[2019] JMSC Civ 99

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 04601

BETWEEN	**WAYNE BOOTHE**	**1ST CLAIMANT/ 1ST ANCILLARY DEFENDANT**
AND	**DENISE BOOTHE**	**2ND CLAIMANT/ 2ND ANCILLARY DEFENDANT**
AND	**DIGICEL (JAMAICA LTD.)**	**DEFENDANT/ ANCILLARY CLAIMANT**

Stephen Shelton, QC and Stephanie Ewbank, instructed by Myers, Fletcher and Gordon, for the Claimants

Georgia Gibson-Henlin, QC, Stephanie Williams and Nicola Richards, instructed by Henlin, Gibson and Henlin, for the Defendant

HEARD: October 16, 17, 18, 2018 and March 18, 19, 20, 29, 2019

CLAIM FOR DAMAGES FOR BREACH OF CONTRACTUAL AGREEMENT RELATED TO USE AND OCCUPATION OF PROPERTY AND FOR DEFAMATION – LEASE AGREEMENT – BREACH OF COVENANT OF QUIET ENJOYMENT – ANCILLARY CLAIM – CREDIBILITY OF WITNESSES – WHETHER ALLEGED DEFAMATORY WORDS WERE SAID AND WHETHER THOSE WORDS ARE DEFAMATORY

ANDERSON, K., J

[1] This claim retains to a situation in which the defendant admittedly used and occupied the claimants' premises between the period of October 1, 2010 and May 7, 2014, to store a tank and pump on the claimant's premises, which were used

for the storage of fuel. As of May 7, 2014, the claimants terminated their arrangement with Digicel, as regards that usage of their property. That was not a mutual termination of that arrangement. That termination arose, as a consequence of actions of the defendant which were taken, in relation to the alleged storage on the claimants' said premises, of stolen Digicel fuel, which caused the claimants concern. Aspects of those actions are being disputed for other purposes, within the overall ambit of this claim.

[2] This is a claim for damages arising from the aforementioned use of the property by the defendant and is also, a claim for damages for defamation of character.

[3] The claimants were admittedly paid the sum of $1,500,000.00, arising from the usage by the defendant, of the claimants' premises, for the first three (3) months, with the sum that was paid for each of those three (3) months, being $500,000.00. It is undisputed between the parties that that was not a sum which was ever agreed on, between the parties, as the sum expected to be paid for the defendant's usage and occupation of the claimants' premises.

[4] The defendant has not denied that the said premises was being used by them during the aforementioned period of time and that only three (3) payments of $500,000.00 were made by the defendant to the claimant, during that period of occupation and usage. At the very least therefore, the claimants must be awarded the benefit of the sum of $500,000.00 multiplied by the number of months' usage of the premises by the defendant, less the sum of $1,500,000.00 already paid by the defendant to the claimants.

[5] The total number of months' usage, up until the end of April, 2014, would have been 43 months and in addition to that, the claimants would, at the very least, also be entitled to recover compensation, arising from the defendant's occupation and usage of their premises, for at least one week in May of 2014. By my calculation therefore, the claimants would, at the very least, be entitled, if the defendant's counterclaim, which is now only seeking to recover damages for breach of the

covenant of quiet enjoyment, were to be unsuccessful, to recover the sum: $2, 200,000.00 ($500,000.00 x 44) plus $125,000.00 (1 week - $500,000.00 ÷ 4). Thus, that total would be: $2,325,000.00.

[6] The defendant initially claimed in their ancillary claim, for the relief of specific performance and for continuing possession of the claimants' premises in accordance with the terms of that which they contend, is the lease agreement, as evidenced by a letter of Intent – Exhibit 3 of the Agreed Bundle of Documents. That letter of intent specified that the term of 'the lease' would be five (5) years. That letter of intent was signed by a representative of the defendant, but although, there are designated spaces with their names thereon, where it would have been expected that if they were willing to have signed that letter of intent, they would have signed same, in those spaces, the claimants' signatures are not on that document.

[7] Since this is now: 2019, the defence counsel had properly conceded, during presentation of her oral closing submissions to this court, that continued possession of the relevant premises is no longer, legally feasible and that also, specific performance of the alleged 'lease agreement' is no longer possible. That is so, because the alleged term of the 'lease agreement' expired years ago.

[8] As far as the defendant's ancillary claim is concerned, whereby the defendant is seeking now, to only recover damages for breach of the covenant of quiet enjoyment, it is the firm view of this court, that no lease agreement has ever existed between the parties, such that the defendant can properly recover from the claimant, damages for breach of the covenant of quiet enjoyment. See: **Street v Mountford** – [1985] AC 809.

[9] I am also not of the view that there existed between the parties, an agreement to create a lease. There were definitely, negotiations ongoing with a view to reaching agreement as to a lease being granted by the claimants to the defendant, which

would have allowed for the defendant to use the claimants' premises for the defendant's intended purpose (s).

[10] There was no agreement between the parties, as to the sum to be paid by the defendant to the claimants, if the defendant was to be a tenant of the claimant, using a part of the claimants' premises, to store fuel there. That is undisputed as between the parties who have testified in this court and whose evidence is relevant for this aspect of this case, those persons being: The 1st claimant, for the claimants and Anthony Barrows, for the defendant . The fact that the 1st claimant accepted sums of money that were paid from time to time, to enable the defendant to use the relevant premises for a particular purpose, does not mean that the parties reached agreement, either on the sum to be paid for usage of that premises by the defendant, much less that the parties had agreed to create a tenancy pertaining to that usage. The H.L case of **Street v Mountford** (*op. cit*.), which was relied on, by the claimants' counsel, in making reference to various other cases therein, provides helpful guidance in matters such as these.

[11] It is clear that not even the terms of the 'letter of intent' were ever agreed to, by either of the claimants, much less, both of them – who are the owners of the relevant property. That is the only reasonable explanation which this court has been able to infer, arising from the fact neither of the claimants ever signed that, 'letter of intent.'

[12] As regards the claimants' claim for defamation of character, I am of the view that the claimants' lead counsel quite properly conceded that said claim, based on the evidence presented to this court, in respect of that claim, can only now properly be pursued and likely be successful, at the instance of the first claimant, as against the defendant. That is, of course, because it is the first claimant who is well known in and around the general area where the relevant properly is situated, as being the owner and operator of the gas station which conducts its business operations as such, on that premises. Whilst the 2nd claimant is a co-owner of the relevant premises, she is not involved in the day-to-day operations of the gas station. The

alleged defamatory words pertain to an alleged unlawful, in fact alleged criminal act that was taking place at the gas station.

[13] I disagree with the submission of defence counsel, that the alleged defamatory words, are not capable of being defamatory, even if this court were to accept – which is disputed – that it was a servant or agent of the defendant, who had stated those words. I accept that, as regards the 1st claimant solely, the alleged defamatory statements were capable, in their natural and ordinary meaning to be understood to mean precisely what has been alleged by the 1st claimant in paragraph 11 of the particulars of claim.

[14] The alleged defamatory statements were that there were stolen Digicel batteries on the premises; that persons were there – at the gas station premises, to search for batteries which were stolen from Digicel; and that the person who allegedly made those defamatory statements had information that, 'the boss' of Nigel Thomas – who was the gas station employee, to whom the alleged defamatory words were primarily directed – if Mr. Thomas' account of that alleged incident is to be believed, had batteries at the property, which were stolen from Digicel. Mr. Thomas' boss, was, at that time, the 1st claimant. It is alleged that at the time when those words were said, by Mr. Anthony Barrows, a crowd had gathered in the immediate vicinity of where those words were said.

[15] If those words were said by Mr. Barrows – a Digicel employee at that time and even as at the times when he testified before this court, in this trial, I accept the claimants' counsel's submission that those words, if they were spoken, are defamatory. For confirmation of this, see the following case: **Rubber Improvement Ltd. v Daily Telegraph Ltd., Rubber Improvement Ltd. v Associated Newspapers Ltd.** – [1964] AC 234. See also: Halsbury's Laws of England, Volume 32 (2019)/1.

[16] The defendant though, has denied outrightly, that Mr. Barrows ever said those allegedly defamatory words.

[17] I do not accept that the alleged defamatory words were said in the presence of customers and members of the public generally, at the gas station which was operated by the claimants, at the material time.

[18] I do not accept that allegation, as made by Mr. Nigel Thomas, primarily because, based on what I saw of Mr. Thomas' demeanour on the witness stand, said demeanour was in stark contrast to that of Mr. Barrows – the person who had allegedly uttered those defamatory words, in the presence of members of the public generally, and in the presence of other employees of the 1st claimant.

[19] Mr. Barrows' demeanour throughout the course of the lengthy testimony which he gave, was always calm, without at any time having been loud and even so, in circumstances wherein he disagreed with suggestions made to him, by opposing counsel.

[20] On the other hand, Mr. Thomas' evidence from the witness stand, became loud at times, albeit that Mr. Thomas did not seem to believe that he was then speaking in a loud tone of voice. At times also, when he was being cross-examined by lead defence counsel, Mrs. Henlin, QC, he appeared somewhat aggressive.

[21] I am of the belief that, on a balance of probabilities, since he (Mr. Thomas) had been made aware, in advance of his (Mr. Barrows') arrival at the gas station premises, that persons from Digicel would be there, to search for stolen Digicel batteries which they said were on the premises, he (Mr. Thomas), had decided to become aggressive, in response to that which he (Mr. Thomas), no doubt, at that time, felt was an unwarranted expected intrusion onto his boss' premises, by personnel from Digicel.

[22] Added to that, is the fact that the documentary evidence adduced from among the documents which were all entered into evidence, by agreement between the parties, which pertain to text messages sent by Mr. Barrows, from Digicel, to Mr. Boothe – the 1st claimant, all strongly suggest that on the day when the search was

conducted by Mr. Barrows, at the claimants' premises, Mr. Barrows had been desirous of, perhaps better described as intending to, create no embarrassment for, or of Mr. Boothe, who is someone that he (Mr. Barrows) respects and who, at that time, was someone that Digicel had a business relationship with.

[23] Those text messages were sent shortly before Mr. Barrows arrived at the relevant premises with police personnel, as well as after the search had been conducted at the relevant premises and Mr. Barrows and the police personnel had left from there. The messages both before and after strongly state that at all times, Mr. Barrows did not wish to cause any embarrassment to Mr. Boothe and the messages sent after, suggest that Mr. Thomas, 'Nigel', - which is, of course, Mr. Thomas' first name and who, Mr. Barrows testified that he was referring to, when he referred to 'Nigel' in one of those messages, apparently, as far as Mr. Barrows view at that time was, had misunderstood the intent of Mr. Barrows, while he (Mr. Barrows) was at the relevant premises, on May 7, 2014.

[24] This court's conclusion though, that the alleged defamatory words were never said outside of the gas station shop and in the presence of members of the public and other employees then Mr. Thomas, does not necessarily mean that the allegation is unproven.

[25] That is so because, as particularized, the claimants have alleged that the said defamatory words were also made to Nigel Thomas, a manager in the said establishment – see paragraph 10 of the particulars of claim, in that regard.

[26] Mr. Barrows testified that after he was taken into a room, by Mr. Thomas, he told Mr. Thomas, 'about the allegations' and that his role there, was, 'to smoothly resolve the matter.' Whilst Mr. Thomas has expressly disagreed with that evidence that Mr. Barrows had told him (Mr. Thomas), of the allegations in the confines of a room that was offered by Mr. Thomas, as a place where he and Mr. Barrows could have a private conversation, I do not, for the reasons already given, accept Mr. Thomas' evidence in that regard.

[27] I accept that Mr. Barrows told Mr. Thomas of 'the allegations' within the confines of that room, in which those two (2) persons were then, the only persons present. What were those allegations? They were, undoubtedly, that stolen Digicel batteries were on the premises owned by the claimants, on which the gas station operated by the 1st claimant, is situated. Also, that he (Mr. Barrows) and other, were there to search for those stolen Digicel batteries and that they had information that Mr. Thomas' boss – who is of course, the 1st claimant, has batteries at the property, which were stolen from Digicel.

[28] The evidence-in-chief of Mr. Barrows as set out at paragraphs 11, 13 and 14 of his supplemental witness statement and the fact that a search was allowed after the allegations had been specifically made known to Mr. Thomas, by Mr. Barrows, in that room – as this court has concluded, is where and when said allegations were made, has caused this court to reach the conclusion that the alleged defamatory word were then and there stated, to Mr. Thomas, by Mr. Barrows.

[29] Mr. Thomas though, had apparently never had any doubt in his mind, that said allegations were, quite simply, entirely untrue. That is why, as accepted by him, he had stated outside of the gas station's shop, on May 7, 2014, when he had encountered Mr. Barrows at the relevant premises that morning, 'My boss a nuh thief.' That is also why, according to Mr. Thomas, he encouraged Mr. Barrows to come and look. Accordingly to Mr. Barrows, Mr. Thomas, while he was then in the office with him, 'told him to come look and satisfy himself.' So it is clear that at no time did Mr. Thomas believe that his boss or anyone else, ever had any stolen Digicel batteries, or stolen batteries at all, on the premises. Mr. Thomas was then the manager of the gas station situated on the premises. Almost certainly therefore and certainly, at the very least, more probably than not he (Mr. Thomas) would have then known that the solar system on the premises, did not operate with the use of batteries. Mr. Boothe – the 1st claimant, gave uncontradicted testimony in that regard.

[30] In order to be defamatory, however, the imputation need have no actual effect on a person's reputation. The law looks only to its tendency, so there is a cause of action, even if the words were not believed by the audience. Thus, as was expressed by Goddard, LJ in **Hough v London Express** [1940] 2 KB 507, at 515 – 'If words are used which impute discreditable conduct to my friend, he has been defamed to me, although I do not believe the imputation and may even know it is untrue.' These quoted words were approved of by Ld. Morris, in **Morgan v Odhams Press Ltd.** [1971] 1 WLR 1239, at 1253 (HL).

[31] The actual damage to the 1st claimant's reputation though, arising from the usage by the defendant's employee, in the course of his employment, of the defamatory words, would have been minimal.

[32] The proffered apology, having only been seen by the 1st claimant and his attorneys as far as this court is aware, is, although satisfactory to the 1st claimant, in terms of its wording, of minimal if any value, in limiting the damage caused to the 1st claimant's reputation, by the usage of the words which I have concluded, were used, on the relevant occasion.

[33] I will therefore award to the 1st claimant as damages for the defendant's defamation of his character, the sum of $200,000.00.

[34] For the usage by the defendant, of part of the claimants' premises, for the purpose of the storage of fuel thereon, I accept the claimants' calculation of US$1200.00 per month as being a suitable sum to be calculated as compensation for same. All reliefs as sought by the defendant in their ancillary claim, are either no longer being sought by the defendant, or will be denied by this court.

[35] The claimants will be awarded the sum, arising from the defendant's usage of their premises of US$1200.00 per month, for 43 months, being the period from October 2010 – April, 2014 – 42 months and approximately one (1) week: May 1-7, 2014.

[36] That would be a total of 2,236 weeks (43 x 52) at US$300.00 per week (US$1200.00 per month). That would constitute: US$670,800.00. Of that sum to have been paid for their usage of the premises during that period of time, the defendant has, to date, paid $1,500,000.00, which must be credited to them.

[37] The US dollar calculation would be at today's rate, which the claimant's counsel has accepted as being: 124 to 1 US dollar.

[38] That would mean that the claimants would be due the sum of $6,435,600.00 less the sum of $1,500,000.00 paid by them, arising from their usage of the said premises.

[39] The claimants would therefore now be due to recover from the defendant the sum of $4,935,600.00.

[40] This court's judgment orders are as follows:

1) All reliefs as sought in the defendant's ancillary claim, are denied and judgment on said ancillary claim is awarded in favour of the claimants.

2) The 1st claimant is awarded general damages for defamation of character, in the sum of: $200,000.00, with interest at 3% with effect from October 8, 2014 until March 29, 2019.

3) In respect of the 2nd claimant's claim for damages for defamation of character, judgment on that claim, is entered in favour of the defendant.

4) The claimants are awarded the sum of $4,935,600.00 as special damages, arising from the defendant's usage and occupation of the claimant's premises, between October 1, 2010 and May 6, 2014, with interest at the rate of 3% from as of May 7, 2014 until March 29, 2019.

5) Order No. 4 of this order, awarding the claimants the sum of $4,935,600.00, as special damages, is stayed for 42 days, pending the possible filing of an appeal from judgment.

6) The claimants are awarded the costs of their claim against the defendant in respect of the defendant's usage and occupation of the claimants' premises and are awarded the costs of the defendant's ancillary claim and such costs shall be taxed if not sooner agreed.

7) No order as to costs is made, in respect of the claimants' claim for damages for defamation of character.

8) The claimants shall file and serve this order.

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Kirk Anderson, J.