[2022] JMSC CIV 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017/HCV00031

BETWEEN	**OSWEST SENIOR SMITH**	**CLAIMANT**
AND	**GLEANER (MEDIA) COMPANY LIMITED**	**1ST DEFENDANT**
AND	**LISA PALMER-HAMILTON**	**2ND DEFENDANT**

Mrs Denise Senior Smith instructed by Oswest Senior Smith & Company for the claimant.

Kevin Powell instructed by Hylton Powell for the 1st defendant.

John Vassell QC, and Mrs Trudy-Ann Dixon Frith instructed by DunnCox for the 2nd defendant.

HEARD: 20th January & 28th April, 2022

Civil Procedure - Rule 26.1 of Civil Procedure Rules - application to strike out claim - whether there are reasonable grounds for bringing the claim; Issue estoppel - whether issue in claim subject to issue estoppel on the basis of it being the subject of Court of Appeal judgment; Defamation - absolute privilege - whether words spoken during trial by counsel subject to absolute privilege

MASTER C. THOMAS (AG.)

Introduction

[1] By a "relisted" notice of application for court orders filed on 2nd July, 2020, the 2nd defendant is seeking to strike out the instant claim pursuant to rule 26.3(1)(a) and (b) of the Civil Procedure Rules ("CPR"). The application was first filed on 12th June, 2018. The grounds relied on are that:

(i) The statement of case discloses no reasonable grounds for bringing the clam as absolute immunity from civil action for defamation attaches to statements made by counsel during the course of judicial proceedings;

(ii) The statement of case is an abuse of the process of the court.

Background

[2] The claim has its genesis in verbal exchanges which took place between the claimant and the 2nd defendant during the murder trial ***Regina v Bertram Clarke and another*** in which the claimant, who is a defence counsel, and the 2nd defendant, who was at the time, a senior deputy director of public prosecutions, were involved. The critical verbal exchanges took place on 1st February, 2016. The transcript of the proceedings records the following exchange as occurring:

> MRS L. PALMER HAMILTON: I am objecting, because that is not the evidence. He was not an accused before the circuit court when he gave that statement. He was – he had already pleaded guilty and was to be sentenced.
>
> MR O SMITH: So, if you plead guilty and you are not sentenced, you are an accused.
>
> MR O SMITH: You are [not] a convict

MR O SMITH: M' Lady as far as I am aware, until the person is sentenced, m' Lady, with the greatest of respect, m' Lady, with the greatest of respect…

HER LADYSHIP: I am not going there. I made a comment, but I am not going to add to that quite at this time. I am not going to enter into any legal dissipation.

MR O SMITH: The Court cannot deny a plea and [sic] be withdrawn under the right circumstances.

HER LADYSHIP: Mr Senior Smith, I am fully aware of that. I have allow[ed] you to do that on several occasions before this Court. Mr Newland was fully before the St Ann Circuit as an accused to be sentenced**.**

MRS L. PALMER HAMILTON: M'Lady, do you see, Counsel's posture, m'Lady.

HER LADYSHIP: Mrs Palmer Hamilton.

MRS L. PALMER HAMILTON: No, I am appalled, that's why I am bringing it – counsel bore down on me a while ago.

HER LADYSHIP: Mrs Palmer-Hamilton you can't - please.

MRS L. PALMER HAMILTON: I felt assaulted.

HER LADYSHIP: Mrs Palmer-Hamilton, we have come thus far, whatever has a beginning will always have an end. And, I am saying I am busily trying to write. Trying to control this court, which is not the easiest thing at this stage. All I ask is, that, everybody be composed, and I appeal to everybody in the case. Once I again, I say to you, you are all senior counsel at the bar. If I had any idea that it was not a court of law I was sitting in, then I would come prepared in my other type of combat. Mr Senior Smith, thank you very much, sir, could you take your seat at this time, let me finish make the notes as to what was said.

MR O SMITH: I will finish the submission, ma'am. And it is on your record that my friend was assaulted. I just wish to correct

that if it is my friend is making reference to. I did not assault my learned friend. And, I think that it is my right to correct the record, because when counsel…

HER LADYSHIP: You know one of the things you know, Mr Senior Smith, and I ask you just to take your seat and you're still standing. Let me just say once and for all. That no matter what you may think, am still in charge of the court. No matter what any of you, all sitting down may think, I am still in charge of the court. I asked you to take your seat and you continued as if I hadn't said it. I do not wish to be stretched beyond a certain limit. I have appealed to you all as counsel of senior years to conduct yourselves in a manner which is befitting of counsel of senior years. And I once again appeal to you all, and say that I expect a certain standard of behavior from you all. It is 10 minutes past 4:00. Maybe we should take this adjournment. We will continue tomorrow morning at 10 o' clock. Thank you very much…

[3] Following these exchanges, on 2nd February, 2016, there was a publication in the 1st defendant's newspaper which related to the above exchanges between the claimant and the 2nd defendant.

[4] The claimant filed claim form and particulars of claim on 6th January, 2017 seeking damages for defamation and amended same on 17th January, 2017. At paragraphs 5-8 of the amended particulars of claim, the following allegations are made:

> **5. That on the 1st day of February 2016 whilst the Claimant and the 2nd Defendant were involved in an ongoing trial in Court 1, the 2nd Defendant falsely and maliciously in the presence of all in the Court including the servant and/or agent of the 1st Defendant Barbara Gayle said the following words: "My lady, My**

Learned Friend [Mr Senior-Smith] has just assaulted me."

6. On the 1st day of February, 2016 the 1st Defendant in an article reported on its website published the false and malicious statements of and concerning the Claimant the following words which are defamatory of the Claimant:

"DEPUTY DPP ACCUSES DEFENCE LAWYER OF ASSAULTING HER DURING MURDER TRIAL
Senior Government Prosecutor Lisa Palmer Hamilton today accused defence attorney Oswest Senior-Smith of assaulting her during the hearing of a murder case.

Palmer Hamilton surprised the Home Circuit Court this afternoon when she made the disclosure to Justice Gloria Smith. She did not state the nature of the assault.

'Conduct yourselves befitting Counsel of senior years and I expect a certain standard of behavior,' the Judge said.
Meanwhile in response, Senior-Smith said he wished to correct the records.

He told the court he never assaulted Palmer Hamilton, who is a senior Deputy Director of Public Prosecutions.

Senior-Smith later told the Gleaner that he was saying something to the prosecutor and he went close to her so his voice would not be heard by the jury. …"

7. The words complained of were therefore published by or caused to be published by the 1st and 2nd Defendants. The

words referred to and were understood to refer to the Claimant. The words were published at large.

8. Accordingly, it was the intention of the Defendants that the words would be published to a wide cross section of persons. The words in their natural and ordinary meaning and in the context of the entire article and in the presence of those in court meant:

   a. That the Claimant has physically attacked the 2nd Defendant;
   b. That the Claimant has threatened the 2nd Defendant;
   c. That the Claimant is a violent person;
   d. That the Claimant has abused the 2nd Defendant;
   e. That the Claimant has engaged in criminal behaviour; and
   f. That the Claimant has put the 2nd Defendant in fear; (Emphasis supplied)

[5] A defence was filed on behalf of the 2nd defendant on 17th November, 2017 in which the following averments are made in response:

3. The Second Defendant admits the date alleged in paragraph 5 of the Amended Particulars of Claim and that she and the Claimant were engaged as Counsel in a criminal trial in the Home Circuit Court and that she made a statement to the Court regarding the conduct of the Claimant as Counsel but denies that the words she used were the words alleged in the said paragraph 5 of the Amended Particulars of Claim.

4. In further reply to paragraph 5 of the Amended Particulars of Claim, the Second Defendant states that, in the course of the trial, the Claimant, having twice said to her whilst on his feet “Why are you leading the Judge into error?” moved over from where he was

standing in the bench behind her, stretched over other Defence Counsel and leaned over to her in a confrontational manner which she found, not only offensive but intimidating and repeated, “Why are you leading the Judge into error?” She was so shocked and dismayed that she rose and brought the Claimant’s conduct to the attention of the learned trial Judge so that the matter would not have escalated in the presence of the jury. **The Second Defendant states that what she said to the trial Judge was, “Milady, do you see Counsel’s posture towards me? I am appalled; that is why I am bringing it to your attention. Counsel bore down on me a while ago! I felt as if I was being assaulted**.” (Emphasis supplied)

5. The Second Defendant neither admits nor denies paragraph 6 of the Amended Particulars of Claim as she does not know whether the matters alleged therein are true.

[6] Then at paragraph 13, it is stated:

13. The Second Defendant states that if, which is denied, the statement made by her to the Court was the one alleged by the Claimant, the said statement was made on an occasion of absolute privilege and is not actionable.

PARTICULARS

a. The Claimant and Second Defendant were engaged as Counsel in a criminal trial in the Home Circuit Court.
b. The Claimant’s case is that the statement complained of was made in the course of, and with reference to, the said proceedings including the Claimant’s conduct as Counsel therein.

A defence was filed on behalf of the 1st defendant on 11th May, 2017, the contents of which are not relevant for the purposes of this application.

[7] The 2nd defendant's application to strike out was supported by two affidavits sworn to by Trudy-Ann Dixon Frith, an attorney-at-law and partner in the firm on record for the 2nd defendant. To her first affidavit, filed on 7th December, 2018 Mrs Dixon-Frith exhibited the transcript of the shorthand notes taken during the trial of ***Regina v Bertram Clarke et al*** as well as the judgment of the Court of Appeal in **Oswest *Senior Smith v the General Legal Council and Lisa Palmer Hamilton*** [2018] JMCA Civ 28 ("the first Court of Appeal judgment"). To her second affidavit filed on 12th February 2019, two letters mentioned in the judgment of the Court of Appeal were exhibited. The first letter dated 2nd February, 2016 was written by the claimant to the Disciplinary Committee of the General Legal Council ("the Disciplinary Committee") in which he stated that he was "constrained to lodge a complaint of professional misconduct" against the 2nd defendant who, he stated, told the learned trial judge that "he had assaulted her". The second letter was letter dated 24th March, 2016 from the 2nd defendant to the Disciplinary Committee in which she set out her response to the claimant's complaint. She gave her account of what had transpired and reiterated that what was said was that she "felt as if she were being assaulted".

[8] A perusal of the first Court of Appeal judgment reveals that the judgment emanated from the claimant's appeal against the decision of the Disciplinary Committee to dismiss the complaint that he had made against the 2nd defendant as the Disciplinary Committee found that no complaint had been made out against the 2nd defendant. The Court of Appeal dismissed the claimant's appeal.

[9] On 11th February 2019, the claimant filed his affidavit in response to the first affidavit of Mrs Dixon-Frith in which he asserted, among other things, that the transcript of the proceedings was erroneous and the judgment of the Court of Appeal was on appeal to the Privy Council. He also deponed that if "credence was to be given to the reported say-so, 'I felt as if I were being assaulted', that intimation

by the prosecutor did not bear any reference at all to the subject matter of the proceedings; and was not for the purpose of the judicial proceedings".

[10] An affidavit sworn to by Denise Senior Smith in response to the first affidavit of Mrs Dixon Frith was also filed on behalf of the claimant. In her affidavit, Mrs Senior Smith deponed, among other things, that the judgment of the Court of Appeal was the subject of an appeal to the Privy Council. She also asserted that "there are live issues to be determined by the Privy Council which touch and concern this application".

[11] The claimant's application for conditional leave to appeal to the Privy Council was dismissed by the Court of Appeal in a majority judgment delivered on 31st July 2020 ("the second Court of Appeal judgment").

Submissions

[12] Mr Vassell QC submitted that the claim against the 2nd defendant is bound to fail as absolute privilege is an answer. He referred to the first Court of Appeal judgment and submitted that one of the issues in that appeal was whether the words uttered on an occasion of absolute privilege could constitute professional misconduct. He submitted that the issue was fully argued and there was a determination of whether absolute privilege attached to the words uttered. Therefore, the claimant was estopped from contending otherwise and continuing to pursue this issue. He submitted that the claimant having failed to seek special leave to appeal to the Privy Council, there was no challenge to the Court of Appeal's decision that the occasion on which the words were uttered was subject to absolute privilege. He also submitted that the claim is subject to estoppel as a matter of evidence.

[13] Referring to the cases of ***Bodden v Brandon*** [1952-79] CILR 67 and ***Wilbert Christopher v Gracie and Rattray Patterson Rattray*** [2011] JMCA App 22, he submitted that the words uttered are subject to absolute privilege. Mr Vassell submitted that if the claimant's account of the events is accepted, the occasion is still one of absolute privilege as the words were spoken in the course of judicial

proceedings with reference thereto and with reference to counsel's conduct in the proceedings and whether counsel's conduct would influence the jury. However, the transcript of the proceedings reflected the 2nd defendant's account and the Court of Appeal had stated in the second Court of Appeal judgment that the transcript is the record of the proceedings.

[14] Mr. Vassell submitted that it is clear that the words complained of were said in the course of judicial proceedings by the 2nd defendant in her character as counsel and were said to the judge while the 2nd defendant was on her feet and there was an unbroken chain when the claimant took objection to what the 2nd defendant was saying and the words and the objection were about the trial. This was a very strong case in which the words said were with reference to the proceedings and this was as high as the court required as the cases of ***Smeaton v Butcher*** [2000] All ER (D) 629 and ***Seaman v Netherclift*** [1876] 1 CPD 540 demonstrate.

[15] Mrs Senior Smith in dealing with the first ground of the application that the claim should be struck out because there was no reasonable ground for bringing the claim, submitted that it was necessary to examine the pleadings. Referring to paragraph 5 of the amended particulars of claim, she submitted that this is the critical pleading that the claimant is relying on to demonstrate to this court that the words were not uttered for the purpose of judicial proceedings nor with reference to the subject of the proceedings. Referring to paragraph 6 of the defence, she submitted that the 2nd defendant did not deny the averments contained in paragraph 5 of the particulars of claim. She submitted that the defendant did not deny that the words complained of did not form part of the 2nd defendant's instructions and had no reference to the proceedings.

[16] Mrs Senior Smith submitted that the amended particulars of claim raise the question of whether the 2nd defendant's remarks as counsel which were said in the course of proceedings to another counsel, said remarks being unrelated to the proceedings concerning the other counsel's conduct and imputing a crime to counsel are protected by absolute privilege. There was no doubt that the statement

was said in court proceedings but the issue was that they were never said with reference to the proceedings. This was a matter for the court to decide. All the cases relied on by the 2nd defendant were cases that were heard before a tribunal. There was no case in which the exception to the principle of absolute privilege had been tested. Mrs Senior Smith argued that the issue as to whether the statement was uttered for judicial purposes and with reference to the proceedings is an issue of fact that is unsuitable for summary determination at this stage.

[17] Referring to the grounds of appeal in the first Court of Appeal judgment, Mrs Senior Smith submitted that the issue had not been decided by the Court of Appeal as this was not one of the questions for the court to decide. She submitted further that issue estoppel does not arise. She referred to the judgment of Phillips JA in the second Court of Appeal judgment and submitted that the very question that the claimant was raising in relation to the applicability of absolute privilege, Phillips JA had stated that it was never argued. What the Court of Appeal had to decide, she argued, was whether the questions put forward to the court satisfied the threshold of great, general or public importance. In this particular case, there is a different set of facts which has not been demonstrated in any case relied on by the 2nd defendant and which having regard to the pleadings and the exception set out by Halsbury's Laws would have a different result.

[18] With respect to the ground that the claim is an abuse of the process of the court, she submitted that there is no explanation in the affidavit in support of the application as to how the claimant is abusing the process of the court. She submitted that the claimant had exercised his constitutional right to bring the claim and this was the first time he was bringing the claim. If he is not permitted to bring the claim, that would be the abuse of process because he is showing by his claim that there is a question to be decided by the court which has not previously been decided.

[19] No submissions were made by Mr Powell as the application did not involve the 1st defendant.

Discussion and Analysis

[20] Rule 26.3(1) of the CPR, in so far as relevant, provides:

> (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 proceedings;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim.

[21] The learned authors of the Civil Court Practice ("the Green Book") 2018 in discussing the circumstances in which rule 3.4(2)(a) of the United Kingdom Civil Procedure Rules, which is in *pari materi* to the provisions of rule 26.3(1)(c) of our CPR, may be exercised, have stated as follows:

> This provision addresses two situations:
>
> (1) Where the content of a statement of case is defective in that, even if every factual allegation contained in it were to proceed, the party whose statement of case it is cannot succeed; or
>
> (2) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

I accept this to be applicable to rule 26.3(1)(c) of our CPR as it is in keeping with the overriding objective of saving expenses and allotting to a case an appropriate share of the court's resources. Thus, if a matter is bound to fail, it ought not to be allowed to take up more of the court's resources than necessary and therefore ought to be disposed of at an early stage.

[22] With respect to abuse of process, Lord Diplock in ***Hunter v Chief Constable of the West Midlands Police and others*** (1982) AC 529 defined it as "the misuse of the court's procedure in a way which, although not inconsistent with the literal application of its procedural rule, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".

[23] It may therefore be said that although ordinarily striking out is a remedy of last resort and a claim should not usually be struck out where there are issues of fact that need to be resolved, the above circumstances as identified by the learned authors of the Green Book are circumstances in which striking out is an appropriate remedy.

[24] With respect to the effect of privilege on cases of defamation, with which this application is concerned, Sir Baliol Brett MR in ***Munster v Lamb*** [1881-5] All ER Rep 791 stated:

> *Cases of libel and slander are always subject to one principle, namely, that if what is said or written is said or written on some particular occasion, it is not an actionable slander or libel.* ***The rule is not that what is said or written on such occasion is a slander or libel subject to a defence, but that if it said or written on a privileged occasion, it is not from the moment it is said or written slander at all.*** (Emphasis supplied)

It follows from this dictum that if the occasion on which the words complained of were spoken is privileged, I would be constrained to strike out the claim as indeed there would be no proper claim before the court.

[25] The central issue that must be determined is whether the words alleged to be uttered were uttered on an occasion that was privileged since if they were, that would be the end of the matter. A critical collateral issue that has arisen is whether the Court of Appeal has already made a determination on this issue since if this is the case, by virtue of the doctrine of judicial precedent, I would be bound to follow that decision. Queen's Counsel has also contended that by virtue of issue estoppel, the claimant would be estopped from denying that the issue had already been determined.

[26] It is therefore now necessary to consider the first and second judgments of the Court of Appeal.

[27] There is no dispute between the parties that the facts out of which this claim arose are the same facts giving rise to the first and second Court of Appeal judgments. However, the parties differ as to whether the issue of absolute privilege was decided by the Court of Appeal. It appears that the nub of the claimant's contention is that the Court of Appeal did not decide whether the exception to the application of the principle of absolute privilege applies.

[28] In the first Court of Appeal decision, Phillips JA (with whom Williams JA agreed) in rehearsing the background to the appeal, stated:

> *Also, on 2nd February 2016, the appellant sent a letter to the [Committee] setting out his concerns. He stated that the 2nd defendant's] statement that he had assaulted her had been made in court during a murder trial before the jury, without any reason. He indicated that:*

> *"This deliberate falsehood maliciously levelled against me in the presence of the jury and in the face of the Court could only have been calculated by Mrs Palmer-Hamilton, a senior practitioner, to cause injury, embarrassment and damage to my reputation and ultimately, my livelihood".*
>
> ***He pointed how important an attorney's reputation is generally, and to the nature of his practice. The [claimant] further maintained that the "unsubstantiated accusation has ascribed immoral, dastardly and criminal behaviour" to him. He therefore invited the Committee to examine the circumstances of this incident particularly since it had occurred in court***. (Emphasis supplied)

It seems to me that from the outset of the complaint, the claimant had raised frontally the issue of reputational damage done to him as a result of the 2nd defendant's utterances.

[29] Later, the learned judge of appeal noted that the Disciplinary Committee had written to the claimant indicating that his complaint had been "dismissed as no prima facie case of professional misconduct had been made out against the [2nd defendant]".

[30] The grounds of appeal relied on were:

1. That the Disciplinary Committee of the General Legal Council erred in fact and in law as their approach was respectfully perfunctory and bereft of the competence contemplated by the Legal Profession.

2. That given the manner of the decision-making adopted by the Disciplinary Committee of the General Legal Council its

capacity was unwittingly outsourced to the reported notes of evidence of the Court Reporting Department, singularly and to that extent it erred in fact and/or law and/or wrongfully exercised its discretion in dismissing the complaint.

3. That implicit in the decision is the absence of any belief and/or alternative view by the Disciplinary Committee of the General Legal Council that the notes of evidence as purported by the Court Reporting Department could have been inaccurate, wrong, erroneous, and/or otherwise and to this extent the Disciplinary Committee wrongfully exercised its discretion to dismiss the complaint.

4. That the Disciplinary Committee of the General Legal Council erred in law when it acted ultra vires the Legal Profession Act when it failed to afford a fair hearing and/or any hearing to the Appellant/Complainant.

5. That the Disciplinary Committee of the General Legal Council erred in law and/or wrongfully exercised its discretion when it acted with demonstrably injudicious haste in arriving at a decision, as it failed to allow the Appellant/Complainant sufficient time to respond to the substantive Reply of the 2nd Respondent.

6. That the Disciplinary Committee of the General Legal Council failed to consider the status of the [appellant] as a fellow Attorney-at-law and the resultant damage to reputation, integrity, character and esteem inter alia both locally, internationally among family members, colleagues, the judiciary, clientele and potential clients, caused by the objectionable utterances of the 2nd respondent and to that

extent erred in fact and/or in law or wrongfully exercised its discretion to dismiss the complaint.

[31] Having outlined the grounds of appeal and the submissions of the parties, Phillips JA distilled the following as the issues emanating from the appeal:

(1) What is the true and proper construction of the provisions of the LPA [Legal Profession Act] and the Rules applicable to the deliberation/determination of the Committee in order to arrive at a decision as to whether a prima facie case has been made out? (ground 1)

(2) Did the Committee comply with the said provisions?

(i) Did it act perfunctorily and bereft of the competence contemplated by the LPA and the Rules, and/or did it act with injudicious haste?

(ii) Was there any obligation for the appellant to be permitted an opportunity to reply to the 2nd respondent's affidavit?

(iii) In all the circumstances of the case was there a denial of fairness or breach of the principles of natural justice? (grounds 4 and 5)

(3) Did the Committee outsource its obligations by relying on the verified shorthand notes, and were the notes reliable in any event? (grounds 2 and 3)

(4) Ought there to be a special Committee constituted to hear the application by an attorney-at-law against another attorney-at-law bearing in mind the potential reputational loss and embarrassment which could be

suffered by the attorney making the complaint? (ground 6)

[32] It is fair to say that neither the grounds of appeal nor the issues as identified by the learned judge of appeal expressly raised the issue of privilege although the issue of damage to the claimant's reputation was raised. Phillips JA in outlining the submissions in response of Mr Vassell QC who appeared on behalf of the 2nd respondent (the 1st defendant) noted the following:

> Mr Vassell posited that a further point of significance was that counsel ought to be free from fear of disciplinary proceedings in relation to what he may feel compelled to say in the course of an adversarial trial. This, Queen's Counsel stated, is in the public interest. It is also, he said, in the public interest that counsel is immune from civil suit for defamatory words used by him in the course of a trial (see ***Munster v Lamb*** [1881-85] All ER Rep 791).

[33] Phillips JA considered the issue of whether privilege applied to the circumstances of this case within the context of issue (i) which required the court to consider whether rule 4 of the Legal Profession (Disciplinary Proceedings) Rules 'the rules' had been observed by the Disciplinary Committee. Rule 4 sets out the procedure to be followed by the Disciplinary Committee from its receipt of a complaint up to the stage where it makes a decision on the complaint. The claimant's complaint in relation to this rule was in essence, that the Disciplinary Committee had failed to follow the procedure in coming to its decision that no prima facie case had been made out. In coming to her conclusion that there had been strict compliance with the procedure under rule 4, Phillips JA stated:

> *"The Committee had considered the correspondence and documentation submitted to it, together with the application, the affidavit in support, and the attorney's response after the specified*

time had passed. There had been strict compliance procedurally with the Rules.[1]

[34] Having also considered the redacted minutes of the Committee's meeting in which it had decided to dismiss the claimant's application and concluded that the minutes could not be said to demonstrate that no proper enquiry had taken place, Phillips JA then stated:

> *[63] The next issue of importance therefore, would be the principles derived from the authorities relating to the question as to whether, inherent in the Committee's findings, they were correct in their conclusion on the issue of professional misconduct.*
>
> *[64] The Halsbury's Laws of England 2012, volume 32, in paragraph 597, makes the following statement on absolute privilege:*
>
> > *No claim lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. [**Munster v Lamb**] The privilege extends to documents properly used and regularly prepared for use in the proceedings. Advocates, judges and juries are covered by this privilege. However, a statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings, or where it has no reference at all to the subject matter of the proceedings.*

[1] See paragraph [61] of judgment

> *[65] The utterances which were said in the instant case were definitely spoken in the cut and thrust of the litigation by advocates representing the defence on the one hand, and the prosecution on the other. Although in disciplinary proceedings the focus is the oversight of ethical and dishonest conduct of attorneys-at-law, the protection given to counsel for words spoken in the cut and thrust of trial remains the same, and is subject to absolute privilege, save and except (for instance) if the words are spoken dishonestly with the intent to deceive the court.* ***The words used in this case, in the well of the court, are protected by absolute privilege.*** *It must also be remembered, and is of significance that the standard of proof in disciplinary proceedings is the criminal standard of proof beyond a reasonable doubt (see* ***Campbell v Hamlet****). As a consequence, since the statements made in this case, in the well of the court, must be assessed within the context of proof beyond a reasonable doubt, and in any event are protected by absolute privilege, in my view, they would not give rise to a prima facie case of professional misconduct.* (Emphasis Supplied)

[35] The foregoing demonstrates that although the issue of the applicability of absolute privilege was not expressly raised in the grounds of appeal, Phillips JA's consideration of the issue was in the context of the claimant's challenge to the Disciplinary Committee's failure to find that a prima facie case of professional misconduct had been made out and in the light of Mr. Vassell's response to the claimant's submissions. It is my view, therefore, that it was part of the reasoning of the majority in coming to their decision that the Disciplinary Committee was correct in its finding that no prima facie case had been made. Consequently, I am of the view that the issue of the applicability of the principle of absolute privilege to the alleged utterances of the 2nd respondent during the trial on 1 February 2016 was considered and decided by the Court of Appeal.

[36] It is my view also that the claimant's subsequent application to the Court of Appeal for leave to appeal to the Privy Council confirms that the applicability of the principle of absolute privilege was decided by the Court of Appeal. It is of great significance that in her affidavit in opposition to the application to strike out, Mrs Senior Smith deponed:

> 5. **That albeit judgment was handed down in the Court of Appeal in favour of the 2nd Defendant on the issue that supports this Application, the Judgment is the subject of an Appeal to the Privy Council**…
>
> 6. That the Claimant is of the firm belief that the utterances made by the 2nd Defendant were not made in respect of litigation proceedings that were taking place at the time and is not protected by absolute privilege.
>
> 7. That there are a [sic] live issues to be determined by the Privy Council which touch and concern this application. (Emphasis supplied)

[37] The judgment of the majority in the second Court of Appeal judgment (written by Phillips JA) listed the questions posed by the claimant in his application for leave to appeal to the Privy Council as follows:

> 1. Whether any or all remarks made by counsel in court, especially in counsel's bench, were to be considered to be expressed for the purpose of judicial proceedings, and as such, protected by absolute privilege;
> 2. Whether the shorthand notes were the only record of proceedings which should be considered in a matter before a tribunal, in circumstances where they conflicted with counsel's position on the matter, or with the notes of a journalist, a neutral third party; and

3. Whether Mrs Lisa Palmer Hamilton's (the 2nd respondent) conduct fell within the bounds of professional misconduct so that a prima facie case could have been established;

[38] Phillips JA in considering the approach of the Court of Appeal to an application for leave to apply to the Privy Council referred to, with approval, the following passage from ***Norton Wordworth Hinds and Others v the Director of Public Prosecutions*** [2018] JMCA App 10:

> *A question of "great general or public importance" is one that is regarded as being subject to serious debate. It must be not just a difficult question of law but an important question of law that not only affects the rights of particular litigants but one whose decision will bind others in their commercial and domestic relations.* ***It must not be merely a question that the parties wish to be considered by the Privy Council in an effort to see whether the Law Lords would agree with the decision of the Court of Appeal*****.** (Emphasis supplied)

[39] The emphasized portion of the above passage makes it clear that an applicant seeking leave to apply to the Privy Council is requiring permission from the Court of Appeal to have the Privy Council decide if it agrees with the Court of Appeal's decision. It follows therefore that any issue which is the subject of a question raised in the application for leave must have been decided by the Court of Appeal. It is my view therefore that the questions posed amount to a clear acceptance by the claimant that the issue of the applicability of absolute privilege to the circumstances of this case had been decided by the Court of Appeal and this was irrefutably confirmed in the affidavit of Denise Senior Smith.

[40] Mrs Senior Smith relied on paragraph [25] of the majority judgment to support her contention that the Court of Appeal did not decide the issue.

[41] Phillips JA in her judgment recorded the argument advanced on behalf of the appellant (the claimant) that "there was no case in this jurisdiction in which the only question which arose in the case was whether the conduct complained of had been done/said for the purpose of judicial proceedings in the course of judicial proceedings and was relevant to the subject matter of the proceedings". At paragraph [25] in dealing with this issue, the learned judge of appeal stated:

> *In my view, the main contention of the applicant was not really whether "any or all remarks made by counsel in counsel's bench were to be considered to be expressed for the purposes of judicial proceedings"), particularly since that was not stated anywhere in the judgment of this court), but whether the statements made by the 2nd [defendant] were uttered for the purposes of judicial proceedings. Counsel for the applicant appears to have included that complaint as a ground to the motion in order to argue that the utterances of the 2nd respondent, not being for the purposes of judicial proceedings, would have lost the protection of absolute privilege, and therefore given the statements of the majority of this court, ought to be submitted to the Privy Council to be addressed by the Law Lords. There are, in my view, several difficulties with this approach. Firstly, this was never argued before the Committee or this court. Secondly, it would require the Law Lords to make certain findings of fact which is not their remit and inapplicable in this case. Finally, the position is entirely without merit, bearing in mind the affidavit evidence tendered by both the applicant and the 2nd respondent before the Committee, which formed part of the record.*

[42] It seems to me that what the learned judge of appeal was saying was that it was never argued before the Committee or in the substantive appeal that the utterances of the 2nd defendant were not for the purposes of judicial proceedings. However, it does not follow from this that the learned judge was saying that the Court of Appeal judgment did not determine the question of the applicability of

absolute privilege because it is obvious that it did. Phillips JA was also saying that if the question of whether the 2nd defendant had made the utterances for the purpose of judicial proceedings were to be sent for their Lordships' consideration, it would require their Lordships to make findings of fact and apart from the fact that this was not within their Lordships' remit, it was not necessary in the circumstances of this case. (It seems to me that this may be because the transcript which the court regarded as the official record had settled the factual dispute surrounding the words that were actually spoken by the 2nd defendant). In any event, the learned judge of appeal appears to have put paid to the argument that the 2nd defendant's utterances were not for the purposes of judicial proceedings when she concluded that this position was unmeritorious bearing in mind the affidavit evidence that was before the Committee.

[43] In considering the question whether the exception to the principle of absolute privilege was of serious debate, Phillips JA stated at paragraph [27]:

> ***The question therefore would be, did this exchange take place between advocates in the conduct of the case for the purpose of judicial proceedings? In my view, it was obvious that it did.*** (Emphasis supplied)

[44] Later, she quoted the following passage from ***Munster v Lamb*****:**

> *It seems to me that we may introduce counsel into this statement and then the rule so stated is the rule of the common law, for the rule requires that a counsel speaking in the conduct of the case in which he is instructed shall do so with his mind uninfluenced by the fear of an action for defamation. If we take that to be the rule, the question of malice, bona fides or of relevancy cannot be raised. The only question is whether what was complained of was said in the course of the administration of the law, and, if this is so, the case must be stopped, for no action can be maintained from the moment the fact*

> *is established that what the plaintiff is suing for was said by the defendant acting as counsel in a judicial inquiry in any court of justice. If this rule is applied to the facts of the present case, it becomes clear that the plaintiff has no cause of action, and therefore the judgment must be affirmed.*

[45] She then stated:

> I find that statement of the law, which was developed so many years ago, remains extant today. And, in the circumstances of this case, the actions done and words stated in the trial were obviously carried out in a legal proceeding, in the course of the administration of the law.

[46] She later concluded that the questions involving the issue of absolute privilege and the exceptions under the doctrine are not questions of any great general or public importance because the law had been settled for over 100 years.

[47] At the end of the day, it is obvious that Phillips JA's conclusion was that the question was not of serious debate. So, even though, she accepted that "each particular case will have a different set of circumstances and perhaps a different outcome in each case, bearing in mind the exceptions", the law was settled. The fact that she accepted that each particular case will have different circumstances does not provide a basis for finding that this case should proceed to trial because it is clear that the Court of Appeal made its finding on the applicability of absolute privilege to the factual circumstances which occurred in this case including the words, alleged or actual, which were spoken by the 2nd defendant on 1st February 2016. There are therefore no relevant facts that would need to be decided that would require the claim to be sent to trial.

[48] I am of the view that in the face of the clear statement in the majority judgment of the Court of Appeal that absolute privilege applies and that the statement was made for the purpose of judicial proceedings, there is no reasonable ground for

the claim to be brought or to continue because as was stated by the court in ***Munster v Lamb*****,** once privilege arises, there can be no question of slander/defamation. In that regard, it would be an abuse of the process of the court to allow the matter to proceed to trial against the 2nd defendant.

[49] I am also of the view that issue estoppel would apply. In ***National Commercial Bank Ja Ltd v O'Gilvie & Ors*** [2015] JMCA Civ 45, Morrison JA (as he then was) in considering abuse of process and estoppel adopted Lord Diplock's elucidation of the two principles in ***Thoday v Thoday***. Morrison JA stated:

> *Although it is* ***Henderson v Henderson*** *abuse with which this appeal is primarily concerned, it is important to understand its generic relationship to cause of action estoppel and issue estoppel. These two were explained by Diplock LJ (as he then was) in* ***Thoday v Thoday*** *[1964] P 181 at pages 197-198:*
>
> > *"...'Estoppel' merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action... ...[Estoppel per rem judicatam] is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged*

> *in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam...The second species, which I will call* ***'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled.... If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was....****" (Emphasis supplied)*

[50] It is my view that the issue having been ventilated in circumstances where the claimant and the 2nd defendant were parties to the appeal and the application for leave to appeal to the Privy Council, the claimant is estopped from maintaining that the issue was not determined and from asserting that the words are not covered by privilege.

[51] In light of my conclusion, it would be unnecessary to consider the issue of the applicability of the privilege to these circumstances afresh. However, in the event that I am wrong that the issue was decided by the Court of Appeal and the statements of the majority of the Court of Appeal are to be regarded as *obiter dicta*,

I will go on to consider whether the defendant is entitled to have the claim struck because the words spoken were said on a privileged occasion.

[52] The claimant's case of defamation rests on the allegation that the 2nd defendant used the words, "My lady, My Learned Friend [Mr Senior-Smith] has just assaulted me". It seems to me to follow from this that, putting aside briefly the issue of the applicability of absolute privilege, the success of the claimant's case rises or falls upon whether those words were used by the 2nd defendant. This is because those words were the pleaded words in the amended particulars of claim and the defamatory meanings pleaded were ascribed to these specific words. So, if it is found that the 2nd defendant's version represents what was said by her, this would be the end of the case for the claimant. The issue of the precise words that were in fact spoken by the 2nd respondent is one of fact, which would usually invite the approach that the claim ought to be allowed to go to trial for the court to make a finding of fact after hearing evidence. However, in my view, this case is one in which there must be a departure from that approach because the factual issue of what was said by the 2nd defendant was raised expressly in the grounds of appeal (see grounds 2 and 3), was considered as a discrete issue by Phillips JA (see issue 3) and was also considered in the application for leave to appeal to the Privy Council.

[53] In the first Court of Appeal judgment, Phillips JA in dealing with the issue considered section 16(2) of the Judicature (Supreme Court) Act, which states:

> (3) *Shorthand notes shall be taken of the proceedings at the trial of any person on indictment in the Supreme Court, and a transcript of the notes or any part thereof shall-*
>
> *(a) On any appeal or application for leave to appeal be made and furnished to the Registrar if he so directs; and*
>
> *(b) be made and furnished to any party interested upon the payment of such charges as may be*

> *fixed by rules of court whether the person tried was or was not convicted, or in any case where the jury were discharged before the verdict*.

The learned judge of appeal also made reference to the Court of Appeal Rules, which rules are not relevant to this application. She then concluded:

> *As was stated by Fox JA in **R v Herman Spence**, it is clear that the shorthand notes are the official records of the proceedings in court. In this case, the learned judge accepted the shorthand notes as the official record of the court. It would, in my view, therefore, clearly be reasonable for the Committee to accept those notes as being an authentic record of the proceedings in the Supreme Court, and prefer what was recorded in the verified shorthand notes, as against what was allegedly heard, reported, and believed to be true by the veteran reporter Barbara Gayle in the Gleaner, as set out in the defence of the Gleaner.*

[54] Phillips JA thereafter remarked that there was other material before the Disciplinary Committee namely, the correspondence, the complaint, the affidavits in support and the affidavits in response, the statement of a witness on behalf of the 2nd defendant and relevant portions of the transcript. She observed that the decision of the Committee was clearly not based solely on the verbatim shorthand notes. She then stated:

> *Additionally, there was no indication, as happened in **R v Herman Spence**, that there was an obvious mistake in the shorthand writers' notes. Indeed, they had been accepted by the learned trial judge and relied on by the 2nd respondent as accurately representing what had transpired in the proceedings in the court. There was nothing to allow the Committee or this court to reject the notes.*

[55] In dealing with the issue in the application for leave to appeal, Phillips JA stated:

> *The issue of the use and reliability of the shorthand notes as a question of great general or public importance or otherwise cannot be viewed as serious. The Supreme Court is a court of record. This court has stated that the shorthand notes are the official notes of court proceedings. It was therefore acceptable for the learned trial judge to rely on them, so too the members of the Committee. Indeed, it would be entirely inappropriate for the views of counsel, or for that matter, those of the senior journalist, on the issue of the accuracy of the notes, to dictate what should be accepted as the record of the proceedings of the proceedings in the courts.*

[56] It seems to me that even though the provision relied on by the Court of Appeal in relation to shorthand notes of proceedings expressly referred to the notes being used in an appeal, it is clear that the intention of the section is that the notes are to be regarded as the official record of the proceedings. The Court of Appeal accepted it as the official notes of the proceedings and found that it was rightly accepted and relied on in proceedings before the Disciplinary Committee, which proceedings did not concern an appeal in relation to the murder trial.

[57] In my view, the Court of Appeal's finding leaves no room for arguing that what is recorded in the shorthand notes is not to be accepted as an accurate account of what took place and the claimant is estopped from arguing the contrary. Given that the shorthand notes' account of the words used by the 2nd defendant do not accord with what is pleaded by the claimant, I am of the view that this must be the end of the case and to allow the claim to go to trial to decide this issue of fact would clearly be an abuse of the process of the court.

[58] The claimant has raised in his affidavit in response to the application the issue that even if the 2nd respondent's account were to be accepted, these words were not said with reference to the proceedings. In my view, there would have to be

pleadings in relation to these specific words including the defamatory meanings that could be ascribed to them before the issue of whether these words were said with reference to the proceedings would arise. In the absence of any such pleadings, I am of the view that I cannot properly take this into account in deciding whether to strike out the claim. This application must be decided on the pleaded case that is before the court

[59] I am also of the view that even if the claimant's account of the words spoken by the 2nd defendant could have been accepted as the correct account, the words were spoken on an occasion of absolute privilege.

[60] The thrust of Mrs Senior Smith's submissions is that the words spoken were not with reference to the proceedings. She submitted that the 2nd defendant's words had nothing to do with a murder trial.

[61] It is therefore necessary to examine some of the decisions of the courts to determine how the courts have applied the principle of absolute privilege in the context of determining whether the impugned were regarded to have been said with reference to the proceedings.

[62] In ***Munster v Lamb***, a solicitor spoke disparaging words of the plaintiff that: the plaintiff had placed in a convent the sister of the accused in a trial so that she would be prevented from giving evidence at the trial; he had his own opinion with respect to the purposes for which young women were at the plaintiff's house; and that there may have been drugs at the plaintiff's house and he had his own view with regard to the purpose for which they had been used for. The Court of Appeal dismissed the appeal against the decision of the trial court to nonsuit the plaintiff. Sir Baliol Brett, MR stated at page 791:

> *… What he said I shall assume for the purpose of this judgment, to have been malicious, in the sense that it was not said for the purpose of doing anything for the defence of his client. I shall assume that there was no justification or ground for saying what*

> *he said, and I shall assume that he acted from an indirect motive – that is, from anger against the prosecutor. If I thought the action would lie at all, I should wish to send back the case for a new trial in order that these facts might be found by the jury, but* ***I am of the opinion that, even though the defendant may have acted from an indirect motive, desiring to injure the plaintiff in consequence of personal anger, and not from acting for the benefit of his client and even if what he said was irrelevant to any issue or fact in the case then before the magistrates nevertheless, inasmuch as it was said with reference to, and in the course of, the inquiry which was taking place, no civil action will lie, however improper the conduct of the defendant may have been.*** (Emphasis supplied)

He later stated:

> *The protection is given, not for the benefit of a man who may wish to act with malice, but because, if the rule were otherwise, an innocent counsel would be in danger, and would be put to trouble.* ***It is better that the rule should be made large, even though it may be large enough to cover the case of a man who acts with malice and is guilty of misconduct****.* (Emphasis supplied)

[63] In ***Bodden v Brandon*** [1952 -79 CILR 67], a decision of our Court of Appeal, the respondent, acting as counsel for the accused in a trial for the charge of attempted murder, peremptorily challenged the plaintiff and the plaintiff returned to her seat. While passing the respondent, the plaintiff thanked him, at which point he stated audibly that he had challenged the appellant because she was a girlfriend of the victim of the attempted murder. The allegation was repeated before the judge whom sought an explanation when the respondent stated that he was responding to an insult by the appellant. The appellant's action against the respondent for

slander was dismissed as the trial judge found that the occasion was absolutely privileged. Duffus P, who delivered the judgment in the Court of Appeal, stated:

> *The problem is not easy of solution. No cases have been cited to us in which a similar or parallel situation has arisen. After a great deal of anxious consideration, I have arrived at the conclusion that this is not a case in which any limit a similar or parallel situation has arisen. After a great deal of anxious consideration, I have arrived at the conclusion that this is not a case in which any limit or boundary can be set between the liberty of counsel and licentiousness.* ***The liberty of counsel is wide and it is not desirable that it should be restricted in any but the clearest of cases. In this case, the statements made by the respondent were made by him during the course of the proceedings and with relation to those proceedings.*** *It is true that the time had passed when the statements might have been relevant and it is clear to my mind that they were uttered recklessly and without proper thought or consideration but nonetheless they were spoken by one who had the arduous task of counsel for a prisoner charged with a serious crime and it is difficult after the event to rationalize what might have sparked off counsel's unfortunate remarks, simple, trivial and harmless though the complainant's remark to him may now appear to have been.* (Emphasis supplied)

[64] ***Bodden v Brandon*** was referred to with approval in ***Wilbert Christopher v Anna Gracie and Rattray Patterson Rattray*** by Morrison JA who stated:

> *… I also consider that* ***Bodden v Brandon*** *is good law and that for this reason any statement allegedly made by the 1st respondent of and concerning the applicant during a sitting of the*

court (albeit in chambers) attracts absolute privilege and is therefore not actionable.

[65] In that case, the applicant, Wilbert Christopher, had alleged that during a hearing before a judge in chambers at Supreme Court in connection with that litigation, the 1st respondent, Anna Gracie, had uttered words that were defamatory of him.

[66] The 2nd defendant has also relied on ***Smeaton v Butcher*** [2000] All ER (D) 629, a decision of the Court of Appeal of England & Wales. In that case, the claimant had entered into a tenancy agreement with the defendants. The claimant issued a cheque in furtherance of the agreement but the cheque was dishonoured. The claimant vacated the premises and brought a claim in the Watford County Court against the defendants for unlawful eviction ("the Watford County proceedings"). The defendants filed an application to strike out the claim as being frivolous and vexatious. In support of the application, one of the defendants swore to an affidavit in which he stated, among other things, that the claimant was a "persistent instigator of unfounded vexatious claim and a litigant who should not be believed". The claimant subsequently entered into another tenancy agreement with one Mrs Dornan pursuant to which he issued a cheque. The cheque was dishonoured and the claimant moved out of the premises. The claimant commenced proceedings against Mrs Dornan in the Brentford County Court for unlawful eviction ("the Brentford County proceedings"). Mrs Dornan then applied to strike out the claim against her and sought to rely on the affidavit filed on behalf of the defendants in the Watford County proceedings. The claimant then commenced a claim against the defendants for libel in respect of their affidavit which was relied on by Mrs Dornan.

[67] Clarke LJ who delivered the judgment on behalf of the court expressed the principle of absolute privilege as follows:

(1) A statement by a witness or prospective witness, whether made to a solicitor for the purposes of the preparation of a

> *statement, proof of evidence or affidavit, or made in a statement, proof of evidence or affidavit, is absolutely privileged unless it has no reference at all to the subject matter of the proceedings.*
>
> (2) ***In deciding whether the statement has any reference to the subject matter of the proceedings any doubt should be resolved in favour of the witness****.* (Emphasis supplied)

He later stated:

> *Having regard to the relevant legal principles which I have identified, that depends upon whether the statements contained in the affidavit as published to Ms Dornan had any reference to the subject of the Brentford proceedings, or whether it had no reference at all to those proceedings.*

Clarke LJ stated that "the statements in the affidavit had reference to the Brentford proceedings just as they had reference to the Watford proceedings". Later, he remarked that it made no difference if the affidavit was already in existence and was simply provided to Mrs Dornan. He then stated that the statements in the affidavit published in connection with the Brentford proceedings were made with reference to the subject matter of those proceedings.

[68] The dicta as well as the actual decisions in the brief survey of cases that I have referred to undoubtedly demonstrate that the principle that has been consistently applied is that words spoken in the course of judicial proceedings with reference to the proceedings are absolutely privileged. It is clear from these authorities that the principle is construed very widely, so much so that any doubt is resolved in favour of the attorney or the witness to whom the alleged defamatory words are attributed. In this regard, the cases also demonstrate that the impugned words need not expressly refer to the proceedings for the words to be found to be with reference to the proceedings.

[69] Applying these principles, it is my view that though the 2nd defendant's words did not expressly refer to the murder, inasmuch as the words were said during the murder trial in respect of the behavior of counsel during his conduct of the defence in the murder trial, which related to an objection raised during the trial, the words related to the proceedings and were therefore said with reference to the proceedings. Consequently, absolute privilege applies and there is no reasonable ground for bringing the claim. In addition, allowing the claim to continue would be an abuse of the process.

[70] In conclusion, I am of the view that the application must be granted for the following reasons:

i. The Court of Appeal has found that absolute privilege applies to the circumstances giving rise to this claim;

ii. Even if it could be said that the issue of the applicability of absolute privilege was not decided by the Court of Appeal, the very words on which the claimant's case for defamation is based are not supported by the official record of the proceedings and therefore there is no reasonable ground for the claimant to have brought the claim.

iii. Even if the claim were to proceed to trial and the trial court were to find that the words alleged by the claimant were spoken by the 2nd defendant, the words were said in the course of judicial proceedings with reference to the proceedings and were therefore spoken on a privileged occasion

[71] I therefore make the following orders:

1. The claim filed herein against the 2nd defendant is struck out as disclosing no reasonable grounds for

bringing the claim and as an abuse of the process of the court.

2. Costs to the 2nd defendant to be taxed, if not agreed.

3. Leave to appeal is refused.