IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 5004

IN THE CIVIL DIVISION

BETWEEN	HON. GORDON "BUTCH" STEWART	CLAIMANT
AND	MUNA ISSA	DEFENDANT/ANCILLARY CLAIMANT
AND	DR. PAULETTE ROBINSON	1ST ANCILLARY DEFENDANT
AND	JAMIE STEWART-McCONNELL	2ND ANCILLARY DEFENDANT
AND	OWEN JAMES	3RD ANCILLARY DEFENDANT
AND	NICKY FARQUHARSON	4TH ANCILLARY DEFENDANT

HEARD: March 5 and 9, 2009

Appearances: Allan Wood Esq. and Ms. Daniella Gentles instructed by Livingston. Alexander and Levy for the Claimant and the 2nd Ancillary Defendant; Abe Dabdoub Esq. and Raymond Clough Esq. instructed by Clough Long for the Defendant/Ancillary Claimant; Mrs. Sandra Minott-Phillips instructed by Myers, Fletcher and Gordon for the 3rd Ancillary Defendant; Shawn Henriques Esq. for the 4th Ancillary Defendant.

DEFAMATION: Application to strike out claim of libel; whether striking out available in libel actions; whether striking out provisions in CPR 26 exhaustive; considerations in determining whether court should strike; Court's power to impose conditions on parties in making orders. Court's duty to manage cases and to apply over-riding objective.

ANDERSON J

The Claimant the Hon. Gordon "Butch" Stewart, (hereinafter referred to as the "Claimant"), is an internationally well-known entreprencur with wide and diverse business interests in areas including the hospitality industry. In the substantive claim in this action, he seeks damages for libel against the defendant, Muna Issa (hereinafter, the "Defendant").

According to the particulars of claim filed by the Claimant, on or about the 25th October, 2007, the Defendant forwarded by electronic mail to one Owen James, a journalist, what purported to be a copy of a letter supposedly written by one Dr. Paulette Robinson, the 1st Ancillary Defendant in this application, which letter had been addressed by the said Dr. Robinson to the

Hon. Edmund Bartlett, Minister of Tourism. The letter contained certain allegations and/or derogatory comments concerning the Claimant, and it is that letter which forms the basis of the suit by the Claimant against the Defendant. In order to fulfill the essential requirement of "publication" in proof of the tort of defamation, the Claimant pleads that the Defendant transmitted the said letter to Mr. Owen James, the 3rd Ancillary defendant. It is now common ground that the only publication of the letter by the Defendant relied upon by the Claimant is that to Mr. James.

In this application which is before me, the Defendant asks that the substantive claim by the Claimant be struck out and judgment entered for the Defendant with costs. The grounds upon which the striking out is being sought are that (the particulars of) the claim discloses no reasonable grounds for bringing the claim; that the claim should be struck out as being frivolous and vexatious and an abuse of the processes of the court and that the claim and the particulars of claim do not provide a realistic prospect of establishing the commission of a real and substantial tort. The submissions by Defendant's counsel, Mr. Abe Daddoub, commenced with a brief chronology which for the purposes of this ruling recite the following:

1. Sometime around October 24 or 25, 2007, the Plaintiff received by electronic mail a copy of the letter referred to above which I shall call the Robinson letter.
2. On or about the 25th October 2007, the Defendant forwarded by electronic mail, a copy of the Robinson letter to Mr. Owen James.
3. On a date subsequent to the 25th October, Mrs. Jamie Stewart McConnell, who is a daughter of the Claimant and who has been joined as an ancillary Defendant on an application by the Defendant/Ancillary Defendant, sent an email to the Defendant in which she complained that the Defendant had published or republished the Robinson letter containing wrongful allegations against the Claimant and false imputations against his character. That email which was sent by Mrs. Stewart McConnell was

copied to all those persons whose names appeared on the original list of names of persons to whom the original Robinson letter had been sent

Counsel on both sides eventually conceded, and I shall proceed on this basis, that it is common ground that the Defendant did not publish the letter anonymously, nor indeed to anyone apart from Mr. James. Secondly, there is certainly no evidence to indicate that Mr. James either was asked to, or did indeed publish the letter sent by the Defendant, and certainly there was no averment that he did so publish it "in the public media".

The first limb of the submissions of Mr. Dabdoub in support of his application to strike out the claim is on what he refers to has "a well established principle of law enunciated in a number of decisions that a libel claim is liable to be struck out as an abuse of process when the extent of the publication within the jurisdiction is minimal." In that regard he referred to the case of ***Wallis v Valentine (2002) EWCA CIVIL 1034*** a decision of the Court of Appeal of England and Wales

The case of ***Wallis v Valentine*** was considered by the Jamaican Supreme Court in January of this year in Suit No. HCV 2328 of 2008, between the Claimant in this matter, and Mr. John Issa. as defendant. In that case the Claimant herein, sued Mr. John Issa for libel, that libel arising out of the same controversial letter which is at the centre of this action. It is a fact of some notoriety that Mr. John Issa is also head of a company that operates in the hotel business. Accordingly, the businesses of these two protagonists compete against each other in the hotel and tourism sector in which they are both major players. In the hearing of the application in the Supreme Court, there was an application by Mr. Issa, the defendant to strike out the claim of the claimant on the grounds that legal professional privilege applied and also because, in the particular circumstances of the case, it was said to represent an abuse of process. That case was heard by learned brother Sykes J. and I shall make extensive reference to his excellently reasoned judgment below

It may be as well to note here that there is an important element which was present in the case before Sykes J which does not arise in the instant matter. That is the element of legal

professional privilege. Thus his lordship in articulating the "sub-issues" to be determined by him. characterized the second one, (the first being the question of privilege) in the following terms: "Assuming that what Mr. Issa did was libelous and legal professional privilege is not a defence, whether this claim should proceed to trial"? In relation to the issue of legal professional privilege, there seems to have been a finding of the court in HCV 2328 of 2008, that the Defendant in this case (Muna Issa) did also consult her attorney Mr. Clough. In the findings of Sykes J on that issue, his lordship concluded that legal professional privilege attached in relation to that consultation between Muna Issa and Mr. Clough. I mention it merely for the record as the common understanding that is shared by all counsel in this case is that she only shared the letter with Mr. James, I shall not make any further comment on that aspect of the matter. It is irrelevant here.

Mr. Dabdoub, counsel for Miss Issa submitted that the ***Wallis*** case supported his position that the matter should be struck out on the basis that to allow it to continue would essentially amount to abuse of process. I do not feel any need to rehearse the contents of the Robinson letter for I do not believe that there would be any serious argument that the words on their face would be considered defamatory. Even if the court were to proceed on this assumption, the Defendant, through her attorney, is saying that in view of the very limited scope of publication, and the fact that damage to character, even if could be proven, the resultant damages would be so small or negligible as would be the extent of vindication, that this matter ought not to proceed to a full trial. He said that that principle could be elicited from the ***Wallis*** case which he had also cited before Sykes J in the ***Stewart v John Issa*** matter.

For the purposes of understanding the authority of ***Wallis v Valentine*** I shall adopt the summary given by Sykes J at paragraph 47, of the learned judge's decision:

> "The abuse of process relied on here is an unusual one. There are two decisions of the Court of Appeal of England and Wales that have been placed before me for consideration.
>
> The first is the case of ***Wallis v Valentine [2003] E.M.L.R. 8***. The claimant and the defendants had had a long series of legal battles. The libel action launched by the claimant was another salvo in an acrimonious relat6ionshhip. The libel

> was said to arise from a letter sent by the defendant to the claimant and his girlfriend. The claimant also alleged that he was libeled by the defendant in an affidavit sworn by the defendant in an earlier legal skirmish with the claimant. There was no allegation that the letter was published to anyone else but the girlfriend. The defendant applied for summary judgment on the following grounds (which are taken verbatim from the headnote): "(1) the claimant was pursuing a vendetta against the defendant rather than vindication of his reputation, as evidenced by a letter he had written; (2) publication was only to G who was privy to all the previous complaints against the claimant and party to some of the litigation; (3) even if the claimant were successful, the damages would be very modest and perhaps nominal, which could justify a trial estimated at 14 days when the claimant had repeatedly made it clear that he had no income and no assets; and (4) one of the claimant's objects in the proceedings was to stave off his bankruptcy. The judge granted summary judgment on the publication issue and struck out the action. The claimant appealed."

The second basis on which the summary judgment had been granted was that it was an abuse of the process of the Court and so the Statement of Case should be struck out. According to the report, Sir Murray Stuart-Smith in delivering the judgment of the court said that Buxton L.J. had said he gave permission only in relation to the issue of narrowness of the publication; that the issue of abuse of process should only be considered if the Appellant found favour with the court on the publication issue. It seems clear that the England and Wales Court of Appeal gave significant consideration to the issue of balancing the interest of the overriding objective of the English Rules (as presently encapsulated in the Jamaican Civil Procedure Rules and particularly rule 1.1) against the possibility of denying a litigant his right to have his day in court. In other words, the question which the Court of Appeal seemed to pose for itself was as follows: Are the damages which will be recoverable and the vindication to be afforded should the action succeed, proportionate to the amount of resources, judicial and otherwise, which were likely to be expended should the matter continue to a full trial? I agree wholeheartedly with my learned brother Sykes J, that the issue of proportionality was a critical consideration in this matter. It is no less so here.

Mr. Dabdoub also sought to make the point that ***Wallis v Valentine*** was authority for the proposition that where a claimant was not motivated so much by the desire for vindication but was pursuing a personal vendetta, the Court is likely to determine the matter summarily. It was

his submission further, though I have to say, without any convincing evidence that this was the case in the instant matter.

The Second authority cited by Mr. Dabdoub in support of his application to strike out the claim was the case of ***DOW JONES CO. INC. V YOUSEF ABDUL LATIF JAMEEL. {2005} 2 WMLR 1614, EMLR {2005} EWCA Civ 75, EMLR 16, {2005} OB946 (the "Jameel" case).*** It was submitted that this latter authority reinforced the earlier decision in ***Wallis v Valentine***. In the Jameel case, the claimant was pursuing an action for damages for libel in that certain defamatory material had been published on a website owned by the publisher Dow Jones Co Inc., the publisher of the Wall Street Journal ad the Wall Street Journal On-Line, which was available only to subscribers. The offending article suggested that the Claimant was a member or supporter of the terrorist organization, Al Qaeda. It was the accepted evidence that insofar as publication in the jurisdiction was concerned, only five (5) persons in England, where the claimant lived, had seen the article and three (3) of those persons were so closely connected with the claimant that, with respect to those three (3) at least, no damage to reputation was likely to arise. That case also raised the issue of the role of the European Convention for the Protection of Human Rights and Fundamental Freedoms which principles are enacted in the Human Rights Act 1998 in the United Kingdom. I will not deal with this point which is based upon the presumption of damages where defamatory material is published with any greater expansiveness than was afforded it by Sykes J. I would merely agree with him in saying that as in England, the presumption of damage remains very much alive in Jamaica. Nevertheless, the obligations imposed on a court in Jamaica in carrying out the provisions of the CPR and in particular Rule 1.1 clearly contemplate that the Court must consider not just the interest of the parties before it but all the other elements which are set out in the sub paragraphs of Rule 1.1. According to dicta of Lord Justice Phillips MR, in his judgment in the Court of Appeal: "The other two issues raised on this appeal both arise out of the fact that the publication in the jurisdiction of which complaint was made was minimal. This led Dow Jones to include in their grounds for seeking summary judgment the contentions(1) that this claimant could not demonstrate that a real and substantial tort had been committed in this jurisdiction, and (2) that this action was an abuse of process". In considering the appeal Lord Justice Phillips considered that it would be appropriate to deal with the issues of no substantial tort and abuse of process

together. In that regard, he said he thought that it would be useful to consider those situations where there had been worldwide or at least transborder publication. He said:

> It is in the context of an application to set aside service outside of the jurisdiction on such grounds that the question of whether 'a real and substantial tort has been committed within the jurisdiction' has been relevant. In Kroch v Russell [1937] 1 All ER 725, the plaintiff brought libel proceedings against the publishers of a French newspaper and a Belgian newspaper. He obtained permission to serve each defendant out of the jurisdiction on the ground that a small number of copies of each newspaper had been published in England. The vast bulk of the publications had been in France and Germany. The defendants applied successfully to have the order giving permission to serve out set aside. Slesser LJ remarked at page 720:
>
> > In no sense can it be said that there is any substantial importation of these papers in England, or that the libel which is said to affect the plaintiff in England is anything but a very minor incident of the substantial publication in France.'
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> Scott LJ added:
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> > I think that it would be ridiculous and fundamentally wrong to have these two cases tried in this country, on a very small and technical publication, when the real grievance of the plaintiff is a grievance against the widespread publication of the two papers in the respective countries where they are published.

The learned Master of the Rolls in considering the matter also referred to the case of Chadha v Dow Jones & Co Inc. [1999] E.M.L.R. 724 at pa 732 where Roch LJ stated:

> In my judgment, once it has been established that there is an "English tort" that is to say there has been a significant publication of prima facie defamatory matter concerning the plaintiff within the jurisdiction, the English courts have jurisdiction with regard to that English tort"

The learned judge summarized the submission of counsel for Dow Jones:

> "Mr. Millar submitted that these principles used in deciding whether to allow service out of the jurisdiction ought to be equally applicable to an application to strike out the claim on the ground that it was an abuse of process. He argued that no substantial tort had been committed in this jurisdiction. The publication had been minimal and it had done no significant damage to the claimant's reputation. In the circumstances, pursuing this expensive action was disproportionate and an abuse of process".

In the ***Jameel*** case it was clear that one of the important questions was whether, if the claimant succeeded in a court in England where it was agreed there had been limited publication, this would provide vindication for the claimant where there had been worldwide publication. The Court of Appeal took the view that such vindication would not arise even if the claimant was successful in England. Indeed, it would only be in relation to the two persons who apart from the three connected with the claimant, had read the article. In support of his submission that the case of Jameel should be applied to the instant case the defendant's counsel cited paragraph 69-71 of the judgment of the Court of Appeal which are set out below:

> If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will merely not have been worth the candle, it will not have been worth the wick.
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> If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction dot not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but, subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court. Including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim brought, it will be dealt with by a proportionate small claim claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR.
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> Mr. Prince submitted that to dismiss this claim as an abuse of process would infringe Article 6 of the Convention. We do not consider that this Article requires the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial. Subject to the final issue, to which we now turn, and on the premise that there have only been the five individual publications within this jurisdiction, we would dismiss this action as an abuse of process.

Finally, counsel for the defendant relied upon the decision of Sykes J, in the case of ***Stewart v Issa and Clough*** to which I have already referred above. It was submitted that in examining the relevant principles within the context of the Jamaican situation and giving consideration to

CPR and to the Constitution of Jamaica, the Court ought to conclude that to allow this matter to continue would be an abuse of the process of the Court. It was emphasised that, in this regard, any publication by the defendant was only to one person whom she referred to as "a friend" and that there has been no evidence of any further publication by Mr. James. It was also pointed out that there was no available evidence to support the assertion that the defendant "intended that same be widely republished by the public media throughout Jamaica".

In conclusion, the Defendant submitted that the publication alleged by the Claimant limited to Mr. James does not give rise to a real and substantial tort. Accordingly, the Defendant asks that the application to strike out should be granted.

Mr. Wood, for the Claimant sought to resist the application to strike out. He submitted that the authorities of Wallis and Jameel cited by the Defendant were distinguishable and ought not be followed by this court. In that regard he referred the court to two recent decisions of the High Court of England and Wales, ***Hughes v Allen Dick & Co. Ltd. 2008 EWCH 2695 (QB)*** and ***Sir Stelios Haji-Ioannu v Mark Dixon, Regus Group PLC and Tim Regan 2009 EWCH 178 (QB)***.

Hughes, as in the other cases referred to above, was also concerned an action for defamation. There the words complained of were communicated to members of the Immigration Service and the police. They suggested that the claimant was involved in illegal activity by embezzling founds from the company. A judgment in default in favour of the claimant was entered on the 25th June 2008 and an application was made to set aside that judgment. Counsel for the claimant indicated that the claimant wished to apply for summary disposal of the action under the relevant provisions of the UK Defamation Act 1996. At paragraph 20 of the decision of Eady J. stated:

> There was an alternative argument raised by Mr. Munden on behalf of the defendants to the effect that the claim should be struck out as an abuse of process in accordance with the Court of Appeal's decision in ***Dow Jones Co. Inc. v Yousef Abdul Latif Jameel. {2005} 2 WMLR 1614, EMLR {2005}***. That is to say broadly speaking, the court recognizes a jurisdiction to strike out for abuse of process in circumstances when the claim whether by way of libel or slander can be characterized as not worth the candle in the sense that reliance is

> placed on purely technical publication and there is no realistic process of obtaining genuine vindication by allowing the proceedings to continue to their natural conclusion. It has been said in a number of subsequent cases not least by Sedley LJ, in the case of Steinberg ***v Pritchard Englefield [2005] EWCA Civ. 288*** shortly afterwards, that that is a jurisdiction which needs to be exercised with some caution. Since the decision of the Court of Appeal in the Jameel case there have, it is fair to say, not been many examples of its being implemented."

In that case Eady LJ refused to set aside the decision of the court. He also declined to grant the claimant's request for summary disposal in the claimant's favour, it having been submitted that on the basis that there was no realistic prospect of the defendant successfully defending the claim. Although he said that at that stage of the proceedings his perception was that it would be difficult to conclude that the Claimant would be able to establish malice on the part of the defendant which would have been necessary to defeat a plea of absolute or qualified privilege, nevertheless he was of the view that the "Claim should proceed in the ordinary way" and be tried fully. Mr. Wood commended this decision as being more appropriate to guide this court in coming to a decision on this application.

In the other case cited by the Claimant's attorney-at-law, the claimant was a well-known businessman and entrepreneur. He was known particularly as being the founder of the easyjet plc and the easyGroup of Companies. It appears that there was contact between the claimant and some senior officials of the defendant company in relation to a prospective joint venture between them. Later, the defendant company acquired a third company (Nuclei) which, it turned out, had a dispute with the claimant over the use of the name "Easy Office". The claimant eventually sent some information about the discussions between himself and the defendant company and their senior executives, to a writer for the Financial Times, a Mr. Burgis. He, in turn, contacted the public relations consultants for the defendants to seek their comments. Those comments were made to the writer Burgis in telephone conversations and e-mails and it is those comments about Sir Stelios that gave rise to his filing an action first for slander and then amended to be one in libel. Mrs. Justice Sharpe said:

> The defendants' case was initially put on two bases; firstly, that there is no realistic prospect of the action yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense and for the wider public in terms of the use of court time and resources. Second, that the

> proceedings were not brought to vindicate Sir Stelios' right to reputation but rather to advance his commercial interests and to cause expense, harassment and commercial prejudice to the defendants beyond that normally encountered in the course of properly conducted litigation. Before me, Mr. Hugh Tomlinson Q.C appearing on behalf of the defendants did not pursue that second ground. On behalf of the defendants he submitted that this action falls fairly and squarely within the principles laid down by the Court of Appeal in Jameel which represented a 'sea change' in the approach of the courts to an application such as this; and that the court's willingness to strike an action out as an abuse had been reinvigorated by the introduction of the Civil Procedure Rules in 1998 and the case management powers given to the court".

The learned judge decided against striking out the action on the application of the defendants. Mr. Wood submitted that it was a more appropriate route not to strike out the matter. In further response to the citing of the Jameel case, he submitted that the mere fact that the number of persons to whom publication had been made was only five (5) ought not to be used to compel this court to the view that where there was only one person to whom publication had been made, that was somehow not adequate. He urged the court to the view that it would be better to allow the matter to go forward for trial rather than determining the proceedings at this stage.

Court's discussion

In looking at the cases cited including the decision by Sykes J (in what may be called a companion case to the instant one), it seems clear that what is being explored is the court's duty to manage cases justly taking full account of the right of each litigant to have his day in court. The Civil Procedure Rules make it clear that the Court has a duty to manage cases justly. Rule 1.1 in defining that term includes allocating an appropriate share of the Court's resources to each trial. It also includes the need to save expense, to consider the importance of the case, the amount of money involved, and the financial position of each party. Those requirements have to be carefully weighed against the right of each litigant as provided by the Constitution of Jamaica to approach the Courts for a resolution of his disputes. I adopt the discussion of Sykes J in the case of Stewart v John Issa and Raymond Clough insofar as it focuses on the Court's need to consider proportionality.

In the ***Wallis*** Case cited by Mr. Dabdoub, there appears to be a general acceptance that the Court in exercising its discretion and in seeking to balance the interests of litigants and the

court system, it is open to the Court to strike out where it forms a certain view as to the possible outcome in terms of damages and vindication. I accept that this is correct as a general proposition. I am also guided by the ***Wallis*** Case to the view that it is of importance to the Court in making its decision, that it considers the number of persons to whom publication of the alleged libel has been made. Accordingly, I do not give over-importance to the fact that in the ***Wallis*** Case the publication was only to the girl friend of the claimant.

The question of the extent of publication was clearly uppermost in the minds of the Court of Appeal in the **Jameel** Case cited by attorney for Miss Issa. It seemed to have been of the view that, both with respect to damages which may become payable, and to the vindication which a successful claimant may receive, the extent of the publication of the libelous material, was important. It should be noted that in this case the Court of Appeal of England and Wales was considering the question of the extent of the publication in the context of a libel, the significant part of the publication of which, had taken place in another jurisdiction and on the internet. To that extent caution should be exercised in seeking to extend the principle where no trans-jurisdictional issues arise. Nevertheless, I accept and adopt for the purposes of this judgment, the passage at paragraph 58 of Sykes J's judgment in the following terms:

> "The principle that has emerged (and I am mindful of the swallow and the summer objection) is that in a libel case even if the written words are in fact defamatory, and there was indeed publication, if there is evidence that the publication by the named defendant was very limited such that the damage resulting is at best minimal, it may amount to an abuse of process to bring the claim. The application of this principle has to be considered quite anxiously having regard to the constitutional right of access to the Courts and all that that entails. It should be obvious that an abuse of process in these circumstances should rarely succeed".

The observation of the learned judge as he explored the basis for his decision in that Application is equally applicable here. Again it is common ground that the defendant in the instant matter did not create the email out of which the action springs. It is also agreed that the defendant only made it available to Mr. James and to no one else. In my view nothing turns on the fact that it was sent via email for there is no evidence whatsoever that the offending email with the letter reached anyone else on account of Miss Issa's sending it to Mr. James. I also agree, despite my earlier caveat on the Jameel Case, (the jurisdictional point) that the argument

in favour of a finding of abuse of process is stronger in the instant case since there was no other publication, whether within or without the jurisdiction, as there was in Jameel.

With respect to the authorities cited by Mr. Wood, I regret that I am unable to accept the submission that the Hughes case is an authority which inveighs against striking out at this stage.. I am mindful of the clearly distinguishing feature between the ***Hughes*** Case decided by Eady J, and the instant matter. There, one was concerned with an allegation of reports of potentially criminal activity made to immigration authorities as well as to the police. In such cases the question of absolute privilege and/or qualified privilege are clearly matters which are relevant. Based upon the authorities, counsel for the defendant argued that publication to an immigration officer could be protected by absolute privilege but at least by qualified privilege. Publication to the police in connection with reporting or seeking to prosecute a crime would be protected by absolute privilege. (See ***Westcott v Westcott [2008] EWCA Civ 818; [2008] WLR (D) 241*** where it was held that a person who made a complaint to the police, thereby instigating a police investigation which did not lead to a prosecution, was entitled to rely on the defence of absolute privilege if defamation proceedings were subsequently brought). His lordship having carefully considered all the issues said that he did not feel able "to describe the claim as one which amounts to an abuse of process although there are quite plainly significant hurdles to be overcome by way of privilege at least".

Secondly, it should be remembered that that case arose on an application to set aside the default judgment for libel which the claimant had already secured. The judge decided that the bases were established to so set it aside. The application by the defendant to strike was an "alternative argument" raised by the defendant. The Judge in that case, Eady J, was careful in explaining why he had come to the decision that he did. At paragraph 20 of his judgment already cited above, he explicitly recognizes "a jurisdiction to strike out for abuse of process in circumstances when the claim, whether by way of libel or slander, can be characterized as "not worth the candle" in the sense that reliance is placed on purely technical publication and there is no realistic prospect of obtaining genuine vindication by allowing the proceedings to continue to their natural conclusion". I agree with the words of his lordship and in particular

his warning that the jurisdiction to strike out is one "which needs to be exercised with some caution".

In the other case cited by Mr. Wood (Sir Stelios Haji – Ioannou) Mrs. Justice Sharpe also declined to strike out the claim. However, I believe that it is not without significance that she stayed the action to give the parties time to continue discussions. In that case, like in the present case, the publication by the defendants was made to a journalist. It had been made by the defendants in response to a request by the journalist to comment upon allegations which had previously been made by the claimant in sending a communication to that journalist. The publication was also clearly made with a full knowledge and intention that the allegations would become the subject of an article by the journalist. This can be distinguished in the instant case because, although Mr. James is a journalist, the defendant avers that she sent it to him as a friend and there is no denial of that averment in the pleadings. Nor does it seem to me to be capable of proving that what was in her mind is different than what she has asserted. A further distinction is that in that case her ladyship said she was unable to form the fixed view that the journalist was likely to disbelieve or discount what he had been told by or on behalf of the defendants so that the Court was not in a position to say that the claimant's reputation would have suffered little damage if any. It seems to me that the claimant's characterization of the journalist Mr. James as a well-known and seemingly well-respected member of the journalistic profession, would make it less likely that he would be influenced by a letter written anonymously or by a person whose identity he was unable to ascertain.

It is also of interest that in considering whether the claimant would be able to recover significant damages for the libel, her ladyship pointed out that the words which were complained of as having been given to the journalist were, on the pleadings, given to him "knowing and intending that what they said would be re-published in the Financial Times". She pointed out that no application had been made to strike that out from the pleadings and she considered that a court, in deciding the issue, would be perfectly at liberty to consider that as an aggravating circumstance in assessing the damages to be paid should the claimant succeed. She therefore was unable to conclude affirmatively that there had been no damage to the claimant's reputation, or that his claim was not genuine, or that if the matter went to trial the

damages to be awarded would be trivial or insignificant. It is not surprising therefore that having arrived at those conclusions she felt unable to strike out the claimant's action. As noted elsewhere in this judgment, there is no credible evidence that there was any "knowledge or intention" on the part of the Defendant that James was to publish the letter further. With respect to Mrs. Justice Sharpe's decision, I find it instructive that exercising the powers which she considered she had, having dismissed the application to strike out the action as an abuse of process she stayed the action for a period commencing with the handing down of her judgment. She said she did this in order to give the parties some time to continue negotiations on which they had clearly embarked with a view to resolving the issue short of a full trial. I am also mindful of the dicta of the learned judge in the penultimate paragraph of her judgment.

> "The Court is under a duty to actively manage cases in accordance with the over-riding objective of enabling the Court to deal with cases justly. Questions of proportionality and cost are material to that objective. Active case management includes the Court helping the parties to settle the whole or part of a case. Here the parties are, or appear to be, actively engaged in the process of negotiating for the purposes of settlement. In the circumstances of this case I consider that it will assist that process if proceedings were stayed for a short period so that negotiations can continue without the pressure and cost that continuing the litigation process itself necessarily involves. I should add that neither side invited me to take this course although it was raised as an option by me during the course of argument."

I shall seek to take a leaf from her ladyship's book. On the morning that this hearing commenced, I had raised with Counsel the possibility of a judge-controlled mediation between the parties. It does not appear that that is being actively considered. In the circumstances, I have come to the view, based upon the authorities referred to above, and especially in light of the fact that whereas the authorities cited by the Claimant are decisions of the Court at first instance while those cited by the defendant are decisions of the Court of Appeal, that the appropriate course given the competing factors at work and the Court's over-riding objective to deal with cases justly, is that the Claimant's claim should be struck out on the ground that to allow it to continue would amount to an abuse of the process. For these purposes, I again refer to the judgment of my learned brother Sykes J, and I adopt for the purposes of this decision to strike out, the analysis of the principles which are to be deduced from the ***Wallis*** and ***Jameel*** cases referred to above. (See the citation from paragraph 58 of his lordship's judgment above).

I set it out again for ease of reference and underline the factors which give rise to the conclusion that there would be an abuse of process:

> "The principle that has emerged (and I am mindful of the swallow and the summer objection) is that *in a libel case even if the written words are in fact defamatory, and there was indeed publication, if there is evidence that the publication by the named defendant was very limited such that the damage resulting is at best minimal, it may amount to an abuse of process to bring the claim*. The application of this principle has to be considered quite anxiously having regard to the constitutional right of access to the Courts and all that that entails. It should be obvious that an abuse of process in these circumstances should rarely succeed".

I believe that this is a case in which it should. The power of the court to strike out a claim in appropriate circumstances is awesome but undeniable, and the instances set out in CPR 26 cited by Mr. Wood for the Claimant are, in my view, not exhaustive. This is so even where the claim is one in libel. It is a power which must be exercised of with great judicial discretion, especially in libel cases where the reputation of the litigant is at stake. The injunction that it ought to be exercised with caution is instructive. (Per Eady J in Hughes, see above) I warn myself of need to exercise caution. But in the exercise of that discretion, the court ought, having advised itself as to all the issues and nuances which may impact upon its decision and its role in managing cases, take a robust approach to the latter. Among those factors which the court must consider are the societal factors which may be so notorious as to be judicially noticeable. This is not the only area where courts are called upon to exercise discretion taking into account its knowledge and experience of the society. By way of a somewhat strained analogy, I may point out that it is settled law that although a claim for special damages must be specifically proven, the court in computing those damages may award what is reasonable based on its knowledge of societal practices and mores. See for example the dicta of Wolfe J.A. (as he then was) in **Desmond Walters v Carlene Mitchell 29 J.L.R. 173.** See also dicta of Rowe P. in **Central Soya of Jamaica limited v Junior Freemen [1985] 22 J.L.R 152.** There the learned judge said:

> "In casual work cases it is always difficult for legal advisors to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages *the court has to use its own experience in these matters to arrive at what is proved on the evidence*".

But it may be thought that such an order without more does not do justice as between the parties. I have accordingly reviewed the rules dealing with the Court's extensive powers of case management and in particular, Rules 26 and 27. Rule 26.2(1) gives the Court a general power to make orders either on an application or on its own initiative. Rule 26.1(2)(e) gives the Court the power to stay the whole or any part of the proceedings generally or until a specified date or event, and (g) the power to direct separate trial of any issue. Given the extensive powers given to the Court by the Rules and its duty to manage cases, it seems to me that it would open to this court, (given the admissions in the pleadings as to whom publication has been made and assumptions as to whether the words in the document are defamatory), to order a trial on the narrow issue of whether the Claimant was lowered in the estimation of the person to whom publication was made. Alternatively, and I believe that this is more appropriate as it will allow counsel on both sides to exercise their creativity to influence events going forward, I would order that the Ruling that the claim be struck out be stayed for 14 days. Further, pursuant to Rule 26.3, where the Court makes any order or gives a direction, it may make it subject to conditions. The Court's right to impose such conditions is at large. I would accordingly as a condition of the order to strike out make that order conditional upon the provision of an appropriate written apology

(a) by the defendant;

(b) to the claimant for publishing the libelous material,

(c) to Mr. Owen James.

It is of course relevant that there is no averment that the Defendant was the author of the letter. The draft terms of that apology are to be agreed by Counsel for both parties and shall be subject to approval by the Court. I shall make myself available to meet with both counsel at an agreed time during the period March 12, to March 19, 2009. I shall also, although there is a view that this is implicit in any order of this nature, grant Liberty to Apply.

Finally, in light of the submissions which were made on Monday March 5, 2009 when I read from the first draft of this ruling, I wish to make it clear that the ruling is that the court is prepared to exercise its judicial discretion to strike out, such exercise being conditional upon the proffering of an appropriate apology within the time allowed by the Court.

I would make an Order in the following terms:

1) The Defendant/Applicant's application to strike out is granted on the basis that to allow the matter to proceed to a full trial would be an abuse of the process of the Court, subject to the following orders:
    a. The order to strike out is stayed for 14 days and its coming into effect is conditional upon the Defendant/Applicant proffering to the Claimant an apology within the 14 day period.
    b. A written draft of the proposed apology is to be prepared jointly by counsel for the Claimant and the Defendant for submission to the Court for its approval as soon as it is prepared but in any event not later than March 18, 2009.
2) Costs to the Applicant/Defendant to be agreed or taxed.
3) Liberty to apply generally.
4) Leave to appeal granted, if necessary.

ROY K. ANDERSON
PUISNE JUDGE
MARCH 9, 2009