[2019] JMSC. Civ 222

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

**CIVIL DIVISION**

**CLAIM NO. 2012HCV02915**

| | | |
|---|---|---|
| **BETWEEN** | **MONICA DYSTANT** | **CLAIMANT** |
| **AND** | **MARY WHITE** | **DEFENDANT** |

**IN OPEN COURT**

Ms Liane Chung instructed by Nigel Jones & Co. for the Claimant

Mr. Leroy Equiano instructed by Duncan Ellis & Co. for the Defendant

Heard: March 25, April 2 and 9, and November 22, 2019

**Defamation – Email sent to proprietors in Strata Corporation by Secretary - Whether words defamatory – Whether Defendant absolved under Registration (Strata Titles) Act, Section 9A – Qualified Privilege – Justification – Fair Comment**

**LINDO, J.**

**[1]** On May 25, 2012, the Claimant, Monica Dystant, a registered owner of Sunbury Apartment, 10 Central Avenue, Kingston 10, in the parish of Saint Andrew, filed a Claim and Particulars of Claim claiming damages against the Defendant Mary White, for defamation.

**[2]** The Defendant is an Account Executive and Secretary of the Strata Corporation of Sunbury Apartment, 10 Central Avenue, Kingston 10, in the parish of Saint Andrew.

**The Claim**

**[3]** Ms Dystant is seeking the following reliefs:

a. Damages for defamation in excess of $4,000,000.00;

b. Aggravated damages;

c. An injunction restraining the Defendant whether by herself, her servants or agents or otherwise, from further publishing or causing to be published, the said words or any words similarly defamatory of the Claimant;

d. Interest at 6% per annum pursuant to the Law Reform (Miscellaneous Provision) Act;

e. Costs against the Defendant in the sum of $12,000.00, a total of Court fees ($2,000.00) and Attorneys Fixed Costs ($10,000.00) and continuing; and

f. Such further and other relief as this Honourable Court may deem fit.

**[4]** By her Particulars of Claim, she states *inter alia,* that on or about February 18, 2012, the Defendant sent an email to the Strata owners which state:

> *"...We must trust in God that the court sees the unscrupulous intent of Monica Dystant to bring down the corporation and extort $1,100,000.00 monies she used to expand her own apartment that she wants reimbursed under the guise of roof repairs"*

**[5]** She also states that the Defendant sent a second email on or about February 26, 2012 which is titled "Counter claim by the Corporation against Monica Dystant". The passage complained of reads as follows:

> *"...compromising security by harbouring a fugitive as well as her son distributing and smoking marijuana to other residents"*

**[6]** The Claimant avers that the words in their natural ordinary meaning meant and were understood to mean that she is an extortionist who associates herself with and provides a safe haven for criminal elements, and that she is herself a criminal. She avers further that:

*"in consequence, the Claimant's reputation has been seriously damaged. She has been ostracised and has suffered distress and embarrassment".*

**[7]** In the particulars she states the following:

*I. Accusations of being associated with criminal elements*

*II. Accusations of harbouring fugitives*

*III. Accusations of extortion*

*IV. Accusations of committing fraud*

*V. Being shunned by persons who know her; and*

*VI. Feelings of discomfort in her own place of residence.*

**The Defence**

**[8]** On July 18, 2012, the Defendant filed a Defence in which she pleaded the defences of qualified privilege and justification. On January 23, 2014, further to the permission granted by the court, the Defendant amended her Defence to include the provision of Section 9A of the **Registration (Strata Titles) Act**. She states that she was acting in her capacity as Secretary of Strata Plan #788 and as such no personal action should be taken against her, that she acted as such in the defence of a claim brought against Strata Plan #788 of the Strata Corporation Committee and that the e-mail reflected the views of the members of the Executive Committee of the Strata Plan. She also included the defence of fair comment.

**Reply to Defence**

**[9]** The Claimant on August 17, 2012, filed a Reply to the Defendant's Defence filed on July 18, 2012, and filed an Amended Reply to Defence on March 14, 2014. in which she denied that the Defendant is entitled to plead qualified privilege, fair comment or justification

**The Trial**

**[10]** At the trial, the Claimant gave evidence on her own behalf. Her Amended Witness Statement filed on December 31, 2013 and her Supplemental Witness Statement filed on June 25, 2015 stood as her evidence in chief and she was cross examined. She called no witness in support of her claim.

**[11]** The Defendant gave evidence on her own behalf and called one witness, Krystal Cameron, in support of her defence. The Amended Witness Statement of the Defendant filed on November 27, 2015 and the Witness Statement of Krystal Cameron filed on January 17, 2014 stood as their evidence in chief and they were cross examined.

**[12]** The following documents were admitted in evidence:

1. Letter dated March 29, 2012 from the Ministry of Justice
2. Letter dated October 11, 2007 from Usim Williams & Company, attorneys-at-law to the Strata management Committee of Sunbury Apartments
3. Terms & Agreement dated February 4, 2008 between Sunbury Apartments and Monica Dystant
4. Email correspondence Claimant received from Defendant, dated February 18, 2012
5. Email correspondence from Defendant dated February 26, 2012
6. Letter dated March 8, 2012 from Sunbury Apartment to Claimant
7. Letter dated February 18, 2012 from Sunbury Apartments addressed to “Dear Owners”
8. Letter dated April 30, 2011, addressed to Management Committee
9. Acknowledgement of Service filed February 20, 2012 in Claim No 2011HCV00788

10. Defence filed on March 21, 2012 in Claim 2011HCV00788

11. Letter from Austin Francis & Co. dated November 6, 2009

**[13]** At the close of the evidence the parties were directed to file written closing submissions which they did.

**The Issues**

**[14]** The issues which the court need to determine in this matter are whether the statements contained in the emails were capable of being defamatory and whether they were defamatory; whether the Defendant is protected by Section 9A of the **Registration (Strata Titles) Act** and whether any of the legal defences of justification, qualified privilege or fair comment can avail her.

**The Law and Application**

**[15]** The tort of defamation is governed by the **Defamation Act** and the statute applicable to the case at bar is the 1963 Act. The tort of defamation protects a person's interest in his reputation (See: **Commonwealth Caribbean Tort Law**, 4th Ed. page 218).

**[16]** A defamatory statement is one which tends to harm the reputation of another as to lower him or her in the estimation of right-thinking members of society or to deter third parties from associating or dealing with him/her; cause people to shun him/her (See: **Sim v Stretch** [1936] 2 All ER 1237). In order to succeed in a claim for defamation, a Claimant must satisfy the court that the words, by way of innuendo or otherwise were defamatory; the words referred to him and the words were published to at least one other person other than himself. The essence of the tort is therefore in effect in the communication of a statement which is disparaging, to a person other than the Claimant.

**Whether the statements are capable of being defamatory and are defamatory**

**[17]** On the facts presented, there is no dispute that the Defendant made and published statements in the emails. The issue of whether the statements are capable of being defamatory require an examination of meaning of the words used and I note that in her evidence in chief and in cross examination, the Claimant sought to indicate what she says the words meant.

**[18]** It is well settled that the judge must decide whether the words are capable of a defamatory meaning, it being a question of law, and if they are so capable, then, it is to be determined as a question of fact whether they are defamatory.

**[19]** Guidance can be taken from Lord Nicholls of Birkenhead, in the Privy Council decision of **Bonnick v Morris, the Gleaner and Allen** [2002] UKPC 31, where at paragraph 9 of the judgment, in giving an explanation of the approach to be taken in determining whether a statement is capable of bearing a defamatory meaning, said:

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

**[20]** Prior to the decision in **Bonnick**, Carey JA, in the case of **The Gleaner Company Ltd. v Small**, [1981] 18 JLR 347, said:

> *"...the judge must put himself in the place of a reasonable fair-minded person to see whether the words suggest disparagement, that is, would injure the plaintiff's reputation, or would tend to make people think worse of him..."*

**[21]** This point was succinctly stated by Lord Morris of Borth-y-Gest in **Jones v Shelton** [1963] 3 All ER 952 at 958, thus:

> *"It is well settled that the question of whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for a decision by the court. If the words are so capable then it is a question for the jury to decide whether the words do in fact convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation..."*

**[22]** I am mindful that it is a two-part test as shown in the case of **Ramsahoye v Peter Taylor and Co. Ltd** [1964] LRBG 329 where Bollers J, at page 331, said:

> *"In a trial with judge and jury, the judge's function is to decide whether the words are capable of being defamatory. If he answers in the affirmative, it is then for the jury to decide whether they are defamatory in the circumstances of the particular case. Where trial is by judge alone as is almost invariably the case in Commonwealth Caribbean jurisdictions, the judge must perform both functions"*

**[23]** As a judge sitting without a jury in this matter, I heed the words of P. Williams, J., (as she then was) in **Percival Patterson v Cliff Hughes and Nationwide News Network Ltd**., [2014] JMSC Civ 167, where at paragraph 34, she states:

> *"It is considered particularly important therefore that when sitting alone in matters such as this, the Judge has to resist the urge of using the 'judicial mode and manner' in determining the meaning of the words used".*

**[24]** The words complained of in the email of February 18, 2012 (Ex. 4) are as follows:

> *"...We must trust in God that the court sees the unscrupulous intent of Monica Dystant to bring down the Corporation and extort $1,100,000.00 monies she used to expand her apartment that she wants reimbursed under the disguise of roof repairs"*

**[25]** The authorities suggest that the impugned statement must be assessed as a whole and in the context of how they were communicated. The email was titled, "Subject: Notice: Legal Fees of $6,250 added to your maintenance". It reads as follows:

*"Dear Owners*

*This letter serves to notify you that the cost of Six Thousand Two Hundred and Fifty Dollars ($6,250) will be added to your contribution fees effective Monday February 20, 2012. The fee becomes due for payment on March 20, 2012.*

*The above fee represents cost of one hundred and fifty thousand dollars ($150,000.00) to retain attorney-at-law Philmore Scott & Associates to defend an 18 point claim against all owners filed in the Supreme Court on February 6, 2012 by Monica Dystant of Apt #23. (see summary of defence below) Three request for quotation were sent out but only one responded so far. It is important to understand that an attorney MUST represent matters filed in the Supreme Court. The Attorneys function will be:*

1. *To file 14-day acknowledgement of service in the Supreme Court by February 20, 2012*

2. *To file 42-day defense in the Supreme Court by March 18, 2012*

3. *To file a motion in the Supreme Court to dismiss the claim*

*Please note that owners will become liable for any additional charges incurred especially if claim to dismiss charges fails, and the lawyer must attend court to litigate claim. If after litigation the court finds in favour of the plaintiff (Monica) and award judgment for the following monetary claims all owners will be equally liable for their one twenty fourth portion of approximate claims of:*

| | |
|---|---|
| *Cost to repair roof* | *$1,100,000* |
| *Modification (interest)* | *$75,000* |
| *Special damages (courier/survey)* | *$10,000* |
| *Interest on loan @23% of $1,190,000* | *$273,700* |
| *Legal fees (estimate)* | *$300,000* |
| *Costs (estimate)* | *$200,000* |
| *Relief (Court discretion)* | *$50,000* |
| *TOTAL* | *$2,008,700 divided by 24=$63,695.83* |

*We asked your and active support by way of timely payments and legal strategies to fight this claim.* ***We must trust in God that the court sees the***

***unscrupulous intent of Monica Dystant to bring down the Corporation and extort $1,100,000, monies she used to expand her apartment that she wants reimbursed under the disguise of roof repairs****....(sic)"*

**[26]** Counsel for the Claimant examined the definitions of the words "unscrupulous" and "extort" and indicated, among other things, that the Defendant was "essentially calling the Claimant an extortionist". She submitted that the ordinary, reasonable reader of the email "would have come to no other meaning than that contended by the Claimant". She pointed out that the literal meaning can be interpreted negatively and places the Claimant in a negative light. Counsel also submitted that the words could be construed as being defamatory by way of innuendo as the email was published to other Strata owners who all knew the Claimant and are aware of the issues regarding her attempts to recover for her roof repairs.

**[27]** Counsel for the Defendant on the other hand pointed out that the communication had to do solely with an action filed by the Claimant against the corporation that required the participation of the owners and that the Defendant, as Secretary, represented the position of the Corporation's executive. It was also pointed out that references were to "we".

**[28]** The words complained of in the email dated February 26, 2012 (Ex. 5) are as follows:

> *"8. Compromising security by harbouring a fugitive as well as her son distributing and smoking marijuana to other residents."*

**[29]** This email message was addressed to "Dear Owners" and stated as follows:

> *"As indicated, we need your input to fight claim filed by Monica in the Supreme Court. Please review the following counter claim and proposed defence and give feedback and advise. Defence must be ready by next Friday. Counter Claim by the Corporation against Monica Dystant".*

**[30]** There were eight points stated under the heading "counter claim...." and it is the one numbered '8' with which the Claimant has taken issue.

**[31]** In cross examination, the Claimant stated that the meaning she ascribed to it is that “I am carrying out a criminal activity, I am breaking the law by harbouring a fugitive...”

**[32]** It was submitted on her behalf that the natural and ordinary meaning that is conveyed to the ordinary reasonable reader by the words is that the Claimant was breaching security “by allowing a person who has escaped from captivity to have shelter in her home and is therefore aiding and abetting this fugitive...” Counsel added that the use of the words “compromising security” would convey that the Claimant’s son was involved in illegal activity.

**[33]** As guided by the authorities, I have examined the emails in their entirety and note that there is no dispute that the words referred to the Claimant. I have also examined them within the context of how they were communicated and find that the words are capable of bearing a defamatory meaning as complained of by the Claimant. I am of the view that the words complained of fall within what can be reasonably considered as comment. Additionally, it is my view that there were expressions of opinion within the said communications.

**[34]** The words and their imputations as contained in the emails are capable of disparaging the Claimant in her capacity as a proprietor within the Strata Corporation. I find that they would tend to injure her reputation and would in fact tend to lower her in the estimation of right thinking members of society and are therefore defamatory of her.

**[35]** I will therefore consider whether the Defendant is protected by Section 9A of the **Registration (Strata Titles) Act** and whether the defences of justification and qualified privilege as pleaded by the Defendant can absolve her.

**Whether the Defendant is protected by Section 9A of the Registration (Strata Titles) Act**

**[36]** Section 9A of the **Registration (Strata Titles) Act** provides as follows:

> *"No action, suit, prosecution or other proceedings shall be brought or instituted personally against any proprietor who is a member of the executive committee in respect of any act done bona fide in pursuance or execution or intended execution of this Act.*

**[37]** The Claimant has provided evidence in which she identified the Defendant as an Account Executive and Secretary of the Strata Corporation Committee of the Sunbury. She asserts that the statements were made maliciously and that they were unconnected with the execution or intended execution "of any part of the Act".

**[38]** Counsel for the Claimant expressed the view that the Defendant should be precluded from the protection of the statute as she has not provided any evidence from the Strata Corporation to support her assertions. The Claimant has not however shown that the Defendant was not acting "bona fide".

**[39]** The Defendant on the other hand has shown in her Defence to the claim and by the evidence proffered that she was acting in her capacity as Secretary of the corporation. I find that the communications containing the words complained of were directly related to issues being addressed by the corporation and had nothing to do with the Defendant in her personal capacity. I note that even in cross examination the Defendant stated that the contents of the emails were not necessarily her personal view.

**[40]** When the emails are examined, they reveal that they refer to the claim filed by the Claimant against the Strata Corporation and that owners of properties within the Strata were written to, seeking their participation. I note also that the emails were signed by the Defendant in her capacity as Secretary of the strata although they were sent through her personal email and I bear in mind that the references were, as pointed out by counsel for the Defendant, "in the first person plural 'we'".

**[41]** There is documentary evidence to show that the Strata Corporation had an email address, as it is listed among the recipients to whom the Defendant made communication by way of email. No evidence was presented to show that the

Strata Corporation communicated with the proprietors or with anyone, for that matter, from that email address. However, what is clear from the evidence, which I accept as true, is that the Defendant has used her personal email address to communicate with the proprietors of the Strata in the past, and I accept the evidence of the Defendant that it was the norm in sending correspondence to owners.

**[42]** Additionally, it is my view that the Defendant in her communication, the use of the word “we” would suggest that it was not being done in her personal capacity. I therefore find it reasonable to conclude that the Defendant was acting in her capacity as Secretary of the Strata Corporation and not in her personal capacity and as such ought not to be held liable.

**[43]** I bear in mind also that an apology was sent by letter dated March 8, 2012 (Ex. 6) under the signature of the Defendant, as Secretary of the Strata, and that this was on the ‘letter head’ of the Strata Plan #788.

**[44]** The issue of the extent of the publication in this case I believe should also be considered. There is evidence that the Defendant sent the emails to proprietors within the strata corporation as well as to the Claimant. The Defendant was addressing the proprietors of the Strata Corporation and I find, on an examination of Exhibit 7, that this was limited to the twenty-four owners, including the Claimant. There is no evidence to contradict that or to show that the emails were sent to any other person or persons. As a consequence, I believe it is reasonable to find that the owners of property within the strata corporation, were the only persons privy to the emails. This readership was a relatively small group of persons and I have no doubt the matter referenced in the emails were of concern to them.

**Qualified privilege**

**[45]** It is a defence to a claim for defamation that words defamatory of a person were spoken or written in circumstances which attract qualified privilege. This defence

can be defeated if the Claimant can show that at the time of the publication the Defendant was activated by malice.

**[46]** Qualified privilege arises from the particular occasion in which the statement which is said to be defamatory was made and may apply where the person making the statement believes it is required as a matter of public interest.

**[47]** Lord Atkinson in **Adam v Ward** [1971] A.C. 309, at 334 stated the position relating to qualified privilege as follows:

> *"A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."*

**[48]** The issue of whether a Defendant can avail himself of the defence of qualified privilege arose in the case of **McDonald Farms Ltd. v Advocate Company Ltd**. [1996] 52 WIR 64. The Court of Appeal referred to **James v Baird** [1916] SC (HL) 158..and quoted from Earl Loreburn who explained the manner in which the court should approach the matter of qualified privilege. Loreburn said:

> *" ...In considering the question of whether an occasion was an occasion of privilege, the Court will regard the alleged libel and will examine by whom it was published, to whom it was published when, why, and in what circumstances it was published and will see whether these things establish a relation between the parties which give rise to a social or moral right or duty and the consideration of these things may involve the consideration of questions of public policy..."*

**[49]** In the defence of qualified privilege, the law recognises that there is a need for certain recipients to receive "frank and uninhibited communication" of specific information from a particular source. (See: **Reynolds v Times Newspapers Ltd. & Ors.** [1994] 4 All ER 609 at 616) Where there is co-existence or reciprocity of interests, the occasion of the communication would therefore be rendered privileged.

**[50]** I have no difficulty in finding that the subject of the e-mails was a matter which was of interest to the proprietors of the Strata. The statements contained in the e-mails concerned the action of the Claimant against the Strata Corporation. It is therefore clear that there is reciprocity of interests on the part of the Defendant in her capacity as Secretary of the Strata Corporation on the one hand, and the owners of properties in the Strata Corporation, on the other. The quality of the information contained in the emails in my view were such that the Defendant, as Secretary of the Strata Corporation, had a duty to convey it to the proprietors who were likely to be affected by the outcome of the claim filed by the Claimant. This in my view would render the occasion of the email messages by the Defendant, privileged.

**[51]** Words found to be defamatory which in the circumstances attract qualified privilege and are not proven to be actuated by malice are protected from liability.

**[52]** On the facts of this case as I have found them, the Defendant established her interest as a member of the strata and Secretary of the corporation in communicating information to other members about the actions of the Claimant. There was sufficient interest on her part, as Secretary of the Strata Corporation, to communicate the statements to the other strata owners in her capacity as Secretary, and the strata owners had a corresponding interest in receiving the statements contained in the emails.

**[53]** The Claimant has stated that the Defendant's malice towards her is clear from the nature of the statements made. She has also given evidence that prior to the emails written by the Defendant, "the Defendant verbally abused me and also physically abused me". However, she has not provided any evidence to support her assertion of malice nor have I found any evidence from which I can reasonably infer that there was any malice on the part of the Defendant or that she had any improper motive when the emails were written.

**[54]** Having assessed her demeanour as she gave evidence and was cross examined I formed the view that the Defendant was genuinely carrying out the functions of Secretary of the corporation and was not moved by any ill-will or any dislike of the Claimant or any wish to calumniate her. I note that in her evidence in chief, she speaks to differences between herself and the Claimant and she has even exhibited correspondence from the Claimant in support of this and I bear in mind that the emails were also sent to the Claimant.

**[55]** Having regard to the fact that the strata owners had an interest in receiving the information, the occasions on which the two emails were sent are in my view privileged and the Claimant not having shown that they were actuated by malice, I find that the Defendant is entitled to avail herself of the defence of qualified privilege.

**Justification**

**[56]** In **Jasper Bernard v The Jamaica Observer**, CL2002B048, unreported, delivered January 27, 2006, the court had this to say in relation to a plea of justification:

> *"Justification is a plea that the defamatory words are true. Truth is a complete defence. To sustain such a plea, it is necessary to prove to the jury that the words were 'true in substance and in fact'. Proof of the Defendant's belief in the truth is not sufficient."*

**[57]** Part 69.3 of **the Civil Procedure Rules, 2002** provides that:

> *"A Defendant (or in the case of a counterclaim, the Claimant) who alleges that*
>
> *(a) in so far as the words complained of consist of statements of fact they are true in substance and in fact; and*
>
> *(b) in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest; or*
>
> *(c) pleads to like effect,*
>
> *must give particulars stating –*

*I. which of the words are alleged to be statements of fact; and*

*II. the facts and matters relied on in support of the allegation that the words are true.*

**[58]** The Defendant has pleaded the defence of justification and therefore has a duty to show that the words found to be defamatory, are true. This defence can succeed if the "gist" of the communication is substantially accurate.

**[59]** Section 7 of the **Defamation Act, 1963** which I find to be the statute applicable to this matter, provides as follows:

> *"In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."*

**[60]** In the Defence filed on July 18, 2012, Ms White has stated particulars including the following:

> *"The email was sent in the Defendant's capacity as Secretary of the Committee and reflected the view of the executive Committee... The Claimant has been demanding that the Strata owes her money for repairs to roof...It is true that the Claimant's son distributes and smokes marijuana with other residents..."*

**[61]** The evidence of the Defendant's witness, who I found to be a witness of truth, is that she has seen the Claimant's son smoking marijuana. She was not shaken in cross examination. The Defendant also maintains that she too, has seen the Claimant's son smoking marijuana and her evidence further is that she was mandated to check court records and this confirmed that the Claimant's son had been "convicted for possession of marijuana and dealing with and attempting to export marijuana and also for possession of cocaine, dealing in cocaine and attempting to export cocaine."

**[62]** The Claimant has claimed ignorance in relation to whether her son smoked marijuana or distributed it to persons in the premises. She was also not candid

with the court when she was being cross examined in relation to the Defendant's signature on a number of documents which were admitted in evidence.

**[63]** While I accept as a fact that she is not always at her premises when her son is there, and would not necessarily know what is taking place in her absence, I accept as true, the evidence of the Defendant's witness that she has seen the Claimant's son smoking marijuana. I find on the evidence, that it is reasonable to believe that he in fact smoked marijuana and distributed marijuana to persons on the premises and I also accept as true the evidence that the Claimant's son had been convicted for offences related to marijuana. I bear in mind also that an application for the expungement of convictions from his police record was approved by the Criminal Records (Rehabilitation of Offenders) Board, at a sitting held on March 29, 2012, which is prior to the filing of the instant claim. (See Exhibit 1)

**[64]** Additionally, with regard the words complained of concerning "harbouring a fugitive" I believe the evidence of the Defendant and her witness that they have been questioned by the police as to the presence of an attorney at law at the premises and I accept as credible, the evidence of the Defendant that she has seen a man leaving early and returning late, as well as smoking in the corridor in front of the Claimant's door and find that it is more likely than not that it is the said man who was being sought by the police.

**[65]** It is my view that the Defendant has shown that the words contained in the emails are substantially true and I accept that it is sufficient for her to prove the substantial truth of the words used as opposed to truth in every detail. I therefore find that she has shown that the defence of justification is available to her.

**Fair Comment**

**[66]** It is a defence to a claim of defamation that the words complained of are fair comment on a matter of public interest.

**[67]** The authors of **Gatley on Libel and Slander**, 10th Edition, Sweet & Maxwell, 2004, at paragraph 12.1, state the basis of the defence of fair comment to be that:

> *"[t]here are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able to comment freely, and even harshly, so long as they do so honestly and without malice"*

**[68]** **Section 8 of the Defamation Act** provides as follows:

> *"In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of are true"*

**[69]** In determining whether the words complained of are expressions of opinion or imputations of fact I have considered the following: "it has been said that the sense of comment is something which is or can be inferred to be a deduction, inference, conclusion, criticism, remark observation, etc."; that the words complained of are likely to be considered comment if it is one of "pure value judgment, incapable of proof"; that words are generally regarded as comment where there is reference to certain facts and thereafter it is shown that the statement is "an inference from the facts"; that "a bald statement with no supporting fact is unlikely to be considered a comment" and an apparently factual statement which is either true or false may be classified as a comment if it appears to be an inference from other facts. (See **Clerk and Lindsell on Torts**, 19th Ed. paragraph 23-169)

**[70]** When the words complained of are examined within the context of the above considerations, I find that to speak to "the unscrupulous intent..." and "compromising security by harbouring a fugitive" may properly be described as comments.

**[71]** It has been established on the evidence that the Claimant has filed a claim against the Strata Corporation and that her son has been seen smoking and distributing marijuana to persons in the complex. Having regard to the factual basis of the comments, therefore, I am of the view that, although harsh, it could fairly be made out in the circumstances.

**[72]** The court therefore finds that the Defendant has shown justification in relation to the words communicated to the other Strata Owners by way of the emails sent from her personal email address.

**Conclusion**

**[73]** In view of all the foregoing, I find that the words complained of by the Claimant contained in the emails sent by the Defendant were capable of being defamatory and were in fact defamatory of the Claimant.

**[74]** The Defendant has however successfully established the defences raised by her and has also shown that she is protected by Section 9A of the **Registration (Strata Titles) Act** as I accept as a fact that she sent the emails in her capacity as Secretary of the Strata Plan #788 and the recipients had a reciprocal duty to receive same.

**Disposition**

**[75]** The claim is therefore dismissed. There will be judgment for the Defendant with costs to be taxed, if not agreed.