COMMONWEALTH OF THE BAHAMAS **2022/CLE/gen/00193**

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

BETWEEN

KAREN THOMPSON **Plaintiff**

AND

COMMONWEALTH BANK (BAHAMAS) LIMITED

Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Attorney Joseph Jerome D'Arceuil for the Plaintiff

Attorney Michaela Barnett-Ellis for the Defendant

Date of Hearing: 20th July 2022

DECISION

FACTUAL SUMMARY

1. The Plaintiff commenced this action by way of a Specially Endorsed Writ of Summons filed on 14 February 2022. The Plaintiff entered into a loan agreement with the Defendant bank on 15 September 2006 to purchase a vacant lot of land situate in West Winds, a gated community in western New Providence. The loan was in the amount of $86,000.00. In November 2013, the Plaintiff had the mortgage upstamped in the amount of $21,850.00 thus totaling $107,850.00. The Plaintiff was charged an interest rate of 9% and was required to make monthly payments of $1,093.77 for 180 months pursuant to the loan agreement. At the time of receiving the mortgage, the Plaintiff was employed as the Director of Guest Services at Atlantis Resort Bahamas. The Plaintiff contends that she entered into an agreement for a monthly salary deduction to facilitate her loan payments.

2. On 1 August 2019, the Plaintiff alleges that the Defendant bank wrote a letter informing her that her account was in arrears in the amount of $101,785.73 which attracted a daily interest of $24.41. Demand was made for the entire amount of the arrears to be paid within 14 days otherwise legal proceedings would be commenced against her. Following this, on 29 November 2019, the Plaintiff

alleges that she was contacted via telephone by the Defendant Bank again demanding payment of the mortgage. The Plaintiff asserts that the Defendant Bank's "unwarranted accusations" that she was indebted to the bank for nonpayment of the mortgage loan and the letter written in that regard amount to libel. The Plaintiff further asserts that the Defendant Bank was negligent in failing to properly audit the Plaintiff's mortgage account, and failed to consider the Plaintiff's salary deduction for payment of the mortgage. The Plaintiff alleges that the actions of the Defendant bank have caused her psychiatric damage and further loss. The Plaintiff claims special damages in the amount of $550.00 and general damages against the Defendant.

3. The Defendant filed a Summons on 22 April 2022 seeking to strike out the Plaintiff's Writ of Summons and Statement of Claim pursuant to Order 18 Rule 19 of the Rules of the Supreme Court (R.S.C), or for it to be dismissed under the Court's inherent jurisdiction on the grounds that it discloses no reasonable cause of action and that it is an abuse of process. In the Defendant's submissions, they also rely on the ground that the Writ of Summons is scandalous, frivolous and vexatious.

THE DEFENDANT'S CASE

4. The Defendant submits that the Plaintiff has to prove that the words contained in the letter were defamatory. The Defendant highlights that the letter sent to the Plaintiff stated that the Plaintiff was in arrears with the Defendant which the Plaintiff deems to be a false accusation. The Defendant counters the Plaintiff's assertions that the Defendant had published a false accusation throughout the Defendant's bank by having the secretary type the letter and having other officers of the Defendant bank contacting her demanding payment. The Defendant submitted that the letter was prepared by the secretary and calls were made by employees in their course of employment. Thus, the information regarding the Plaintiff's arrears was only published to specific employees of the Defendant in their course of employment. The Defendant contends that the information was not published to a third party which is a necessary component for the Plaintiff to prove libel in this matter. In this regard, the Defendant relies on the authority of ***Riddick v Thames Board Mills Ltd. [1977] 3 All ER 677*** which examines the relationship between master and servant when publishing interdepartmental reports, and whether such an act can amount to libel. In that case, Lord Denning MR reasoned that the act of the servant in making the report is that of the master and is essentially a master making a publication to himself. Lord Denning MR reasoned that in such an instance no one can be responsible for libel published to himself. As a result, the Defendant submits that the Plaintiff has no cause of action against the Defendant and there is no basis for the Court to determine the veracity of the statements, the remoteness of the damage or conduct an assessment of the damages. The Defendant further submits that an amendment to the Plaintiff's Writ of Summons would not cure the cause of action against the Defendant.

5. The Defendant further submits that the court must prevent the abuse of its legal machinery which would occur if a party is forced to engage in frivolous litigation which is obviously unsustainable. The Defendant relies on the case of ***Willis v Earl of Beauchamp*** which was cited in ***Mitchell and another v First Caribbean International Bank (Bahamas) Ltd. [2018] 1 BS J. No. 67*** in support

of this point. The Defendant contends that it would be fair in the circumstances and cost-efficient for the Plaintiff's Writ of Summons to be struck out.

THE PLAINTIFF'S CASE

6. The Plaintiff contends that the Defendant bank published libel against the Plaintiff to its employees. The Plaintiff submits that the Defendant's contention that libel must be published to an independent third party is misconceived. The Plaintiff relies on the case of ***Dr. Theodore Ferguson v Public Hospital Authority and Dr. Paul Ward 2013/CLE/gen/01662*** to advance the point that libel is not always confined to publication to an independent third person, as a Defendant can publish libel to itself. The Plaintiff placed further reliance on the case of ***Cambridge v Lockhart 2005/CLE/gen/01427*** in which the Court found that a letter published internally within an organization of the Plaintiff was defamatory in nature.

7. The Plaintiff submits that internal publication to the Defendant's staff is not a bar to the action for libel. Further, the Plaintiff submits that the words of the Defendant were defamatory, as they accused her of not meeting her obligation, contrary to the evidence they say will be produced at trial. The Plaintiff asks the court to dismiss the Defendant's summons and grant costs to the Plaintiff.

LAW AND ANALYSIS

8. The provisions of Order 18 Rule 19 of the RSC provides in part that:

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1) (a)."

9. It is a settled position in law that the Court's power to strike out a pleading is a summary process that ought to be used sparingly and only in circumstances where the pleading is incurably bad. Fletcher Moutin LJ makes it clear in ***Dyson v Attorney General [1911] 410 (419)*** that "our judicial system would never permit a plaintiff to be 'driven from the judgment seat' in this way without any Court having considered his right to be heard, excepting in cases where the cause of action

was obviously and almost incontestably bad." Despite this, the Court must also give effect to the overriding objective contained in Order 31A of the RSC and the Court's power to actively manage cases.

10. Charles J in ***B. E. Holdings Limited v Lianji (also known as Linda Piao – Evans or Lian Ji Piao – Evans) [2017] 1 BHS J. No. 28*** cited ***Walsh v Misseldine [2000] CPR 201, CA*** where Brooke LJ held:

> "When deciding whether or not to strike out, the Court should concentrate on the intrinsic justice of the case in the light of the overriding objective, take into account all the relevant circumstances and make 'a broad judgment after considering the available possibilities.' The Court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the Statement of Claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

11. The Defendant claims that the Plaintiff's Statement of Claim discloses no reasonable cause of action. In ***Drummond-Jackson v British Medical Association [1970] 1 All ER 1094***, Lord Pearson explained that a reasonable cause of action is one "with some chance of success". He continues by stating that 'if when the allegations in the pleadings are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.' The Plaintiff claims that her cause of action is founded in defamation, more specifically libel.

12. Libel is defined by Lord Blackburn in ***Capital and Counties Bank Ltd. v Henty & Son [1881-85] All ER Rep 86*** **as** "a written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule." The test for libel in that case was explained to be "whether, under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libelous sense." Winder J, as he then was, in ***Smith v The Tribune Ltd., Carron and Coalition to Protect Clifton Bay BS [2015] SC 75*** simplifies this test and cites the learned authors of Gatley on Libel and Slander (11th edition) at paragraph 28.2, stating that *"the necessary particulars to found a case in libel are: (1) publication by the defendant; (2) the words published; (3) the meaning the words are said to bear; (4) that the words were published of the plaintiff and, where necessary, (5) the facts relied on as causing them to be understood as defamatory or as referring to the plaintiff and knowledge of those facts by those to whom the words were published."* In that case, Winder J also had to contend with an application to strike out parts of the Plaintiff's Statement of Claim which alleged libel against the Defendant.

13. Gatley also provides insight on how the Plaintiff is to frame their Statement of Claim when alleging libel. The learned authors stated in paragraph 28.5 "Details of Publication: Libel":

> "The general principle demands only that the defendant be given due notice of the case he has to meet, and there is no fixed rule as to what amounts to a sufficient

averment of publication. However, unless there are good grounds for variance, the particulars of claim should allege, in respect of each publication relied on as a cause of action, that the words were published by the defendant on a specified occasion to a named person or persons other than the claimant." *See.* Footnote at 22 "particulars of claim which do not allege publication to some third person disclose no cause of action: Hall v Geiger (1929) 41 B.C.R 481"

14. It is established that the Plaintiff entered into a mortgage agreement with the Defendant bank in 2006, which was subsequently upstamped in 2013. The crux of the Plaintiff's contention is that she had engaged in salary deductions with her employer Atlantis Hotel to deduct the monthly mortgage payments from her salary. There is nothing before the Court at this juncture to confirm whether this happened. What is agreed is that the Defendant sent a letter to the Plaintiff advising that her mortgage account was in arrears of $101,785.73 and that she was demanded to make payments on the said account. Further, that the Plaintiff was contacted by officers of the Defendant who also demanded payment on the loan account. However, the Plaintiff laments that this information provided by the Defendant to herself is untrue, and constitutes libel. The Plaintiff particularizes the libel as the Defendant publishing the false accusation throughout its bank *"by having other officers [call] the Plaintiff and demanding payment"*. It seems to me that the Plaintiff's reference to "other officers" means that the officers who contacted her via telephone were different from the individual who contacted her via letter. Hence, the Plaintiff's intimation that the false accusation was published "throughout" the Defendant's bank.

15. I am not required at this stage to consider the truthfulness or otherwise of what is contained in the letter, as to do so would require me to conduct a mini-trial in this action, which offends the rules of striking out proceedings. In any event, the letter is not before the court. I am simply required to determine whether the words stated to have been used about the Plaintiff are defamatory in that those words lower the Plaintiff in the estimation of right-thinking persons in society, and whether the said letter was published. I have confined my analysis to the letter as the Plaintiff has only pleaded libel and not slander in the Statement of Claim. Hence, the telephone call is not a matter for consideration.

16. The Plaintiff alludes to the contents of the letter in the Statement of Claim. It is stated at paragraphs 3 – 8 that:

> "3. That the Defendant by letter dated the 1st August, 2019 informed the Plaintiff that her account was in arrears in the amount of $101,785.73 and that interest continues to accrue at $24.41 per day.
>
> 4. That the Defendant demanded that the said amount was to be paid within 14 days or proceedings will be taken out in the Supreme Court of the Commonwealth of the Bahamas to recover the above stated amounts.
>
> 5. That the Defendant also in the said letter threatens the Plaintiff with incurring legal fees on its behalf.

> 6.That the Defendant informed the Plaintiff that in order to pay partial payments the Plaintiff would have to enter into an agreement with the Defendant or [its] employee as that only the full amount of $101,785.73 would be accepted.
>
> 7. The Defendant [included] in the letter the date on which the loan was made, the date on which the contract for repayment was made, the [date] that a note or memorandum of the contract was made and was signed by the borrower, the date when a copy of the note or memorandum was delivered or sent to the borrower, the amount repaid, the amount due but unpaid, the date upon which such unpaid sum or sums became due: and the amount of interest accrued due and unpaid on every such sum.
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> 8. That the Plaintiff will use this letter as evidence for [its] full effect at trial."

From what has been stated, this appears to represent the outline of a typical demand letter by a financial institution. If it is so that the letter contained this information, on the face of it there is nothing to me that would render the words themselves to be defamatory, or that would lower the Plaintiff in the estimation of right-thinking members of society. What the letter purports to say is that the Plaintiff received a mortgage loan in a desired amount, that the Plaintiff repaid a portion of that loan, but that a portion remained unpaid, and that the outstanding portion is due and owing and subject to interest. Although the Plaintiff alleges that this may not be true due to her salary deduction arrangement, I do not consider that the contents of the arrears letter are defamatory.

17. I move on to consider whether in fact the letter was published. The Plaintiff pleads with no specificity when and to whom the letter was published. The Plaintiff simply generalizes that the letter was published throughout the Defendant's bank by the Defendant allowing a secretary to type the letter and having other officers call the Plaintiff, demanding payment. It does not arise in the Plaintiff's Statement of Claim that the letter was sent or addressed to an individual other than the Plaintiff. The Plaintiff places reliance on the fact that employees of the bank were privy to the contents of the letter alleging that she was in arrears of a substantial amount of money on her mortgage account. Here, it is imperative to determine whether in these circumstances the Defendant bank made a publication to itself.

18. The authorities on the publication of libel between master and servant have been developed over the years given the changes in the formulation of written documents. In cases which predate the 1900s, the courts considered that dictation by a master to a servant of details of another's misconduct was not a privileged occasion. The Court in ***Bryanston Finance Ltd. and others v De Vries and another [1975] QB*** 703 examined this, and recognized business developments whereby a businessman dictates his letters to a typist or secretary, and reasoned that such an instance attracted privilege given their common interest in the writing of the letter. At page 719 – 720, the Court stated:

> "In my opinion, when a man of business dictates a letter to a typist, there is an original privilege which derives from the fact that they have both a common interest in the writing of the letter. The law on this subject has developed over the

> years. At one time it was held that if a man wrote a letter to another accusing him of misconduct he should write it in his own hand. He should not dictate it to a typist. The dictation to the typist was not a privileged occasion: see Pullman v. Walter Hill & Co. Ltd. [1891] 1 Q.B. 524. But that was 85 years ago when letters were usually written by hand. Things are different now. Nearly every business man dictates his letters to a typist, even when they contain defamatory statements about the party to whom they are sent, or about someone else. During the last 50 years it has regularly been held that dictation to a typist is a privileged occasion: see Osborn v. Thomas Bouler and Son [1930] 2 K.B. 226. On what ground is dictation to a typist privileged? In my opinion it is privileged because it is in accordance with the reasonable and usual course of business for a business man to dictate his business letters to a typist in his office, even though these letters contain statements defamatory of some one or other. That very fact gives rise to a common interest between the business man and the typist so as to make the occasion privileged. The business man has an interest in dictating the letter to her - so as to get it written - and she has an interest or duty to take it down - so as to type it out for him to sign. I do not think that the privilege depends on the person to whom it is intended to be sent.
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> From these instances I suggest that the correct principle is that, when a letter is dictated as being the accepted mode of writing it, the dictation is a privileged occasion which is not to be defeated except on proof of express malice. The intention of the writer - as to whom he intends to send it - may in some circumstances go to show malice: but it does not otherwise take away the privilege."

19. The Plaintiff relies on the case of ***Dr. Theodore Ferguson and Public Hospital Authority and Dr. Paul Ward*** in which Hanna – Adderley J (as she then was) held that the words in the letter were libelous and were published to the Plaintiff and members of the Public Hospital's Authority who were carbon copied into the letter. The Defendant claimed that the letter was published on an occasion of qualified privilege under a sense of duty and without malice toward the Plaintiff. The Plaintiff essentially makes a case that libel can be published by a company to its employees and not solely independent third parties. The decision of the judge was appealed. On appeal, the Court significantly held, allowing the appeal:

> "An occasion will enjoy qualified privilege at common law where the defendant makes the statement in pursuance of a legal, social or moral duty, or in protection or furtherance of a legitimate interest, to a person with a like duty or interest to receive it. The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source.
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> ....
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> Once it is established that a publication attracts qualified privilege, judges must consider whether the qualified privilege is defeated by express malice. Express malice defeats the defence of qualified privilege when the desire to injure is the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests.

...

A plea of express malice is generally treated as tantamount to one of dishonesty, and should therefore be treated with the same circumspection as a plea of fraud; it must be pleaded with scrupulous care and specificity/particularity. Each particular of the plea has to raise a probability of malice and has to be more consistent with the existence of malice, than with its non-existence. The onus is on the plaintiff to prove that the dominant and improper intention in making the defamatory publication was to injure him. Even though a defamer may have formed a belief not based on any reasonable grounds, or on inadequate research, or conduct which is hasty, credulous, foolish, involves jumping to conclusions, or is irrational, stupid, pig-headed, obstinate, or the product of 'gross and unreasoning prejudice, this does not to amount to malice."

20. The Court of Appeal through a line of authorities explained that if a Defendant is successful on a defence of qualified privilege, there is a presumption that the Defendant acted without malice, which must then be rebutted by the Plaintiff. The Theodore Ferguson decision turned on the fact that the trial judge had not considered this presumption. I find that the circumstances of this case and ***Riddick v Thames Board Mills Ltd.*** differs entirely from the matter at hand, as they are concerned with an internal memorandum relating to the defamation of an employee, as opposed to a customer. In ***Riddick***, the Court similarly examined the master-servant doctrine against the backdrop of a company being liable to a servant for defamatory statements made to the company itself about another servant in their course of employment. The court then referred to the *qui facit per alium facit per se* maxim which provide that no master is liable for the acts of his servant except where the servant acts on the authority of his master, in which case the act of the servant is considered to be the act of the master. The Court acknowledged that if this maxim were to be applied to inter-departmental memoranda, the act of the servant making the report would be the act of the master, and the act of the other servant receiving it and reading it would also be the act of the master. The Court regards this as a company publishing to itself. Given the line of authorities, there is no doubt in my mind that even a company with no hands but those of its agents, can publish a letter to itself by a master dictating a letter to be typed by a secretary in their course of duty, which attracts privilege. However, this privilege can be rebutted and the publication can be deemed defamatory where there is malice in the publication, which is pleaded and proven by the Plaintiff.

21. The letter sent by the Defendant to the Plaintiff is one consistent with the Defendant's daily operation and procedures. As indicated, I cannot speak to the contents or the veracity of the letter. However, on the face of what was pleaded in the Statement of Claim, there appear to be no defamatory words contained in the letter. The Plaintiff admits that the letter was addressed to her and this rules out the instance of the letter being published to an individual third party. The Plaintiff's umbrage lies within the fact that the secretary of the Defendant bank typed the letter and was privy to the contents of the letter. The secretary was not identified by the Plaintiff in the Statement of Claim, however, I can only imagine that the secretary is employed in a delinquency department responsible for customer arrear accounts. This letter must have been prepared pursuant to the secretary's ordinary job role/function as an employee at the Defendant bank on the

instruction of a higher authority. To my mind and according to the authorities, the preparation of the letter by the secretary amounts to a publication which attracts qualified privilege. The Plaintiff has not pleaded or established any malice on behalf of the Defendant to refute the presumption that the publication was privileged. The Plaintiff has valiantly asserted that the contents of the letter purport an innuendo that the Plaintiff is a credit risk, untrustworthy, and defaulted without reason on her obligation. If the letter were published to an independent third party, the Plaintiff might have had a better footing to advance this argument. Nonetheless, this is not the case in this instance. I cannot find that the letter insinuated to the secretary any of the above statements alluded to by the Plaintiff. Considering this issue in the round, I find that the Defendant's letter of 1 August 2019 addressed to the Plaintiff solely, did not defame the Plaintiff and that no psychiatric injuries flowed as a result of it. Additionally, I find that the Plaintiff has disclosed no reasonable cause of action against the Defendant in this regard and that the action is scandalous, frivolous and vexatious, amounting to an abuse of the court's process. I hereby order that the claim for libel in the Statement of Claim be struck out pursuant to Order 18 Rule 19 RSC.

Negligence

22. The Plaintiff also alleges negligence against the Defendant for failing to complete a proper accounting of her mortgage account and considering payments made via salary deduction. The Court makes a clear assertion in ***Rahming v The Mail Boat Company Ltd. BS 2015 CA 142*** that *"it is common ground that to prove the claim of negligence the appellant must show that she was owed a duty of care by the respondent, that the respondent was in breach of that duty, and that the breach caused the accident and injury."* In pleading her case with respect to negligence, the Plaintiff has not specified that the Defendant bank owed her a duty of care, that they breached that duty and that she suffered loss as a result to make out a claim of negligence. The Plaintiff only asserts that she was current on her mortgage payments to the Defendant bank due to her salary deduction arrangement, and the Defendant has failed to take that into account by conducting a proper audit of her mortgage account. I presume that the case of the Plaintiff is that this failing amounted to negligence, which caused the Plaintiff psychological harm. I set the pleadings out for completeness:

> "17. That the Defendant after sending a letter to accused the Plaintiff of not honoring her obligation to service her mortgage in a timely manner or not at all. Calls the Plaintiff and demanding that she pay her mortgage payment on Friday the 29th, of November 2019.
>
> 18. That the Defendant having in their possession a salary deduction form and receiving mortgage payment every month persist in their behavior.
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> 19. That the Defendant previously informed the Plaintiff that she would have to pay the total mortgage amount in order to retain her property.
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> 20. That due to these unwarranted [accusations] and attack on the Plaintiff she had to seek the medical services of Dr. Timothy Barrett M.B.B.S, Msc and

Psych. A Board certified Psychiatrist. That the said Psychiatrist provided a medical report which shall be [exhibited] at trial.

21. [That] due to the Defendant libel and psychiatric damage has caused the Plaintiff loss.

....

PARTICULARS OF NEGLIGENCE

(i) The Defendants failed to do a complete audit of the mortgage account.

(ii) The Defendant failed to take into account that the Plaintiff had a standing order [from] her salary to pay the Defendant on her mortgage account.

(iii) The Defendant failed to inform itself of the payments coming from the Plaintiff employer.

(iv) The Defendant failed to [*sic*] a true statement of the mortgage account in the letter dated 1st August, 2019.

(v) The Defendant failed to audit the Plaintiff's mortgage account."

23. To my mind, the claim as pleaded by the Plaintiff is somewhat muddled. However, there lies the likelihood that there may be some evidence to support the Plaintiff's claim that her salary was deducted to satisfy the mortgage payments, for which the Defendants failed to properly account. If that is so, and if the payments were being deducted and were not being properly accounted for by the Plaintiff, it would in my view be a matter for trial whether the alleged failure amounted to negligence which caused harm to the Plaintiff.

CONCLUSION

24. I therefore order that the Plaintiff's claim for libel be struck out from the Specially Endorsed Writ of Summons filed 14 February 2022 pursuant to Order 18 Rule 19 of the RSC. I decline to strike out the claim for negligence, as I find that this claim, while it may face some challenges, is not incurably bad, and presents an arguable claim appropriate for a trial on the issues. Given my split decision on the Defendant's summons, I order that each party bear their own costs.

Dated this 7th day of June A.D., 2023

Neil Brathwaite

Justice