



[2023] JMSC CIV.250

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

**CIVIL DIVISION**

**CLAIM NO. 2017HCV03800**

<b>BETWEEN</b>	<b>OWEN ELLINGTON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>REVEREND MERRICK “AL” MILLER</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>REVEREND HERRO BLAIR</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>NATIONWIDE NEWS NETWORK LIMITED</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN CHAMBERS**

Ms. Sharon Usim, Ms. Deborah Martin and Miss Kelly Hamilton instructed by Usim, Williams & Company for the Claimant/Respondent.

Mr. Wentworth Charles and Mr. Demetrie Adams instructed by Wentworth Charles & Company for the 2<sup>nd</sup> Defendant/Applicant.

**Heard: October 12, 2023, November 17 and November 23, 2023**

**Application to Strike Out – Application for Summary Judgment- Whether Words Bear/Capable of Bearing a Defamatory Meaning – Defences of Truth and Absolute Privilege - Rule 15.2 (a) and 69.4 of the Civil Procedure Rules – Section 17 of The Political Ombudsman (Interim) Act**

**TRACEY-ANN JOHNSON, J (AG.)**

**BACKGROUND**

[1] The Claimant/Respondent filed a claim in this Honourable Court on November 10, 2017 against Reverend Merrick “Al” Miller, the 1<sup>st</sup> Defendant, Reverend Herro Blair, the 2<sup>nd</sup> Defendant/Applicant and Nationwide News Network Limited, the 3<sup>rd</sup>

Defendant, seeking inter alia, *“Damages for Defamation including exemplary and aggravated Damages resulting from statements made by the 1<sup>st</sup> Defendant at a Press Conference and in various publications and statements made by the 2<sup>nd</sup> Defendant on a radio broadcast hosted by the 3<sup>rd</sup> Defendant”*. A Notice of Discontinuance was filed in this Honourable Court in relation to the 3<sup>rd</sup> Defendant on July 7, 2023.

**[2]** The Claimant's/Respondent's claim in relation to the 2<sup>nd</sup> Defendant/Applicant as particularised in the Particulars of Claim filed on November 10, 2017 is as follows:

- “4. The second Defendant is a well-known Minister of Religion and at the material time was the Political Ombudsman and head of the Peace Management Initiative located at 85A Duke Street, Kingston.*
- 6. By way of background, on the 22<sup>nd</sup> day of July, 2016, the 1<sup>st</sup> Defendant was convicted in the St. Andrew Parish Court for Perverting the Course of Justice. The 1<sup>st</sup> Defendant was sentenced on 15<sup>th</sup> September, 2016. The trial and conviction for the First Defendant arose after the First Defendant was intercepted along Mandela Highway on the 22<sup>nd</sup> June, 2010 by members of the Jamaica Constabulary Force transporting the then fugitive Christopher “Dudus” Coke. At the material time, a warrant had been issued for the arrest of Christopher Coke.*
- 16. On September 15, 2016 the Second Defendant made defamatory statements whilst participating in an interview which was broadcast and published by radio and internet by the Third Defendant on Nationwide Radio. At the material times, the Third Defendant's website was open to and accessed by users of the worldwide web who chose to log into the address referred to in paragraph 6 and thereafter to listen to the Nationwide Radio Station.”*

**[3]** The words spoken were set out at paragraph 18 of the Particulars of Claim and the full transcript of the radio interview was attached to the Particulars of Claim. At paragraphs 20 to 21 of the Particulars of Claim, the Claimant/Respondent further particularised as follows:

- “20. In their natural and ordinary meaning the said words and defamatory statements at [paragraph]... 18 and more fully set out in the full transcripts attached hereto, meant and were understood to mean that the Claimant:*
  - (i) Is a dishonest person.*

- (ii) *Is an untrustworthy person.*
- (iii) *As the then Commissioner of Police participated in a criminal conspiracy.*
- (iv) *Is corrupt and cowardly.*

21. *Further or alternatively, the said words bore and were understood to bear the meaning pleaded in paragraph 20 above and by way of innuendo.*

**PARTICULARS PURSUANT TO RULE 69 OF THE CIVIL PROCEDURE RULES**

- a) *The Claimant who at all material times was the Commissioner of Police and head of the Jamaica Constabulary Force conspired with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to participate in a criminal act by agreeing to allow for the evasion of capture of wanted fugitive Christopher Coke for whom there was a “warrant” issued pursuant to the Jamaica Extradition Act.*
- b) *The Claimant is a dishonest person who lied and betrayed the trust of the 1<sup>st</sup> Defendant who relied on assurances given by him.*
- c) *The Claimant is a coward in that he refused to attend Court to support the First Defendant, in the circumstances where the First Defendant was acting pursuant to the instructions of the Claimant.*
- d) *The Claimant is a coward for failing to give evidence at the trial of the First Defendant and giving the “full” story.*
- e) *The Claimant did not give evidence at the trial of the First Defendant because he had something to hide.”*

[4] In his Defence filed on May 21, 2018, the 2<sup>nd</sup> Defendant/Applicant stated in summary that he participated in an interview on September 15, 2016 which was conducted by Cliff Hughes and Patria Kay Aarons, which the 3<sup>rd</sup> Defendant broadcasted on radio. He stated that paragraph 18 of the Particulars of Claim is denied as the transcript in its natural and ordinary meaning when taken in its proper context was not defamatory of the Claimant/Respondent as alleged or at all. Additionally, he denied paragraphs 20 and 21 of the Particulars of Claim and stated that the words in their natural and ordinary meaning did not bear nor were they capable of bearing the meanings as alleged in paragraph 20 inclusive of subparagraphs “(i) to (iv)”. He further stated that if the words in their natural and

ordinary meaning bore and were understood to bear the meanings set out in the transcript at paragraph 18, they were true in substance and in fact. He stated that the Claimant/Respondent was guilty of betraying the trust and confidence of the 2<sup>nd</sup> Defendant/Applicant when he denied meeting with the 2<sup>nd</sup> Defendant/Applicant at the Claimant's/Respondent's Office and authorised meetings with Christopher "Dudus" Coke. He further stated that the Claimant/Respondent was being hypocritical by making public pronouncements contrary to the facts which he well knew having instructed the 2<sup>nd</sup> Defendant/Applicant to inform Christopher "Dudus" Coke to turn himself into the American or Jamaican authorities.

- [5] He further stated that the Claimant's/Respondent's conduct, as Commissioner of Police in refusing to acknowledge and/or admit that the 2<sup>nd</sup> Defendant as Political Ombudsman and Chairman of the Peace Management Initiative (PMI) was asked to meet with Christopher "Dudus" Coke and advise him of the possible loss of life and damage to property if he failed to turn himself into the United States Embassy or the Jamaican authorities, was deceitful. Additionally, he denied that the said words in their natural and ordinary meaning bore or were understood to bear any of the meanings alleged in paragraph 21 of the Particulars of Claim and Particulars a) to e) which were set out pursuant to *rule 69* of the **Civil Procedure Rules**. He relied on *section 20* of the **Defamation Act**. He relied on the defences of Truth and Absolute Privilege as also stated in his Affidavit evidence as outlined below at paragraphs [8] to [12].

## THE APPLICATION

- [6] On July 14, 2023, the 2<sup>nd</sup> Defendant/Applicant filed a Notice of Application for Court Orders in this Honourable Court to determine the following:

- "1. ... *whether the words and/or publication, the subject matter of this Claim: -*
- a. *Bears a defamatory meaning as alleged by the Claimant or at all;*

- b. If the words/publication, the subject matter of this Claim, is capable of bearing a defamatory meaning as alleged by the Claimant or at all, whether those words were published on an occasion which attracts the defences of truth and absolute privilege pursuant to **Section 17** of the **Political Ombudsman (Interim) Act 2002**;*
- 2. If this Honourable Court determines pursuant to paragraph 1(a) hereof that the words/publication was either not capable of bearing a defamatory meaning as alleged or at all, that the Claim be struck out and/or there be summary judgment for the 2<sup>nd</sup> Defendant.*
- 3. In the alternative and/or in addition, if this Honourable Court determines pursuant to paragraph 1(b) hereof that the words/publication, the subject matter of this Claim, were published on an occasion which attracts the defences of truth and absolute privilege, that the Claim be struck out and/or there be summary judgment for the 2<sup>nd</sup> Defendant.”*

**[7]** The grounds upon which the 2<sup>nd</sup> Defendant/Applicant seek the Orders are as follows:

- “a. Pursuant to **Rule 69.4** of the **Civil Procedure Rules (“CPR”)** at any time after the service of the Particulars of Claim, either party may apply to a judge sitting in private for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statements of case. If it appears to the judge on the hearing of an application that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statements of case, the judge may dismiss the claim or make such order or give such judgment in the proceedings as may be just;*
- b. Pursuant to **Rule 15.2(a)** of the CPR, the Court may give summary judgment on the claim or on a particular issue if it considers that the Claimant has no real prospect of succeeding on the claim or the issue;*
- c. The 2<sup>nd</sup> Defendant has a case “which is better than merely arguable” and he has a ‘realistic’ as opposed to a ‘fanciful’ prospect of success;*
- d. The words spoken in their natural and ordinary meaning were not defamatory as alleged by the Claimant;*
- e. The words spoken by the 2<sup>nd</sup> Defendant were in his capacity as Political Ombudsman and/or Chairman of the Peace Management Initiative (PMI);*

- f. *The 2<sup>nd</sup> Defendant was the former Political Ombudsman and acted at all material times in his official duties under the **Political Ombudsman (Interim) Act 2002** and enjoys absolute immunity from all proceedings whatsoever for acts done in relation to his duties as Political Ombudsman;*
- g. *The words/publication formed part of the 2<sup>nd</sup> Defendant's Annual Report [2010] to the Parliament of Jamaica;*
- h. *It is in the interests of the administration of justice to grant the Orders sought herein for the proper adjudication of the issues between the parties;*
- i. *The interest of the 2<sup>nd</sup> Defendant will be protected and served by the terms of the Orders; and*
- j. *The overriding objective of the Rules would be best served by this Honourable Court making the aforesaid orders for the claim to be struck out."*

#### **THE AFFIDAVIT EVIDENCE OF THE 2<sup>ND</sup> DEFENDANT**

[8] The 2<sup>nd</sup> Defendant/Applicant relied on the Affidavit of Reverend Herro Blair in Support of Notice of Application for Court Orders which was filed on July 14, 2023. In his Affidavit he sought leave to rely on his defence filed on May 21, 2018. He stated that by virtue of section 20 (2) of the **Political Ombudsman (Interim) Act**, he was required to submit an Annual Report to the Houses of Parliament on matters investigated by his office or those matters which required the special attention of Parliament which he did. On or around September 15, 2016 he gave an interview to Nationwide Radio station where he answered truthfully the questions which were posed to him. He gave an account of the events leading up to the Tivoli incursion by the security forces and thereafter. He stated that he did not believe that the words/publication made by him which are complained of in their natural and ordinary meaning are defamatory. By virtue of section 17 (1), (2) and (3) of the said Act, the words were spoken on an occasion of absolute privilege as the words/publication were him repeating what transpired in his official duties as Political Ombudsman and Head of the PMI which formed part of his 2010 Annual Report to the Houses of Parliament.

- [9] He further stated that on or around May 9, 2010, he was invited by the Claimant/Respondent to a meeting at his office along with other members of the police force. Whilst at the meeting, he was instructed to visit Tivoli and to speak to the fugitive, Christopher “Dudus” Coke, in an effort for him to turn himself in to the authorities. He was informed and believed that Christopher “Dudus” Coke was also at liberty to turn himself in to the American authorities at their Embassy or in the alternative, to the Jamaican authorities where he would face the local courts. It was further discussed at the meeting that should Christopher “Dudus” Coke adopt the option of going straight to the American authorities, his sentence would be likely reduced. Following the meeting, on the said date, he proceeded to Tivoli Gardens and advised Christopher “Dudus” Coke of the options proposed and he refused to accept either option. After leaving the meeting, he was telephoned by the Claimant/Respondent who enquired whether he knew that the 1<sup>st</sup> Defendant was also going to Tivoli Gardens to which he responded in the affirmative.
- [10] He was aware that on May 24, 2010 there was an operation led by a joint police and military force in Tivoli Gardens and its immediate environs. On or around June 2010, he heard a newscast that the 1<sup>st</sup> Defendant and Christopher “Dudus” Coke were stopped while travelling in a motor vehicle along Ferry, in the parish of Saint Andrew. To his surprise within an hour or so, he heard the Claimant/Respondent on the radio indicating that the 1<sup>st</sup> Defendant was a person of interest. He was shocked because of his prior knowledge that the Claimant/Respondent was aware of the attempts being made by him and the 1<sup>st</sup> Defendant to get Christopher “Dudus” Coke to surrender and turn himself into the authorities. He felt betrayed because he could have equally been placed in that position.
- [11] The 1<sup>st</sup> Defendant was subsequently arrested and charged for harbouring a fugitive and Attempting to Pervert the Course of Justice. Christopher “Dudus” Coke was eventually extradited to the United States of America. After the occurrence of the Tivoli incursions, he prepared an Annual Report of 2010 to the Parliament and also appeared in the Commission of Enquiry held by the Government of Jamaica to give an independent assessment of the operations carried out by the security force

as commissioned by Former Prime Minister, the Honourable Orette Bruce Golding and his role as Political Ombudsman at the material time.

- [12] He is of the view that he acted in accordance with his functions as Political Ombudsman in 2010 in relation to this matter. He denies that he has defamed the Claimant and even if he made defamatory statements attributable to him, he relies on the defences of Truth and Absolute Privilege as he is protected from suit under *section 17* of the **Political Ombudsman (Interim) Act 2002**. The overriding objective of the rules would be best served by this Honourable Court making the aforesaid Orders for the claim to be struck out.

## ISSUES

- (1) Whether the statements made by the 2<sup>nd</sup> Defendant/Applicant in an interview given on the 15<sup>th</sup> day of September 2016 and conducted by Nationwide News Network Limited bear and/or are capable of bearing a defamatory meaning?
- (2) Whether the 2<sup>nd</sup> Defendant/Applicant is entitled to rely on any relevant defences?
- (3) Whether the Claimant's/Respondent's statement of case should be struck out or alternatively, whether the 2<sup>nd</sup> Defendant/Applicant is entitled to Summary Judgment?

## LAW AND ANALYSIS

### **Issue 1 - Whether the statements made bear and/or are capable of bearing a defamatory meaning?**

- [13] At this stage of the proceedings, the Court has been asked to rule on the meaning of the words/publication which are/is the subject matter of this claim. That is, the Court has been asked to determine whether the words/publication bear/bears or are/is capable of bearing a defamatory meaning as alleged by the Claimant/Respondent. The law governing defamation claims is contained in the



**Defamation Act** of 2013 and *Part 69* of the **Civil Procedure Rules (CPR)**. The **Defamation Act** of 2013 was enacted and amended the law relating to libel and slander and other malicious falsehoods. This also resulted in the abolition of the distinction between libel and slander and the establishment of one single cause of action known as defamation. The interpretation section of the Act, defines a “*defamatory matter*” to mean “*any matter published by a person that is, may be, or alleged to be defamatory of a person.*” The word “*matter*” is further defined and “*includes words and gestures or oral utterances*”. *Section 5(2)* of the legislation stipulates that except where the Act expressly provides otherwise, it does not affect the law relating to the tort of defamation. As it relates to defences, *section 19* preserves the usual defences available to a defendant, but replaces the defence of Justification with the defence of Truth. The defence of Absolute Privilege is not provided for under the statute. The defendant has the burden to establish any of the available defences on a balance of probabilities. For words to be defamatory, they must tend to lower the claimant in the estimation of right-thinking members of society generally, and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem. With that being said, vulgar abuse is not defamatory, “*for a mere general abuse spoken no action lies*” that is to say, words uttered as general vituperation are not actionable: *Bollers, J in Ramsahoye v Peter Taylor and Co Ltd* [1964] LRBG 329 at p. 331 as cited in **Commonwealth Caribbean Tort Law**.

[14] *Rule 69.4* of the **CPR** provides as follows:

- “69.4 (1) *At any time after the service of the particulars of claim, either party may apply to a judge sitting in private 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.*
- (2) *If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statement of case, the judge may dismiss the claim or make or make such other order or give such judgment in the proceeding as may be just.*”

- [15] The Court's task pursuant to this section is to determine whether the words/publication are/is capable of bearing the meaning or meanings alleged by the Claimant/Respondent and not to determine whether the actual meaning of the words/publication alleged by the Claimant/Respondent are/is defamatory. This Court is to lay down the limits of the range of possible defamatory meanings of which the words/publication are/is capable and it is for the jury to determine the actual meaning of the words within the permissible range: See **Mapp v News Group Newspaper Ltd** [1998] Q.B 52 and paragraphs 10 and 12 of the judgment in **Khemlani Mart Limited and Anor v Radio Jamaica Limited** (unreported), Supreme Court, Jamaica, Claim No. 2007HCV03326, Judgment delivered May 26, 2008.
- [16] The Court has considered and is in agreement with the view expressed by Thompson-James, J at paragraph 36 of the judgment in **Julie Blair-Johnson v Trend Media Limited and Avando Mitchell T/A Jaradio Media** [2019] JMSC Civ 232, that whilst the approach in respect of a substantive defamation claim is to consider the single meaning the words convey rather than all the meanings, an application under *rule 69.4* requires a consideration of all the meanings attributed to the words by the Claimant, as the rule requires the Judge to determine "*whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case*". The ultimate determination of the single meaning the words published convey, is to be determined by the tribunal of fact.
- [17] The test to be applied in determining whether these words are capable of a defamatory meaning is to give the words complained of the natural and ordinary meaning which they would have conveyed to the ordinary, reasonable, fair-minded person, that is, a person who is not naïve, unduly suspicious or avid for scandal. In **Deandra Chung v Future Services International Limited and Yaneek Page** [2014] JMCA Civ 21, Morrison, JA (as he then was) stated at paragraph [16] of the judgment that:

[16] I take as a starting point **Bonnick v Morris et al** [2002] UKPC 31, in which Lord Nicholls explained (at para. 9) the correct approach to determining whether a statement can bear or is capable of bearing the defamatory meaning applied:

*“As to meaning, the approach to be applied by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in **Skuse v Granada Television Ltd** [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the [newspaper], reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines, but he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The Court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant...”*

[18] The Court is not limited by the meanings which either the Claimant or the Defendant sought to place on the words: **Skuse v Granada Television Limited** [1996] E.M.L.R 276.

[19] At paragraph 43 of the judgment in **Khemlani Mart Limited and Anor v Radio Jamaica Limited** relying on the authority of **Jones v Skelton** [1963] 1 W.L.R. 1362, McDonald-Bishop, J (Ag.) (as she then was) considered what is meant by the ordinary and natural meaning of words and stated as follows:

*“43. It is established on high authority that the ordinary and natural meaning of the words may either be the literal meaning or it may be implied or inferred or may be an indirect meaning. Any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be part of the ordinary and natural meaning of words. The natural or ordinary meaning may, therefore, include any implication or inference which a reasonable listener, viewer, or reader guided not by special but only general knowledge and not fettered by any strict legal rules of construction would draw from the words...”*

[20] In **Khemlani Mart Limited and Anor v Radio Jamaica Limited**, McDonald-Bishop, J (Ag.) (as she then was) at paragraph 13 of the judgment, identified the question that is reserved for the court's contemplation in these matters as follows:

“13. *The question that is reserved for my contemplation is strictly one of law and that is to say whether the words alleged by the claimants in their statement of case as being defamatory of them are capable of the meanings attributed to them by the claimants or capable of any less defamatory meaning whether pleaded or not by either party. The critical question is really this: would an ordinary man reading the publication complained of discover in it matters defamatory of the claimants? It is not the meaning that suspiciously-minded persons would put on the words that is relevant but rather the most damaging meaning that the ordinary fair-minded person who is not unusually suspicious or unusually naïve would put on them.*”

[21] The Court is to decide whether the ordinary, reasonable, fair-minded person could regard the words as defamatory. If they are capable of being so regarded, then it will be for the tribunal of fact to decide whether or not the words did bear a defamatory meaning.

[22] In considering the appropriate standard that the words should reach in determining whether they are capable of the alleged defamatory meaning, McDonald-Bishop, J (Ag.) (as she then was) stated at paragraph 17 of her judgment in **Khemlani Mart Limited and Anor v Radio Jamaica Limited** as follows:

“17 *...Following on the guidance afforded by the decisions applying RSC Ord. 82 r. 3A [which is identical to our r.69.4], I am minded to say that the words complained of should not merely be arguably capable but reasonably capable of conveying the meaning ascribed to them. In my view, the words alleged should be such as to disclose a reasonable ground for complaint against the Defendant since under the new regime, the Court may strike out a claim where it fails to disclose a reasonable (not an arguable) ground for bringing the claim.*”

[23] Having considered the cases of **Charleston v News Group Newspaper Ltd** [1995] 3 All ER 313 and **English and Scottish Co-operative Property Mortgage and Investment Society v Odham's Press** [1940] 1 K.B. 440 as cited by McDonald-Bishop, J (Ag.) (as she then was) in **Khemlani Mart Limited and Anor v Radio Jamaica Limited** (paragraphs 40 to 41 of the judgment), although the facts in the latter case are different from the facts of the instant case, the Court extracted certain principles which are useful for determining the issues in this case. From those authorities, it is clear that in deciding whether words spoken or

published are defamatory, the court has to consider all the words and the context within which they were used. The court must not look at the meaning of any particular word in isolation but must consider the overall meaning of the words or publication when taken collectively. The defamatory effect of a particular word by itself may be neutralized when considered within the context of the text or the words spoken as a whole.

**[24]** In this case, there is no dispute that on September 20, 2016, the 2<sup>nd</sup> Defendant/Applicant participated in an interview conducted by Cliff Hughes and Patria Kay Aarons which was broadcasted by Nationwide News Network. The 2<sup>nd</sup> Defendant/Applicant has not disputed that he spoke the words contained in the transcript (as extracted and contained in the Particulars of Claim) during the course of the interview. Neither did he take any issue with whether the words spoken referred to the Claimant/Respondent. However, he contends that the transcript in its natural and ordinary meaning, when taken in its proper context, was not defamatory to the Claimant/Respondent. He further relies on the defences of Truth and Absolute Privilege.

**[25]** Having considered the principles outlined above and the submissions made by counsel for the 2<sup>nd</sup> Defendant/Applicant and counsel for the Claimant/Respondent, I will examine the different meanings pleaded by the Claimant/Respondent in relation to the words/publication, as well as consider the meanings that are related together to determine whether they are capable of bearing a defamatory meaning. I will also utilize the approach stipulated by the authorities cited.

*The Claimant is a dishonest person; the Claimant is an untrustworthy person; The Claimant is a dishonest person who lied and betrayed the trust of the 1<sup>st</sup> Defendant who relied on assurances given by him*

**[26]** The words when considered in their full context may suggest that the Claimant/Respondent in his capacity as Commissioner of Police had specifically made arrangements with the 2<sup>nd</sup> Defendant/Applicant and the 1<sup>st</sup> Defendant for

them to assist with having Christopher “Dudus” Coke turn himself in to either the United States Embassy or the Jamaican authorities. They may further suggest that the Claimant/Respondent was aware of the instructions that he had given to the 2<sup>nd</sup> Defendant/Applicant and the 1<sup>st</sup> Defendant and the attempts that they would be making to get Christopher “Dudus” Coke to surrender to the authorities. Yet, when Christopher “Dudus” Coke and the 1<sup>st</sup> Defendant were found together, the Claimant/Respondent in his capacity as Commissioner of Police designated the 1<sup>st</sup> Defendant as a person of interest. In these circumstances, the Claimant/Respondent sought to distance himself from the arrangement and to suggest that he had no knowledge of the actions embarked on by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was subsequently charged in these circumstances. They also are capable of connoting that this was a betrayal of trust in circumstances where the 2<sup>nd</sup> Defendant/Applicant and the 1<sup>st</sup> Defendant should have been able to rely on the security forces based on the discussions had and the instructions given. Therefore, when the words are considered and examined within their full context, the Court is of the view that the words in their natural and ordinary meaning are capable of bearing the meaning that the Claimant/Respondent is a dishonest and untrustworthy person. The words are also capable of bearing the meaning that the Claimant/ Respondent is a dishonest person who lied and betrayed the trust of the 1<sup>st</sup> Defendant who relied on assurances given by him.

*The Claimant is corrupt and cowardly*

**[27]** In this regard, the Claimant/Respondent has asserted that:

- “(c) *The Claimant is a coward in that he refused to attend Court to support the first Defendant, in the circumstances where the First Defendant was acting pursuant to the instructions of the Claimant.*
- (d) *The Claimant is a coward for failing to give evidence at the trial of the first Defendant and giving the “full story”.*
- (e) *The Claimant did not give evidence at the trial of the First Defendant because he had something to hide.”*

**[28]** In the Court's view, the words spoken by the 2<sup>nd</sup> Defendant/Applicant in their natural and ordinary meaning are capable of connoting that the Claimant/Respondent being cognizant of the background and circumstances within which the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant/Applicant sought to assist the security forces to get Christopher "Dudus" Coke to surrender to custody, was obligated to disclose the full story. This is what is expected of an individual occupying the office of head of the country's police force. Such an individual is expected to be forthright in their dealings and to possess the attributes of honesty and integrity. They may further suggest that the Claimant/Respondent acted in this way because he himself had something to hide. He chose to abstain from participating in the Court proceedings because of his own legal vulnerabilities. In failing to do what he was obligated to do, he was a coward. Therefore, the Court is of the view that the words in their natural and ordinary meaning are capable of bearing the meanings ascribed to them by the Claimant/Respondent.

*The Claimant as the then Commissioner of Police participated in a criminal conspiracy; the Claimant who at all material times was the Commissioner of Police and Head of the Jamaica Constabulary Force conspired with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to participate in a criminal act by agreeing to allow for the evasion of capture of wanted fugitive Christopher Coke for whom there was a "warrant" issued pursuant to the Jamaica Extradition Act*

**[29]** Having examined the words within their context, the 2<sup>nd</sup> Defendant/Applicant was being interviewed after the 1<sup>st</sup> Defendant was convicted for an offence in circumstances where according to the 2<sup>nd</sup> Defendant/Applicant, the 1<sup>st</sup> Defendant was doing what he was instructed by the Claimant/Respondent to do. An ordinary and reasonable person could infer from the words used that the Claimant/Respondent participated in the acts and/or was the source of the conduct which led to the 1<sup>st</sup> Defendant's arrest and subsequent conviction. Therefore, these words are capable of bearing the defamatory meanings ascribed to them by the Claimant/Respondent in this regard.

[30] The Court notes that the Claimant/Respondent at paragraph 21 of the Particulars of claim stated that, *“Further or alternatively the said words bore and were understood to bear the meaning pleaded in paragraph 20 above and by way of innuendo.”* Part 69.2 (b) of the **CPR** stipulates that, the particulars of claim in a defamation claim must, in addition to the matters set out in Part 8, *“where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, give particulars of the facts and matters relied on in support of such sense.”* Whether words are capable of meaning by innuendo depends on whether with the knowledge of special facts (as pleaded), individuals would take the words used as defamatory of the claimant: See **Lewis v Daily Telegraph** [1964] AC 234. In order to ground a true innuendo, the claimant must plead the special meaning he contends for and prove that the facts upon which this meaning is based were known to at least one of the persons to whom the words were published: See **Gatley on Libel and Slander**, 9<sup>th</sup> edition, para. 3.17 as cited by Morris, JA (as he then was) at paragraph [23] of the judgment in **Deandra Chung v Future Services International Limited and Yaneek Page**. In the latter case, the appellant in the particulars in support of the innuendo stated that, *“It is commonly known by right thinking Jamaicans that such publications is [sic] warranted in circumstances where ex-employees are dishonest, thieves, fraudsters and are purporting the [sic] act for their ex-employees for the benefit of the ex-employees”*. Therefore, the words complained of were considered in both their natural and ordinary meaning and in their alleged extended meaning by way of the pleaded innuendo.

[31] In the case before this Court, based on the structure of the Particulars of Claim, the Court has not been able to identify any specific particulars or special meanings pleaded in support of any alleged defamatory meaning by way of innuendo outside of what was pleaded at paragraphs 20 and 21 of the Particulars of Claim. The Court also noted that there is very little difference in substance between what was pleaded at both paragraphs. It may be that some of the words are capable of bearing a defamatory meaning by way of innuendo, if the Claimant/Respondent



were able to prove at trial that the words are untrue as well as the extrinsic facts to show that certain persons hearing or reading the words had special knowledge of the Claimant/Respondent that might lead such a person to attribute a meaning to the words that was not apparent to those who do not have that special knowledge.

**Issue 2 - Whether the 2<sup>nd</sup> Defendant/Applicant is entitled to rely on any relevant defences?**

[32] The authorities have indicated that the court is not concerned at this stage with the merits or demerits of any possible defences to the Claimant's/Respondent's claim: **Skuse v Granada Television Limited** [1996] E.M.L.R 276 as cited at paragraph 12 of the judgment of McDonald-Bishop, J (Ag.) (as she then was) in **Khemlani Mart Limited and Anor v Radio Jamaica Limited**. At paragraph 25 of the judgment in the **Khemlani Mart** case McDonald-Bishop, J (Ag.) (as she then was) stated that:

“25. *In considering this application, I must point out from the very outset that it is not for me to say whether or not I believe the Claimants or the Defendant on any matter especially in so far as it relates to the exact terms of the publications in question. My task is to determine whether the words alleged by the claimant to have been published by the Defendant and which the Claimants are claiming are defamatory of them are capable of the meaning attributed to them in paragraph 6 of the Claimants' particulars of claim. It is the Claimants' statement of case concerning alleged defamation that is now material and so the merit or demerit of the possible defence to the Claim is immaterial.*”

[33] In **Julie Blair-Johnson v Trend Media Limited and Avando Mitchell T/A Jaradio Media**, Thompson-James, J pointed out at paragraph 44 of the judgment as follows:

“[47] *...the way in which the article was framed, and the great reliance placed on the alleged eyewitness' testimony, gives the impression that the matters stated therein are true. So too does the reference to the investigation by the police. I believe that whether this is actually true, particularly in light of the fact that the claimant has not substantially denied the matters stated in the article, is a matter to*

*be dealt with in respect of the defence of truth at trial. The court is not here concerned with the possible defences.”*

[34] In this case, the 2<sup>nd</sup> Defendant/Applicant has raised the defences of Truth and Absolute Privilege. It is clear that what the 2<sup>nd</sup> Defendant/Applicant is seeking is an examination of the defences to determine their viability. However, whether or not these are defences that he can successfully raise is a triable issue and not one that can be disposed of summarily. The Court is fortified in this position by the guidance provided by and posture adopted by the courts in the cases of **Skuse v Granada Television Limited**, **Khemlani Mart Limited and Anor v Radio Jamaica Limited** and **Julie Blair-Johnson v Trend Media Limited and Avando Mitchell T/A Jaradio Media**. Therefore, the Court will abstain from any analysis of the merit or demerit of the defences raised as that is not a material consideration for the Court at this stage.

**Issue 3 - Whether the Claimant's/Respondent's statement of case should be struck or alternatively, whether the 2<sup>nd</sup> Defendant/Applicant is entitled to summary judgment?**

[35] By virtue of *rule 69.4(2)* of the **CPR**, the Court is empowered to strike out or dismiss a claim where it finds that the words complained of are not capable of bearing a defamatory meaning. The rationale seems to be that if the Claimant's/Respondent's case is bound to fail at trial, then he should know it and the overriding objective would be achieved by ending the case at an early stage: **Khemlani Mart Limited and Anor v Radio Jamaica Limited** (paragraph 24). The Court having found that the words are capable of bearing the defamatory meanings attributed to them by the Claimant/Respondent cannot strike out the Claimant's/Respondent's statement of case pursuant to *rule 69.4 (2)* of the **CPR** and the 2<sup>nd</sup> Defendant's/Applicant's application must fail on this basis.

[36] This application was not pursued under *rule 26.3 (1) (b) or (c)* of the **CPR** which empowers the Court to strike out a statement of case or a part thereof if certain conditions are satisfied. The Court bears in mind that based on the authorities

relating to the court's power to strike out, this is considered a severe sanction and a draconian measure and so the power to do so must not be hurriedly exercised: see **S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance** SCCA 112/04 delivered 31st July, 2007 and **Branch Developments Limited Trading as Iberostar Rose Hall Beach Hotel v. The Bank of Nova Scotia Limited** [2014] JMSC Civ. 003. Therefore, in the absence of any specific application by the 2<sup>nd</sup> Defendant/Applicant pursuant to *rule* 26.3 (1) (b) and (c) of the **CPR**, the Court will not embark on any detailed discussion of this rule in relation to the 2<sup>nd</sup> Defendant's/Applicant's application. In any event, having found that the words/publication complained of by the Claimant/Respondent are/is capable of bearing the defamatory meanings ascribed to them by the Claimant/Respondent, it is for a court to determine whether the words/publication are/is in fact defamatory and to assess whether the Claimant/Respondent or the 2<sup>nd</sup> Defendant/Applicant is to be believed on any matter. The defence of Truth will depend on the credibility of the witnesses, which is strictly within the purview of a tribunal of fact. Additionally, the applicability of the defence of absolute privilege and the **Political Ombudsman (Interim) Act** is also for the determination of the trial judge. These are matters which are appropriately to be dealt with at the trial of the substantive claim and, therefore, the 2<sup>nd</sup> Defendant/Applicant could not successfully pursue an application pursuant to *rule* 26.3 (1) (a) or (b) of the **CPR**.

[37] In relation to the 2<sup>nd</sup> Defendant's/Applicant's application for summary judgment, *Part 15* of the **CPR** permits the Court to determine a claim or a particular issue in a claim without undergoing a trial. *Rule 15.2* states as follows: -

*"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that –*

- (a) The claimant has no real prospect of succeeding on the claim or the issue; or*
- (b) The defendant has no real prospect of successfully defending the claim or the issue."*

[38] Rule 15.3 of the **CPR** indicates the type of cases for which summary judgment is not available. It provides as follows

*“15.3 The court may give summary judgment in any type of proceedings except -*

- (a) proceedings for redress under the Constitution;*
- (b) proceedings against the Crown;*
- (c) proceedings by way of fixed date claim form;*
- (d) proceedings for –*
  - (i) false imprisonment;*
  - (ii) malicious prosecution; and*
  - (iii) defamation;*
- (e) admiralty proceedings in rem; and*
- (f) probate proceedings (other than under rule 68.56 [summary proceedings]).”*

[39] Rule 15.6 (1) outlines the court’s powers in granting summary judgment. It states that: -

*“15.6 (1) On hearing an application for summary judgment the court may-*

- (a) Give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*
- (b) strike out or dismiss the claim in whole or in part;*
- (c) dismiss the application;*
- (d) make a conditional order; or*
- (e) make such other order as may seem fit.”*

[40] By virtue of the Claim Form filed on November 10, 2017, the Claimant/Respondent seeks “*damages for Defamation including exemplary and aggravated damages*”. In the Particulars of Claim filed on the same day, at paragraph 15 the Claimant/Respondent asserts that:

*“On September 15, 2016 the Second Defendant made defamatory statements whilst participating in an interview which was broadcast and published by radio and internet by the Third Defendant on Nationwide Radio. At all material times, the Third Defendant’s website was open to and accessed by users of the worldwide web who chose to log into the address referred to in paragraph 6 and thereafter to listen to the Nationwide Radio Station.”*

- [41] Therefore, this is a Defamation claim and pursuant to *rule 15.3(d) (iii)* of the **CPR**, summary judgment is not a remedy available to the 2<sup>nd</sup> Defendant/Applicant in this type of case. In these circumstances, the 2<sup>nd</sup> Defendant’s/Applicant’s application for summary judgment must fail.

## **ORDERS AND DISPOSITION**

- [42] Taking all these matters into consideration, the Court is of the view that the statements made by the 2<sup>nd</sup> Defendant/Applicant in an interview given on the 15<sup>th</sup> day of September 2016 and conducted by Nationwide News Network Limited are reasonably capable of bearing the defamatory meanings attributed to them by the Claimant/Respondent in their Particulars of Claim filed on November 10, 2017. The viability of the defences raised by the 2<sup>nd</sup> Defendant/Applicant are not for the Court’s consideration at this stage. The matter raises triable issues and questions of fact which cannot be disposed of summarily or on a preliminary consideration of the matter. Therefore, the 2<sup>nd</sup> Defendant’s/Applicant’s application for the claim to be struck out or alternatively for summary judgment to be entered in favour of the 2<sup>nd</sup> Defendant/Applicant is refused.

- [43] Accordingly, the Court makes the following Orders:

- 1) The words and/or publication which are the subject matter of this Claim are considered by this Court as capable of bearing the defamatory meanings attributed to them by the Claimant/Respondent in the Particulars of Claim filed on November 10, 2017 in relation to the 2<sup>nd</sup> Defendant/Applicant.
- 2) The application to strike out the claim or in the alternative for there to be summary judgment for the 2<sup>nd</sup> Defendant/Applicant is refused.

- 3) Costs of the application to the Claimant/Respondent against the 2<sup>nd</sup> Defendant/Applicant to be taxed, if not agreed.
- 4) The 2<sup>nd</sup> Defendant's/Applicant's Attorneys-at-Law are to prepare, file and serve the Formal Order herein.