule 69.3 [c] of the CPR and in any event for failing to disclose any or reasonable grounds of defence.

4] That paragraphs 38 and 39 of the Defence be struck out for failure to disclose a reasonable ground of defence pursuant to rule 26.3 [1] [c] of the CPR.

[3] An amended defence was filed on the 18th October 2011, the day before the scheduled case management conference. Mr. Tharpe has also challenged the status of the amended defence.

[4] There are several issues for the court's determination. Mr. Tharpe relied on written submissions contained in the Further Amended Legal Submissions filed on 8th June 2012 and also oral submissions. Mr. Charles Piper, who appeared for the defendant, relied on oral submissions.

Can the Amended Defence Stand?

[5] Mr. Tharpe contends that in the face of the claimants' application to strike out the defence, the defendant is obliged to satisfy the court that the said defence has a real prospect of success. He is relying on **consolidated appeals Nos. 112, 115, 116 AND 117 of 2008, Pan Caribbean Financial Services Ltd v Robert Cartade and Others [per Harrison JA who approved the application of this principle by Brooks J, the trial judge [as he then was] at paragraph 74-76].**

[6] In relation to the above submission, it is to be noted that the application for the amendment in the above case was made at the case management conference itself. At that stage, the permission of the court is required [per rule 20.4[1] of the CPR]. In the case at bar, the amendment preceded the hearing date and the permission of the court is not required unless the amendment breaches relevant limitation periods [per rule 20.1 of the CPR]. This is not an issue in the case under consideration.

[7] The court, however, has an overriding discretion to disallow such an amendment [per rule 20.2 [1]. At any rate, even if the court is required to assess the prospect of success of the amended defence, the court considers, firstly, the extent of the differences between both defences.

[8] Except for the section entitled particulars on page 13 of 14 of the original defence, the differences between the original and amended defence are all underlined in the amended version. Most of the amendments are words added in various paragraphs e.g, paragraph 8 where these words are added 'because we do not know if the allegation is true'. Paragraph 19 contains the most substantive amendments. It is an additional paragraph. It refers to a letter dated September 20, 2011 from the Financial Services Commission [FSC] to the defendant. This letter was not mentioned in the original defence. Page 13, which incorporates paragraph 37 b to e and paragraph 39 of the original defence avers the defence of fair comment and justification respectively.

[9] In relation to paragraph 19, Mr. Tharpe has submitted that the defendant is not allowed to rely on material to justify the published words that has arisen after the publication. The authorities support his submissions. **Chase v Newsgroup Newspapers Ltd.** [2002] EWCA Civ 1772, Lord Justice Brooks, paragraph 30. However, the fullness of the principle is not clear as Lord Justice Brooks described it as a general rule: [paragraph 52,55]

> *-----a defendant may not rely on matters which occurred after the date of publication complained of in order to support a plea that there were, objectively speaking, reasonable grounds for suspecting that the claimant performed the actions attributed to him ---*
>
> *Although there appears to be no authority directly on point, the same principle seems to be properly applicable when the meaning sought to be justified is that there were reasonable grounds at the date of publication to suspect that the claimant was guilty of the matters attributable to him/her.*

[10] The reference in paragraph 19 to public notices by the Financial Services Commission [FSC] by way of print media dated subsequent to 7th May 2008 should therefore be struck out. This holds true also for these words appearing below paragraph 18 d:

> *The first claimant was in fact blacklisted by the Financial Services Commission by notices to the public dated January 1, 2010, May 12, 2010.*

References to these notices which also appear at paragraph 18 e ii and iii are also to be struck out.

[11] It is to be noted also that the defence of fair comment and justification which appeared at paragraphs 37 and 39 of the original defence have been removed from the amended defence. In order to rely on the defence of fair comment, the amended defence must conform to rule 69.3.The defendant would therefore be unable to rely on any such defence by virtue of the amendment.

[12] Secondly, at this stage of the proceedings, without embarking on a mini trial, the court cannot say that the amended defence has no realistic prospect of success. The major issue [in relation to the amendment] is contained within the said paragraph 19. Whether Careif Ltd was an alternative investment club under investigation by the FSC, and whether it was blacklisted by that organization can only be determined after witness statements have been filed. Apart from the pleadings ordered to be struck out, the amended defence is allowed to stand.

The Application under Rule 69.4 {1} of the CPR

The Meaning of the Words

[13] A second issue for determination is whether the words complained of are capable of bearing the meanings attributed to them in the particulars of claim, whether they are capable of being defamatory or capable of bearing any other meaning defamatory of the claimants.

[14] Mr. Piper has submitted that the court ought not to engage in such an exercise at this time as a substantial part of the particulars speak to issues relevant to establishing the reputation of the claimants prior to the date of publication. The claim is a significant one in terms of the assessment of damages. The defendant filed an application dated 12th October 2011 for specific disclosure in relation to the business dealings of the claimants who had previously refused their request for information on the basis of irrelevance. This application has not yet been heard.

[15] Mr. Piper has also submitted that the claimants are asking the court to determine defamatory meanings, but whether the words are defamatory has to be considered against the background of the claimants' refusal to provide particulars of the allegations on which they claim the good reputation is based. It is his view that the court is being asked to determine issues when there is material that should be disclosed by the claimants that would be helpful to determine the issues.

Some Legal Considerations

[16] The particulars of claim sets out the passages complained of from the published article at paragraph 11. Paragraph 14 a to z and [aa] and paragraph 15 a to e list the defamatory meanings attributed by the claimants.

[17] While I would agree with Mr. Piper that certain orders sought by the claimants should await the application for specific disclosure, it is to be noted what the rules actually entitle the court to do. It is not to decide whether the words are actually defamatory of the claimants, which is the function of the jury, but whether they are capable of the defamatory meanings attributed. To this extent, it would appear that the exercise is somewhat futile and fragmented, bearing in mind the scope of the issues, but to the extent the court can assess this issue, it will do so

[18] Rule 69.4 [1] of the CPR allows the court to consider an application made by either party after the particulars have been filed for:

> an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case.

[19] The court is therefore limited to an assessment in relation to the meaning or meanings attributed and not to whether they are capable of bearing any other meaning defamatory of the claimants. It is important to note also that the court is not engaged in an assessment as to whether the words are actually defamatory which is an assessment of fact for the trial but whether the words are capable of bearing the meanings attached to them. This is an assessment of law. In some cases, if there is a ruling that the words are capable of a particular defamatory meaning and there is no valid defence, the defence statement of case can be struck out by virtue of rule 26.3 of the CPR. This was the decision of the Court in **Elwardo Lynch v Ralph Gonsalves, Civil Appeal no 18 of 2005,** a case from St Vincent and the Grenadines.

[20] It is also clear that the amended defence does not set out alternative meanings for those paragraphs where the defamatory meanings are denied. Mr. Tharpe relies on rule 10.5 [4] of the CPR and submits that if defamatory meanings are denied, the defendant should state what meanings are to be attributed to the defamatory words. Rule 10.5[4] reads as follows:

[4] *Where the defendant denies any of the allegations in the claim ---*

[a] the defendant must state the reasons for so doing; and

[b] if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

[21] Mr. Tharpe has submitted that this is a basis for the said defence to be struck out. However, the key issue here is whether the defendant intends to prove a different version of events. In **Lucas –Box v News Group** Ltd [1986] WLR 147, a decision of the English court of appeal, it was held that a defendant relying upon a plea of justification must make it clear in the particulars of justification the meaning to be attributed to the words he was seeking to justify. Ackner LJ, spoke to this issue in delivering the judgement of the court of appeal (page 153 f-h):

> *....in future a defendant who is relying upon a plea of justification must make it clear to the plaintiff what is the case which he is seeking to set up. The particulars themselves may make this clear, but if they are ambiguous then the situation must be made unequivocal.*

In that case, the defendants were required as a condition of the grant of leave to amend, to plead their case that the plaintiff knew clearly what they were purporting to justify.

[22] However, in the present case the defence has not pleaded justification but is essentially alleging that the words are not defamatory. They are saying that the article must be viewed within the full context of the publication. [paragragh 10]. They are alleging that the words are not defamatory because of matters set out in the defence [paragraphs 15, 17, 18, 19, 29] They are also alleging that some of the defamatory meanings attributed at paragragh 15 of the particulars of claim are artificial, unnatural and contrived [paragraph 20].

[23] It is to be noted that sections of the publication are words attributed to Mr. Tharpe who has not denied that those words are his. The defence has also pleaded background material that they intend to rely on in contesting the defamatory meanings. The court does agree to some extent with Mr. Tharpe that there is a suggestion of reliance on the plea of justification, however

there is no such pleading. In **Al Rajhi Banking and Investment Corporation v Wall Street Journal Europe SPRL [2003] EWCH 1358, (paragraph)** 14 Justice Eady expressed the view that the court will be reluctant to refuse permission to add or extend a plea of justification solely for reasons of delay:

> *....because it is not in the public interest that claimants should recover damages and thereby achieve a public vindication of reputation which is not deserved; see e.g Basham v. Gregory, 21 February 1996, unrepresented, C.A. and Mavkenzie v. Business Magazines Limited 18 January 1996, unreported, C.A.*

While there may be some ground laid for the admission of a plea of justification in the amended defence, there is no basis to strike out a defence that is not pleaded.

[24] The issues for determination, therefore, are essentially twofold. Firstly, what do the words mean? Secondly, are the words reasonable capable of a defamatory meaning or any of the words ascribed to them in the innuendo? I am seeking to determine the ordinary and natural meaning of the words so I must examine the whole publication and in its full context. The readers of the publication would not necessarily be privy to other documents referred to by the defendant, so they would not be relevant to the issue of the ordinary and natural meaning. These documents, however, including information that has been requested by the defendant, would be relevant to the issues of the truth of the facts [to be proved by the defendant] and to malice [to be proved by the claimants].

[25] At paragraph 16 of the amended defence, the defendant has admitted the meanings attributed to the words as set out in paragraph 14 [a] to [e], [i], [j], [r] and [s] of the particulars of claim. However, in relation to paragraphs 14 [f] to [h], [k] to [q], [t] to [z], the defence states that these meanings are neither admitted nor denied because of the matters set out in paragraphs 1 to 16 of the said defence as well as matters set out in paragraph 18. They have put the claimant to proof.

[26] In considering the meaning of the words, there is some guidance given by Lord Nichols in **Charleston v Newsgroup Newspaper** [1965]2 All ER 313 at 319, that the law adopts a single standard for determining whether statements are defamatory and that is the response of the ordinary listener to the publication. I also bear in mind the meaning of the word defamatory as

defined by Sir Thomas Bingham, MR in **Skuse v Granada Television Limited** [1996] **EMLR 278 at 286** where he said:

> *A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.*

Further guidelines are summarized by Sir Anthony Clarke MR in **Jeyes v News Magazines Limited** [2008] EWCA Civ. 130 at paragraph 14:

> [1] The governing principle is reasonableness.
>
> [2] 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.
>
> [3] Over-elaborate analysis is best avoided.
>
> [4] The intention of the publisher is irrelevant.
>
> [5] The article must be read as a whole and any 'bane and antidote' taken together.
>
> [6] The hypothetical reader is taken to be representative of those who read the publication in question.
>
> [7] In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced or utterly unreasonable interpretation'.
>
> [8] It follows that 'it is not enough to say that by some person or another, the words might be understood in a defamatory sense'.

The Disputed Sections

[27] Bearing in mind the above guidelines and having considered the whole publication in its full context, I am of the view that the words are capable of the meanings attributed to them as follows;

- Paragragh 14 [g]
- Paragragh 14 [h]
- Paragragh 14[m]
- Paragragh 14[n]

- Paragragh 14 [p]
- Paragragh 14 [q]
- Paragragh 14 [t]
- Paragragh 15 [a]
- Paragragh 15 [d]

[28] I will be declining to rule on whether the other meanings pleaded are capable of the defamatory meanings, as in essence they are alleging factual meanings in advance of the trial. In **Elwardo Lynch** , Barrow, JA who delivered the judgment of the court stated that it will not always be appropriate to determine the factual meaning of allegedly defamatory words in advance of trial [paragraph 14]:

> *It was appropriate in the circumstances of this case to do so. Among the circumstances that make it appropriate . . . was that there was no outstanding issue of fact to be determined at the point when the judge considered the strike out application, so there was nothing to await to be done or to emerge during the course of trial.*

[29] At the trial stage in **Elwardo Lynch**, the judge had noted that there had been discovery of documents and that witness statements and documentary evidence had been filed. Barrow LJ commented on this point [paragraph 9]:

> *'The point that the judge was making, I gather, was that in the instant case, she knew what evidence the defendant would be able to lead in support of its case.'*

[30] In essence, this is the complaint of Mr. Piper, and I must bear in mind that it is within these circumstances that the claimants are asking the court to strike out several aspects of the defendant's statement of case on the basis that they disclose no reasonable grounds for defending the claim.

Application under Rule 10.5 of the CPR.

[31] The claimants have also asked the court to examine the defence in the context of the guidelines of the abovementioned rule. Is there any basis for the defence to be struck out for failure to comply with the above rule? This section of the CPR deals with the defendant's duty to set out its case. In particular, 10.5[3], [4] and [5]
read as follows:

[1].....

[2].....

[3] In the defence the defendant must say-

[a] which [if any] of the allegations in the claim form or particulars of claim are admitted;
[b] which [if any] are denied; and
[c] which [if any] are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove

[4] where the defendant denies any of the allegations in the claim form or particulars of claim-

[a] the defendant must state the reasons for so doing; and
[b] if the defendant intends to prove a different version of events from that given by the claimant the defendant's own version must be set out in the defence.

[5] where, in relation to any allegation in the claim form------, the defendant does not-

[a] admit it; or
[b] deny it and put forward a different version of events
the defendant must state the reasons for resisting the allegation.

Paragraghs 7 and 8

[32] Mr. Tharpe takes issue with paragraphs 7 and 8 of the amended defence that responds to the issue of the readership and circulation of the newspaper locally and internationally. Paragraph 7 states that it is neither admitting nor denying the alleged readership and circulation which is described as 'substantial' by the particulars. Similarly, paragraph 8 neither admits nor denies the alleged readership internationally with the addition 'because we do not know if that allegation is true'.

Can the defendant claim that it does not know whether its readership and circulation is substantial?

[33] Rule 10.5 [5] does require a defendant who is not admitting or denying an allegation, to state the reasons for resisting it. However, Rule 10 .5 [3] [c] also allows a defendant to neither admit nor deny because he does not know if the allegation is true and requires the claimant to

prove. In relation to the issue of international readership, the defendant has said he does not know if it is true. However, he has not stated that the claimant is required to prove the allegation.

[34] In **Anwar Wright v The Attorney General**, unreported at 2009 HCV 2875, a judgment of my brother Sykes J, an application to extend time to file defence was refused because the court held the view that the proposed defence had no real prospect of success [paragraph 35]. Sykes J came to this conclusion because the defence breached rule 10.5 and failed to address specific assertions except to say it 'neither admits nor denies' the averments. These averments, however, were matters that were in the knowledge of the defendant, so the pleadings were inexcusable [paragraphs 32, 33].

[35] In the present case, the issue revolves around the word 'substantial'. There is no specific assertion to be addressed. Certainly the defendant is taking no issue with the newspaper being a national one nor the existence of the website which opens a port for international circulation. In my opinion, a trial court would be entitled to take judicial notice of the potential readership and circulation. There is no real basis for any ruling that these two paragraphs should be struck out especially in view of the fact that the defence has stated that they do not know if it is true.

Paragraph 11

[36] Mr. Tharpe has also taken issue with paragraph 11 of the amended defence in so far as it relates to paragragh 13 [vii] of the particulars of claim which deals also with the issue of substantial circulation. The same principle as stated previously in the preceding paragraph would apply to this paragragh.

Paragraph 14 of the Amended Defence

[37] In relation to the claimants' attack on the first part of paragraph 14, the issue is that it denies that certain words were defamatory of the claimant as alleged or at all. Mr. Tharpe submits that it does not provide a reason as required by the rules. In particular, this would be rule 10.5 [4] where a denial of allegations requires reasons for doing so and must set out the defendant's version if there is an intention to prove a different version. In other words, the defendant has not pleaded an alternative meaning to the words.

Analysis of Paragragh 14 of the Amended Defence

[38] It appears to the court, however, that paragraph 14 is denying that the words were defamatory as alleged, or at all. Certainly, the issue of whether the words are defamatory will be a matter for the trial court. It is the claimant who is to prove that the words in their natural and ordinary meaning convey a defamatory meaning or imputation. The defence is alleging that they will be relying on the full context of the entire article as well as other matters set out in their statement of case. Secondly the court has already formed the view that the defendant is not seeking to rely on justification. There is no obligation therefore to set out an alternative meaning.

Paragraghs 15, 17 and 18.

[39] In relation to paragraph 15, 17 and 18 of the said defence, it is Mr. Tharpe's opinion also, that the pleadings are just a denial of defamatory meanings without more. Specifically in relation to paragraph 15, the defendant states that it is denying that the published words were defamatory for reasons set out hereafter. Paragraph 18 then sets out what these matters are. Paragraph 18 speaks to several issues that must be taken into context in determining the matter. The defendant would be entitled to rely on other material as a defence. These documents would be relevant to the issues of the truth of the facts [although there is no plea of justification] and to malice. There are however references to notices of January 1 and May 12, 2010 by the FSC that I have already indicated are to be struck out.

Paragragh 17

[40] The reasoning of the court also applies to paragraph 17 of the amended defence. The defendant is requiring the claimants to prove the matters that have not been admitted and have stated that they neither admit nor deny them, because of the matters set out in paragraphs 1 - 16.

ADDITIONAL SUBMISSIONS OF THE CLAIMANTS

[41] Mr. Tharpe has submitted further that the defamatory meanings admitted by the defendant at paragragh 16 of the amended defence has the effect of an implied admission of defamatory imputations at paragragh 14[f] to [h], [k] to [q],[t] to [z]. In relation to paragragh 14 [h],[m],p],[q],[t[, I have already ruled that they are capable of the defamatory meanings implied.

However, whether the words are actually defamatory of the claimants await a determination at trial when all the evidence will be considered.

Paragraph 20

[42] In relation to paragragh 20 of the amended defence, Mr. Tharpe states it is a bare denial which is prohibited by the rules. This is not a proper assessment. In denying the meanings attributed, the defendant has referred back to all the pleadings at paragraph 1 to 19 of the said defence. Paragraph 20 speaks to defamatory meanings alleged at paragraph 15 b to e of the particulars of claim. The court has ruled that paragraph 15[d] is capable of the defamatory meeting. However, I repeat that it is for the trial court to come to a conclusion as to whether the words are defamatory of the claimant.

RUMOUR OR FACT?

[43] Mr. Tharpe has submitted that there are certain aspects of the defence statement of case that are improper as the defendant cannot rely on the opinions held by law enforcement authorities such as the FSC and the Real Estate Board as proven facts. These references are found at paragraphs 18 c, d, e and 19. He further submitted that they must prove that the subject matter of the rumour is true. In **Armstrong v Times Newspaper Ltd and Ors 2004 EWHC 2928 [QB]** the court was essentially considering an innuendo which was a repetition of suspicion that the plaintiff, a cyclist, was probably taking drugs. Mr. Justice Eady [paragraph 22] quoted Lord Devlin's observation on the point in **Lewis v Daily Telegraph Ltd {1964} A C 234,285** where he said:

> *...loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded.*

Mr. Justice Eady concluded:

> *Likewise, repetition and loose talk about 'questions' can convey the impression that there are reasonable grounds to suspect.*

[44] In the publication, the article states that Careif is one of several alternative investments clubs on the blacklist of the FSC. This is either a fact or not. The defendant has referred to publications by the FSC on the April 06, 2008 website. If this is so, then it cannot be held that the defendant was repeating a rumour as in **Armstrong.** In relation to the Real Estate Board, paragraph 18 c speaks to a notice published by the Board on January 21, 2007 in relation to Careif Limited. Paragraph 32 of the amended defence also refers to an advertisement by the claimants with respect to the first claimant dated 26 January 2007. In that advertisement, it is said that Careif:

'continues to suffer fall outs from the advisory----in which the Real Estate Board stated that Careif Limited is not a registered real estate developer.'

[45] This advertisement and the notices are either factual or not. It is disingenuous of the claimants to therefore allege that these issues are repetitions that are impermissible. The repetition complained of in **Armstrong** can clearly be differentiated.
There is no legal basis therefore to strike out the references to the FSC and the Real Estate Board. Although Mr. Tharpe has submitted further that the FSC publication refers to Careif Investment Fund and not Careif Ltd, the relationship between the various entities has not been made clear in any of the pleadings and the reference appears to be to the same entity.

QUALIFIED PRIVELEGE

[46] The final issue to be decided is whether the defence of Qualified Privelege should be struck out. The amended defence pleads qualified privilege at paragragh 37. The defence of qualified privilege is founded upon the need to permit the making of statements where there is a duty, legal, social or moral or sufficient interest on the part of the maker to communicate them to recipients who have a corresponding duty to receive them, even though they may be defamatory. It is the occasion on which the statement is made which carries the privilege. In relation to this particular case, the law is concerned with balancing the freedom of expression, the importance of the role of the media in the expression and communication of information and the reputation of individuals as an integral and important part of their dignity.

[47] The balance is to provide protection for responsible journalism when matters of public concern are being reported. In relation to this issue, the case of **Reynolds v Times Newspaper Ltd And Others [2000] EMLR 1** has established guidelines to be considered at a trial in order to determine whether this defence can be upheld. These guidelines are not exhaustive but the jury must decide what weight to give to these and any other relevant factor. The guidelines are listed as follows:

1. The seriousness of the allegation. The more serious the charge, the more the public is misformed and the individual harmed if the allegation is untrue.
2. The nature of the information and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the claimant, however an approach to the claimant will not always be necessary.
8. Whether the publication contained the gist of the claimant's side of the story.
9. The tone of the broadcast. It can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

[48] The issue for determination is whether the defendant fell short of the standard to be expected of responsible journalism. The factors that are being relied upon by the defendant are set out at paragragh 37 a to m.

[49] The defendant must satisfy the duty interest test and establish that they acted in accordance with the tenets of responsible journalism. The issue of the financial woes of Careif, a company that obtained funds from the public for investment, would be a matter of public interest.

[50] It is to be noted also that a substantial part of the publication is allegedly based on a memorandum sent out to employees by Mr. Tharpe. It also spoke to investigations by the FSC into the business. The defendant has referred to public notices sent out by the FSC concerning Careif.

[51] The publication also refers to employees not being paid because of cash flow problems. The article quotes Mr. Tharpe as speaking to this issue. It speaks to Careif being sued by a Mandeville company. Paragragh 18 g of the said defence cites that action as one filed on the 3rd March, 2008 before the Manchester RM court. It speaks to investors in certain planned developments of the company and quotes an informant as questioning where the funds are as none of the proposed developments have started.

[52] The application for disclosure referred to above includes documentation in relation to these planned developments. The defense also avers at paragraph 37 k and l , that an interview was requested from Mr. Tharpe on the 6th May 2008 and the reporter referred to an employee of the claimants.

[53] The central aspect of the defense of privilege is extracted from the judgement of Lord Hobhouse [page 63] in **Reynolds:**

The liberty to communicate [and] receive information has a similar place in a free society but it is important always to remember that it is the communication of information, not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation.

[54] Based on all the above circumstances and the legal issues involved, it is my opinion that the pleadings as set out in relation to privilege are sufficiently clear so that the claimants are able to understand how the defendant claims to have discharged the obligation of responsible journalism. Proof of malice defeats the defence and the claimants have the burden to prove the presence of any such improper motive. I could only strike out this defence if, [having assumed

that the factual issues being relied on by the defence can be established at trial], I am prepared to hold that the defendant cannot bring itself within the framework of the **Reynolds'** principles. I am not of the view that I could properly make the above finding. There is no basis for a ruling that this defence should be struck out either in relation to rule 10.5 or rule 26.3[c].

CONCLUSION

In my closing remarks, It is my opinion that the claimants attack on paragraphs 38 and 39 of the amended defence is ill founded. Paragraph 39 is merely a repetition of all the allegations denied and can be considered as verbiage. Paragraph 38 claims a constitutional right to freedom of expression by virtue of section 22 of the Jamaica Constitution. This is not an issue that should be a request for an order to strike out at this stage of the proceedings. The preliminary issues that have been under consideration relate to the pleadings that are sufficient for a defence in relation to an action of defamation. The amended defence is to stand with the relevant sections as indicated struck out.

Costs to be in the claim.