JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 16/2009

BEFORE: **THE HON. MR. JUSTICE COOKE, J.A.**
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MRS. JUSTICE M^{C}INTOSH, J.A. (Ag.)

BETWEEN	**GORDON STEWART**	**APPELLANT**
AND	**JOHN ISSA**	**RESPONDENT**

Vincent Chen and Jerome Spencer, instructed by Patterson Mair Hamilton for the Appellant.

Lord Anthony Gifford, Q.C., and Mrs. Helene Coley-Nicholson, instructed by Clough Long & Company for the Respondent

21st, 22nd July and 25th September, 2009

COOKE, J.A.

1. In this appeal, the appellant challenges the correctness of the decision of Sykes J. in the court below to strike out his claim for "damages interest and costs for libel in respect of words contained in an electronic mail dated 10th March 2008 purportedly written by one Dr. Paulette Robinson to Jamie Stewart which was published by the Defendant to Mr. Raymond Clough." This Sykes J. did on the 16th January 2009 when he further awarded costs against the appellant. He also granted leave to bring this appeal.

2. The date of the publication to Clough was the 11th March 2008. The learned trial judge in paragraph 7 of his judgment neatly summarises the contents of the e-mail and I will adopt his précis, which is as follows: -

> "7. I shall not be reproducing the libellous email but I still need to give a sense of what the libel is. The essence of the email is that (a) Mr. Stewart schemed and plotted to have placed in important positions in government persons who were previously employed to his companies so that he could have advance information about government's intentions and plan his affairs accordingly; (b) drugs were found on Mr. Stewart's yacht and (c) while Mr. Stewart was chairman of Air Jamaica he caused an (sic) plane to be flown at a time when it was declared defective by the relevant regulatory agency of the United States of America".

3. It was common ground (as Sykes J. stated in paragraph 6 of his judgment) that the contents of the e-mail were "undoubtedly defamatory" of the claimant.

4. Both the appellant and the respondent enjoy a very high profile stature in our society. They can be described as titans in our hotel industry in which they are competitors.

5. The burden of the respondent's defence is contained in paragraph 8 of the amended defence filed on the 14th August, 2008. It is in these terms:

> "8. That the First Defendant and the First Defendant's daughter shared the contents of the electronic mail with Mr. Raymond Clough, the First Defendant's Attorney-at-Law who is also the Attorney-at-Law for the First Defendant's daughter Ms. Muna Issa. That the communication to the Second Defendant was in his capacity of Attorney-at-Law and is the subject of legal professional privilege (Attorney/Client privilege) and was shared with the Second Defendant as a result of and in connection with the ongoing litigation between the Claimant and the First Defendant's daughter Ms. Muna Issa in Claim No. 2007 HCV 5004. The First Defendant states that any "publication" to his Attorney-at-Law was privileged communication, was not libelous (sic) and is not actionable in law".

6. By a Notice of Application for Court Orders filed on the 2nd June 2008, the then defendant (now respondent) sought the following orders:-

> "1. That the Claim filed herein by the Claimant be struck out as being disclosing (sic) no cause of action and being frivolous vexatious and an abuse of the process of the Court and Judgment entered for the Defendant with costs to be taxed if not agreed, or alternatively
>
> 2. That Summary judgment be entered for the Defendant with costs to be taxed if not agreed."

The grounds on which the orders were sought pertained specifically to the assertion that "the publication by the claimant is therefore subject to legal professional privilege and is therefore not actionable". It is noticeable that neither in this application nor in the supporting affidavit of Mr. John Issa (to which reference will be immediately made) was there any

indication of particularity as to basis for the contention that the claim was an abuse of the process of the court.

7. The Issa affidavit dated 2nd June 2008 sets out in a fulsome manner the platform on which the assertion of legal professional privilege is launched. As the learned trial judge accorded the contents of this affidavit of significant import, I will reproduce substantial parts of it: -

> "2. That the Claimant alleges against me that I published to Mr. Raymond Clough an electronic mail sent by one Paulette Robinson to Jaime McConnell and that in my doing so he has suffered damages.
>
> 3. That Mr. Raymond Clough is a partner in the law firm Clough Long &Co. and is one of my Attorneys-at-Law.
>
> 4. That the said Raymond Clough is presently acting for me in a number of claims brought by me against the Jamaica Observer and others claiming damages for libel.
>
> 5. That to the best of my information knowledge and belief the Jamaica Observer is owned and controlled by the Claimant and/or owned and controlled by a company which is owned and controlled by the Claimant.
>
> 6. That my daughter Ms. Muna Issa is a Director of Superclubs and the Claimant commenced proceedings her (sic) claiming damages for libel arising out of an alleged publication by her of a letter written by one Paulette Robinson to Dr. Edmund Bartlett. I consulted with Mr.

Raymond Clough and we retained him to act on her behalf. Clough Long & Co. entered an acknowledgment of service to Claim No. 2007 HCV 5004 brought by the Claimant and I beg to refer This Honourable Court to the said Claim No. 2007 HCV 5004.

7. That the electronic mail from Paulette Robinson to Jaime McConnell was received I (sic) immediately contacted Mr. Raymond Clough who came to the Superclubs office at St. Lucia Avenue, Kingston 5, in the Parish of Saint Andrew and met with Ms. Muna Issa and myself.

8. Ms. Muna Issa and I showed the electronic mail to Mr. Raymond Clough and we discussed the implications of same in so far as the ongoing litigation between my daughter Ms. Muna Issa and the Claimant were concerned. We did not give Mr. Raymond Clough a copy of the said electronic mail.

9. That the contents of the said electronic mail were shared with Mr. Clough solely and only because of the ongoing litigation between the Claimant and my daughter Ms. Muna Issa. There was no intention on my part to publish same nor do I consider allowing my Attorney-at-Law to read the said electronic mail to be publication which is actionable. That no malice was intended by me or my daughter in allowing him to read the contents of the said electronic mail.

10. That I am advised my (sic) Attorney-at-Law Mr. Raymond Clough and do verily believe that the communication between an Attorney-at-Law and his client is privileged communication and is protected by legal professional privilege.

> 11. That I am further advised by my said Attorney-at-Law and do verily believe that in our allowing him to read the contents of the said electronic mail no cause of action can legally arise therefrom and that the said electronic mail having been written by Paulette Robinson ought to have been brought to his attention in his capacity as our Attorney-at-Law in order that he may determine the relevance, if any, that same may have to the ongoing legal proceedings between the Claimant and my daughter Ms. Muna Issa."

8. The learned trial judge peremptorily refused that part of the application which sought summary judgment. This he was compelled to do, as Rule 15.3 (d) (iii) of the Civil Procedure Rules 2002 (CPR) except defamation proceedings from within the category of actions for which summary judgment is available.

9. In this appeal, as it was in the court below, the relevant Rule of the CPR is 26.3 (1) (b) and (c) which is now set out:-

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (a) ...
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> (c) that the statement of case or the part to be struck out discloses no

> reasonable grounds for bringing or defending a claim; or
>
> (d) ..."

10. This judgment will deal firstly with the application of Rule 26 (3) (c). The approach of the learned judge to this issue is demonstrated in paragraph 5 of his judgment which states:-

> "5. I should indicate that by the time the matter came before me, it was certainly the case that as between Mr. Stewart and Mr. Issa there was hardly any contested issue of fact and although the matter was not originally presented in this way it certainly can be said that the real issue between the parties is (since each party has accepted the pleadings of the other, subject to Mr. Issa relying on legal professional privilege) whether Mr. Stewart has a real prospect of succeeding (sic) his claim against Mr. John Issa. This is another way of saying that there is no reasonable ground for bringing the claim if legal professional privilege applies here. On the vital facts surrounding Mr. Issa's consultation with Mr. Clough, not (sic) issue is taken by Mr. Stewart. His point is that what Mr. Issa has said does not permit him to rely on legal professional privilege. This is how I have approached this application."

11. The learned trial judge employed some twenty-seven (27) paragraphs reviewing what he termed "the principles" that informed legal professional privilege. Then at paragraph 41 of his judgment he said: -

> "41 It was against these principles that Mr. Issa's contact with Mr. Clough is to be examined. Mr. Issa has claimed legal professional privilege. No issue is joined regarding the circumstances which led to Mr. Issa consulting Mr. Clough. I make this point because it is important to appreciate that the fact that Mr. Issa has given details about how he came to consult Mr. Clough, he is not to be taken as waiving the privilege. The disclosure is necessary if the court is to be able to assess properly the claim to privilege."

12. Further in underpinning his decision, the learned trial judge opined as follows in paragraphs 43 – 45:

> "43. On the pleadings of Mr. Issa's case, Mr. Clough accepted and agreed to the consultation in his capacity as a lawyer and it is during that process the publication occurred. At all material times, Mr. Clough was acting in his capacity as a lawyer. This is what legal professional privilege is designed to do: permit a client to make the fullest and frankest disclosure so he will get accurate legal advice so that he will know what to do. How else could Mr. Issa obtain proper and sound legal advice from Mr. Clough without also telling him about or showing him the actual contents of the email?
>
> 44. The fact that Mr. Issa was not consulting with Mr. Clough about his own cases is beside the point. Once it is agreed that legal advice privilege is not and cannot be restricted to advice about the client's own rights and liabilities, it becomes clear that Mr. Robinson's contention that what Mr. Issa did cannot attract legal advice privilege is hard to sustain. It is the capacity

> in which Mr. Clough was consulted that is important not the subject matter of the consultation. I therefore conclude that Mr. Issa's consultation with Mr. Clough qua lawyer attracts legal professional privilege. The privilege is Mr. Issa's and he has not waived it.
>
> 45. The necessary and inevitable conclusion from this is that Mr. Issa's publication to Mr. Clough cannot be used to ground a libel action. Publication by Mr. Issa in this context does not give rise to a cause of action. If a defamation action could flow from seeking legal advice then who could consult an attorney with any degree of confidence? To permit this claim to go forward would undermine the policy reasons behind legal professional privilege. This is not a **Minter v Priest** situation where it was the client who told what had happened (apparently without objection from the other person who could have claimed privilege) and so there was evidence to determine what took place and so decide that privilege did not attach. Here, the client is claiming privilege and he has not waived it and there is no power in Mr. Clough to waive it in relation to Mr. Issa, or I might add, Miss Issa. I therefore hold that legal professional privilege, where the client has not waived it, is an absolute bar to a defamation action. There is no rule of law that I am aware of that makes it possible to use privileged communication to ground a cause of action unless that privilege was waived by the client. I now turn to the second ground of the submission."

13. The appellant's attack of the judgment of Sykes J. was that he took into account irrelevant considerations when considering whether to strike

out the claim. It was submitted that in exercising his discretion the learned judge's function was limited to a review of the claimant's pleadings to "ascertain whether a cause of action was made out and whether it disclosed any reasonable grounds for bringing the action". In support of this proposition, dictum from the judgment of Dukharan JA, in **Sebol Limited and others v Ken Tomlinson and others** (SCCA No 115/2007 delivered 12th December 2008), was brought to the attention of the court. At paragraph 16, Dukharan JA, said: -

> "The main issue in this appeal is not whether there can be a rectification of the mortgage but whether the pleadings give rise to a cause of action against the Respondent ..."

To determine whether Sykes J. was correct it is necessary to carefully examine the pleadings to see whether it gives rise to a cause of action against the respondent. The appellant contended that in respect of this claim there was no criticism that it lacked any validity. Further, as is evidenced by paragraph 5 of the judgment of Sykes J. (supra), he used the wrong test, which was "whether Mr. Stewart has a real prospect of succeeding [in] his claim against Mr. John Issa." This was the test that was relevant to summary proceedings. Rule 15.2 of the CPR states:-

> "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."

The appellant also brought to the attention of the court the statement of Harris JA, in **S & T Distributors Ltd. & Anor. v CIBC Jamaica Ltd. & Anor.** (SCCA No. 112/2004 delivered 31st July 2007), that –

> "Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases."

14. It is my view that the approach of the learned trial judge as explained in paragraph 5 of his judgment was incorrect. At this stage, the genesis of the proceedings, the consideration under Rule 26.3 (1) (c) is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to attempt to divine what will be the outcome of a properly filed claim. Apparently Sykes J. has not been sufficiently discriminating in recognizing the difference in approach in the application of Rules 26.3(1) (c) and 15.2. There is merit in the submissions of the applicant on this aspect of the appeal.

15. The appellant also challenged the decision of Sykes J. in that he in effect gave summary judgment for the respondent which by Rule 15.3 (d) he was prohibited from doing. There was the complaint that the learned trial judge erred in embarking upon a trial of the matter on the pleadings

and the affidavits in making a finding that the consulting of Mr. Issa with Mr. Clough qua lawyer attracted legal professional privilege. It was submitted that there was a burden on the defendant to establish the existence of legal professional privilege.

16. The learned trial judge, as demonstrated in paragraphs 43 – 45 (which have previously been excerpted), determined the issue of legal professional privilege in favour of the then defendant. That he came to this finding is perplexing. His decision would appear to have been born of his view expressed in paragraph 5 (supra) that:

> "On the vital facts surrounding Mr. Issa's consultation with Mr. Clough not (sic) issue is taken by Mr. Stewart. His point is that what Mr. Issa said does not permit him to rely on legal professional privilege."

Mr. Issa's purpose for his consultation with Mr. Clough would be within the peculiar knowledge of the former. It would seem impossible to me to take issue with Mr. Issa's assertions in his affidavit (supra) as to his purpose other than through cross-examination. To say the least at the hearing there was none – nor would such a course been efficacious as this was not an exercise where the judge should have been concerned with whether or not the claim had any real prospect of succeeding. There was nothing in the pleadings of the then claimant which admitted to the truth of Mr. Issa's assertions. The weight to be allocated to those assertions should be determined at the trial when the appropriate scrutiny will be deployed.

Accordingly, the learned trial judge was in error in upholding the application on the basis that in this case the defence of legal professional privilege was "an absolute bar to a defamation action".

17. I will now address the application of Rule 26.3 (1) (b) (the abuse issue) as it affects this appeal. The learned trial judge, in reliance on two decisions of the Court of Appeal of England and Wales , stated as follows in paragraph 58 of his judgment:-

> "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 authorities were **Wallis v. Valentine** [2003] EMLR 8; [2002] EWCA Civ 1034 and **Dow Jones & Co Inc v. Jameel** [2005] EWCA Civ 75; [2005] 2WLR 1614; [2005] EMLR 353.

18. In paragraphs 53 and 54 of his judgment Sykes J. said:-

> "53. Rule 1.1 states that in managing cases justly, the courts are to take into account (i) the need to save expense; (ii) the importance of the case; (iii) the amount of money involved; and (iv) the

financial position of each party. The court also allocates to the case a fair share of the courts' resources. The balancing required by the court is obvious.

54. The matters mentioned in rule 1.1 of the CPR have to be balanced against the fact that courts exist to resolve disputes and under the Constitution of Jamaica, a litigant has the right to approach to the court to determine what his rights and obligations are (see section 20 (2)). Thus a litigant should not be lightly turned away from the court. Nonetheless, the court ought not to be a source of profligacy and waste. The Constitution, which is the supreme law, must always be upheld in the application of procedural rules and substantive law. The courts in Jamaica also have the duty to see that litigation is pursued for legitimate purposes and in the case of defamation proceedings, for the protection of and vindication of the claimant's reputation that has been unlawfully damaged. I see no difference between the role of the courts in England and Jamaica save that the presence of a written constitution have (sic) placed the fundamental rights in an almost impregnable position."

19. The learned trial judge accepted the headnote of the EMLR report of **Wallis v. Valentine** (supra) with which I have no quarrel. This is now set out:

"(1) the claimant was pursuing a vendetta against the defendants 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 not 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 trial judge's decision was upheld. In paragraph 48 of his judgment Sykes J. stated that:

> "The significant legal principle emerging from this case is the importance of the concept of proportionality. The court has to take into account the cost of the litigation as well as the likely quantum of damages recoverable."

20. In **Wallis v. Valentine** (supra) at paragraphs 32 and 33, the court said:

> "32 In *Schellenberg v British Broadcasting Corporation* [2000] EMLR 296 Eady J, in an application to strike out for abuse of process, rejected the claimant's submission that the overriding objective under the CPR was irrelevant. At page 318 he said:
>
> > 'Even in a jury action it is regarded under the CPR as a judge's duty to take a realistic and practical attitude. He or she is expected to be more proactive even in areas where angels have traditionally feared to tread.
> >
> > I have seen nothing to suggest that the CPR are to be applied any less rigorously,

> or the judges are to be less interventionist, in litigation of the kind where there is a right to trial by jury. That important right is sometimes described as a 'constitutional right', although the meaning of that emotive phrase is a little hazy. Nevertheless I see no reason why such cases require to be subjected to a different pre-trial regime. It is necessary to apply the overriding objective even in those categories of litigation and in particular to have regard to proportionality. Here there are tens of thousands of pounds of costs at stake and several weeks of court time. I must therefore have regard to the possible benefits that might accrue to the claimant as rendering such a significant expenditure potentially worthwhile.'
>
> 33. I agree with Eady J. And although the judge must not usurp the function of the jury, as was explained by this court in *Alexander's* case, he is entitled, and indeed bound, to look at the case at its highest from the point of view of the claimant, and ask himself the relevant questions which arise when considering the overriding objective. That is what the judge did here."

21. In the **Jameel case** (supra) Dow Jones had posted on the worldwide web services, an article which Jameel complained defamed him as having been a financial supporter of Al Qaeda, a terrorist body. There were only five subscribers in England who had read this article. There was a wider publication in other parts of the world. In paragraph 69 of the **Jameel** Judgment, Lord Justice Phillips M.R, who delivered the judgment of the court, said:

> "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 not merely not have been worth the candle, it will not have been worth the wick."

22. The **Jameel case** endorsed the requirement for proportionality in executing the overriding objective of the English CPR. It is interesting to note the court's comment on **Wallis v. Valentine** (supra) at paragraph 58 of the judgment:

> "In *Wallis v. Valentine* [2002] EWCA Civ 1034; [2003] EMLR 8 the Court of Appeal, in a judgment delivered by Sir Murray Stuart-Smith, endorsed Eady J's approach and dismissed an appeal by the claimant against the striking out of his claim as an abuse of process. That was an extreme case where the judge had found that even if the claimant succeeded his damages would be very modest, perhaps nominal, and not such as could justify the costs of an action which was estimated to last 14 days in circumstances where the claimant had no assets. Furthermore the claimant was not motivated by a desire for vindication, but was pursuing a vendetta."

23. The overriding objective of the Jamaican CPR is now set out.

> "1.1 (1) These Rules are a new procedural code with the objective of enabling the court to deal with cases justly.
>
> (2) Dealing justly with a case includes –

(a) ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position;

(b) saving expense;

(c) dealing with it in ways which take into consideration –

(i) the amount of money involved;

(ii) the importance of the case;

(ii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

The English CPR is different in respect of 1.1 (2) (c) in that our Rules speak of "dealing with it in ways which take into consideration" while the former directs to "dealing with the case in ways which are proportionate". The English CPR was a model for our Rules and we have chosen not to use the word "proportionate". It may well be that the concept of proportionality as used in the English cases is derived from the used word "proportionate" in their Rules. This perhaps may have permitted the strident activist

approach. I would be loth to give our judges discretion to - under the banner of the overriding objective – shut out prospective litigants from having their viable causes heard. The overriding objective is to deal with cases justly and not to throw them out on the basis that the effort (financial and otherwise) is not worth it. There are provisions within the CPR to ensure that 'the court ought not to be a source of profligacy and waste'.

24. In the **Wallis v. Valentine** case, the prospective nominal award in damages was just one factor in consideration of the abuse issue. None of the other factors negatively impinges on Mr. Stewart's pursuit of his cause. In **Jameel**, in respect of the global picture and the vindication which was sought, the bringing of the action in England would not have achieved that aim. A similar consideration does not arise in this case.

25. In chapter III of the Constitution of Jamaica, under the heading "Fundamental Rights and Freedom", section 13 is in these terms: -

> "13 Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely —
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) ...

(c) ..."

I interpret "protection of the law" in section 13 (a) as enshrining the unfettered right of every person in Jamaica to pursue viable claims in civil actions in our courts. To prevent a person from so doing, for whatever purported reason, would be an abrogation of that fundamental right. Therefore, this fundamental right has placed Mr. Stewart not "in an almost impregnable position", but rather in an unquestionably impregnable position. There is to be no restriction on the presumed basis that an award of damages, if successful, will be so small as not to be worth the effort in the utilization of the court's resources. The substantive law of defamation does not preclude an aggrieved party from bringing an action because the award of damages would in all probability be derisory. Further, even if the overriding objective was open to the construction which the learned trial judge would seek to place on it (erroneous in my view), such an interpretation would seek to render the provision of section 13 (a) of our Constitution of no account. This is wholly impermissible.

26. In conclusion, I would allow this appeal. The appellant should have his costs both here and in the court below.

MORRISON, J.A.

27. I have had the great advantage of reading the judgment prepared by Cooke JA in this matter and I am in full agreement with his reasoning and his conclusions. I have chosen to add these few words only because we are differing from the learned judge, whose valuable discussion on the current state of the law of legal professional privilege may well merit closer study if and when this matter comes to trial.

28. This appeal challenges the correctness of Sykes J's order striking out the appellant's claim, pursuant to rule 26.3(1)(b) and (c) of the CPR on the bases that it discloses no reasonable grounds for bringing the claim and that it is an abuse of the process of the court.

29. On the first issue (no reasonable grounds for bringing the claim), I am of the view, as Cooke JA has convincingly demonstrated, that Sykes J plainly fell into error at the outset of his consideration of whether the action should be struck out under rule 26.3(1)(c), when he described the "real issue" between the parties on the striking out application as "whether Mr. Stewart has a real prospect of succeeding in his claim against Mr. John Issa". This, the learned judge went on to state, was "another way of saying that there is no reasonable ground for bringing the claim if legal professional privilege applies here" (paragraph 5).

30. By formulating the test in this way, what the judge in effect did, as the appellant submitted, was to conflate the test for summary judgment under rule 15.2(a) ("the claimant has no real prospect of succeeding on the claim or the issue") with the test on an application to strike out under rule 26.3(1)(c) ("...the statement of case...discloses no reasonable grounds for bringing...a claim"). As the learned judge himself appreciated, summary judgment "is not permissible in a defamation action (see rule 15.3(d) (iii) of the [CPR]" (paragraph 3), with the result that this matter fell to be dealt with entirely under rule 26.3(1) (c).

31. An application to strike out under this rule raises what Gatley (Libel and Slander, 11th ed., paragraph 32.34) describes as "a pleading point", in respect of which the authorities are clear that the court is required only to ascertain whether, as Dukharan JA put it in ***Sebol Limited and others v Ken Tomlinson and others*** (SCCA 115/2007, judgment delivered 12 December 2008), "the pleadings give rise to a cause of action..." (paragraph 18). The difference between the approach on an application to strike out and on a summary judgment application is neatly captured by Eady J in ***B v N and L*** [2002] EWHC 1692 (QB), in the following passage (at paragraph. 21.22):

> "21. I must focus on the claimant's pleaded case in first instance. That is all I am permitted to do for the purposes of the strike-out application. If I rule against the

> plea, then that would be the end of the matter.
>
> 22. As to the Part 24 application, however, I can have regard also to the evidence for determining whether the claimant's case has no realistic prospect of success."

32. I therefore agree with Cooke JA's conclusion that Sykes J was not "sufficiently discriminating in recognizing the difference in approach in the application of Rules 26.3 (1) and 15.2" (paragraph 14 above). There being no question in this case that the appellant's statement of case was sufficient to raise a cause of action for libel, it appears to me to be clear that the defence filed on behalf of the respondent, pleading legal professional privilege, gives rise to an issue which must now be resolved at trial.

33. On the second issue (abuse of process), Sykes J was explicitly influenced by two decisions of the Court of Appeal of England and Wales, both of which were based, in my respectful view, on wholly unusual, if not unique, facts.

34. ***Wallis v Valentine*** [2002] EWCA Civ 1034, was a dispute between neighbours and the claimant's action for libel was founded primarily on the single publication of two allegedly libelous letters to the lady with whom he lived. On the defendant's application to strike out, the judge at first instance appeared to have accepted the defendant's

submission that the claimant was pursuing a vendetta rather than seeking vindication of his reputation ("my finding is that this is a wholly unmeritorious claim pursued for, in effect, vindictive purposes") (paragraph 34). The judge also found that, even if the claimant were to succeed, his damages would be very modest, perhaps nominal, and not such as to justify the costs of an action estimated to last 14 days, in circumstances where the claimant had no assets.

35. The Court of Appeal dismissed an appeal from the judge's order striking out the action as an abuse of process, concluding that the judge had been entitled in the circumstances to take into account the overriding objective of the CPR (UK), having regard in particular to rule 1.1(2). This rule enjoins the court to deal with cases justly and "in ways which are proportionate" to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party.

36. In ***Dow Jones & Company Inc. v Jameel*** [2005] EWCA Civ 75 ("***Jameel***"), Lord Phillips MR described ***Wallis v Valentine*** as "an extreme case" (paragraph 58). The same can, in my view, probably also be said of ***Jameel,*** which was a case in which the claimant sued for libel in England on the basis that the defendant, a United States newspaper publisher, had published on the internet material suggesting that the

claimant was a member of a terrorist organisation. The defendant sought to strike out the action for abuse of process, on the basis that only five persons had read the article in England, that the claimant had suffered no damage to his reputation and that, if he had, it was quite minimal.

37. The two questions which arose on this application were, in the Court of Appeal's view, whether, firstly (paragraph 61), "where there has been a worldwide publication on the internet, can a claimant justify proceeding in a country where publication has been minimal on the ground that this is a good forum in which to seek global vindication?" and, secondly, "to what extent are the present proceedings likely to result in vindication?". Dismissing the appeal, the court's answer to these questions was as follows:

> "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 not merely not have been worth the candle, it will not have been worth the wick". (per Lord Phillips MR, at para. 69).

38. Despite describing ***Jameel*** as "unique" (paragraph 58), Sykes J discerned in it the emergent principle "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 the process to bring the claim". And, despite expressing the further view that a challenge on the ground of abuse of process in such circumstances "should rarely succeed", the judge nevertheless felt able to strike out the action for abuse of process on the basis of the limited publication of the alleged libel, the likelihood that nothing more than "minimal" damages were likely to be recovered by the appellant and the resulting disproportion of the likely costs of the proceedings to the damages recoverable.

39. In my view, the learned judge fell into error in acceding to the strike-out application on this ground for the reasons given by Cooke JA. But in any event, it does not seem to me to be at all clear from the authorities that ***Jameel*** can be taken to describe a principle invariably applicable in every case in which a claimant appears likely to obtain no more than nominal damages. Indeed, as the following extract from Gatley (and the authorities cited) demonstrates, there are in fact cases on both sides of the line (para. 32.44):

> "So, a claim in which no jury, properly directed, could award more than nominal damages, might well be struck out. By contrast, 'commercially imprudent' libel proceedings, whether funded on a conditional fee basis or not,

> should not be characterised as an abuse and will be allowed to proceed. The mere fact that the costs of a claim are out of all proportion to the possible monetary recovery – a state of affairs far from unusual in defamation litigation – will not by itself be indicative of abuse."

40. On this state of the law, I would be inclined to approach the business of striking out a libel action for abuse of process at the very preliminary stage of the litigation in the instant case with somewhat more diffidence than Sykes J felt able to do. In my view, neither ***Wallis v Valentine*** nor ***Jameel***, both conspicuously unusual cases, constrained such a result in this case, not least of all because of the added constitutional dimension in our law which is also fully discussed by Cooke JA in his judgment. Despite a passing reference to our "written constitution where right of access to the courts is guaranteed" (paragraph 60), Sykes J gave no further consideration at all to this aspect of the matter in his ruling. In this regard, I prefer Cooke JA's analysis and the primacy which he gives to the protection of the law (and the concomitant right of access to the courts) enshrined in section 13(a) of the Constitution.

41. For these and all the reasons given by Cooke JA, I would also allow this appeal, with costs to the appellant in this court and in the court below, such costs to be taxed if not sooner agreed.

McINTOSH, J.A. (Ag.)

42. I have had the opportunity to read in draft the judgment of Cooke and Morrison JJA, and concur with their reasoning and conclusions. There is therefore nothing that that I need add, save that I would wish to make a comment on the applicability of the proportionality concept in our jurisdiction.

43. The relevant Rule in our Civil Procedure Rules 2002, would suggest a deliberate intention to depart from the English approach, hence the word proportionate, while employed in the English CPR, was apparently not considered to be appropriate for inclusion in our Rules. It is certainly arguable that the proportionality concept, in my view, would violate the constitutional right of our citizens to have recourse to our courts to settle their viable claims. This, as Cooke JA expressed it, would be wholly impermissible.

44. I also would allow this appeal with costs to the appellant both here and below.

ORDER

COOKE, J.A.

Appeal allowed. Costs to the appellant both here and in the court below.