IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

Claim No. 2022/CLE/gen/01261

B E T W E E N

CHRIS JOHNSON & ASSOCIATES LTD.

Claimant

AND

KEITH KELTY

1st Defendant

AND

MOSAIC FINANCIAL LTD

2nd Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Carl Bethel KC, Cedric Moss II and Shelly Nairn for the Claimant
Philip McKenzie KC, Lenthera Culmer and Glenda Roker for the First and Second Defendants

Hearing Dates: 15 February 2024; 30 April 2024; 20 June 2024;

Submissions received: 29 January 2024; 7 February 2024; 23 May 2024

Practice and Procedure – Insolvency – Liquidation – Defamation – Slander – Libel by necessary re-publication – Malicious falsehood – Qualified privilege – Justification – Fair Comment – Strike out of Statement of Claim - Supreme Court Civil Procedure Rules, 2022 Parts 24.2, 24.5, 26.3, 26.4

RULING

DARVILLE GOMEZ, J

Introduction

[1.] The First and Second Defendants by a Notice of Application filed on 1st December 2023 sought the reliefs set out below pursuant to Parts 26.3 and 26.4 of the Supreme Court (Civil Procedure) Rules 2022 (**"CPR"**), the overriding objective and the inherent jurisdiction of the Court.

"(1) An order to strike out the Claimant's Statement of Claim;

(2) Any further relief that the Court deems just and fair in the circumstances; and

(3) That costs of and occasioned by this application be the costs in the cause."

[2.] The grounds for the application are as follows:

"(1) The Statement of Claim discloses no reasonable ground for bringing the claim; and/or

(2) The Statement of Claim is frivolous, vexatious, scandalous and an abuse of the court process."

[3.] The Defendants' application is supported by the Affidavit of Keith Kelty filed 1st December 2023. Submissions of the Defendants in support of their application were dated 29th January 2024 and Supplemental Submissions of the First and Second Defendant were dated 23rd May 2024.

[4.] The Claimant opposes the application on the ground that the application is ill-founded and filed an Affidavit in Response on 12th January 2024. Submissions of the Claimant in support of its position were dated 5th February 2024 and Supplemental Submissions of the Claimant were dated 6th May 2024.

[5.] Pending the determination of its Application, the Defendants have also made an Application for Security for Costs pursuant to the overriding objective and Parts 24.2 and 24.5 of the CPR. The application was filed 1st December 2023 and brought on the following grounds:

"(1) The Claimant is an external company pursuant to part 24.3(f);

(2) The Claimant is ordinarily resident out of the jurisdiction pursuant to part 24.3(g); and

(3) In all the circumstances of the case, it is just to make such an order."

[6.] The Defendant's application is supported by the Affidavit of Keith Kelty filed 1st December 2023.

[7.] The additional documents filed in this action include the:

(1) General Writ of Summons filed 7th September 2022;

(2) Statement of Claim filed 7th September 2022;

(3) Defence of the Second Defendant filed 11th November 2022;

(4) Concurrent Writ of Summons & Praecipe for Concurrent Writ of Summons filed 21st November 2022;

(5) Defence of the First Defendant filed 8th December 2022; and

(6) Summons for Further & Better Particulars of the Defences of the First & Second Defendants filed 11th April 2023.

[8.] Prior to its Summons, the Claimant requested Further and Better Particulars of the Defendants' Defence by way of Letter dated 12th January 2023. The Defendants sent their respective Letter in Response on 16th February 2023. Submissions of the Claimant in Reply were dated 5th December 2023.

Background

[9.] The Claimant is a company incorporated under the laws of the Cayman Islands operating as insolvency practitioners in the Cayman Islands and elsewhere.

[10.] The Claimant seeks an award for damages against the First and Second Defendants, as agent and principal, for alleged slander, libel by necessary re-publication and malicious falsehoods.

[11.] The First Defendant is a Director of FundHaven Ltd., a mutual fund administrator duly registered and situate in The Bahamas. FundHaven was engaged by the Second Defendant to act as Administrator of a mutual fund for which the Second Defendant served as Investment Fund Manager.

[12.] The said mutual fund had shareholdings in the *Income Collecting 1-3 Months T-Bills Mutual Fund* ("Mutual Fund") and its shares were held in the name of the Second Defendant, on its behalf.

[13.] The Second Defendant, a company formerly known as Old Fort Financial Ltd., is also a licensed broker-dealer registered with the Securities Commission of The Bahamas. In that capacity, the Second Defendant acts on behalf of several investment funds in a portfolio of offerings available to the investing public.

[14.] The Claimant's claims arose from the alleged *"defamatory words"* and *"innuendo[s]"* the First Defendant published to Mr Boisy H Roberts, beneficial owner and director of the Bahamas Registered Limited Partnership NY Alaska ETF Management LP ("NY Alaska"). At the material time, NY Alaska was the Registered Director of the said Mutual Fund, held 100% of its Management Shares and acted as its Investment Manager.

[15.] The Claimant avers that the said *"defamatory words"* and *"innuendo[s]"* were published to Mr Roberts during a series of telephone conversations that took place between 24th June 2021 and 5th August 2021.

[16.] Prior to those conversations, in or around 22nd June 2021, Mr Roberts placed the Mutual Fund into voluntary liquidation in the Cayman Islands and appointed two of the Claimant's insolvency practitioners, Russell Homer and Karen Scott, to act as its Joint Voluntary Liquidators.

[17.] The Joint Voluntary Liquidators applied to the Grand Court of the Cayman Islands for Court supervision of the Voluntary Liquidation process. Notwithstanding, the Second Defendant, acting in its capacity as *"the sole or majority investor"* in the Mutual Fund, applied for it to be placed into Official Liquidation instead.

[18.] In that same application, the Second Defendant also applied for the Joint Voluntary Liquidators to be removed and replaced by Mr Keiran Hutchinson and Mr Igal Wizman who were to be subsequently appointed as the Joint Official Liquidators of the Mutual Fund.

[19.] Mr Hutchinson and Mr Wizman were partners of a third-party international accounting firm and independent of the parties to the proceedings.

[20.] Thereafter, on 30th July 2021, during a telephone call between the First Defendant and Mr Roberts, the Claimant alleges that the First and Second Defendant, acting through the First Defendant, made the following *"defamatory, false and malicious statements and innuendos"* to *"disparage the Claimant in its said business and profession, and to secure an economic advantage to the 2nd Defendant"*. The Claimant alleges that the First Defendant (in reference to the Claimant) said:

> "(1) 'Those guys are dangerous';
>
> (2) 'Our Companies don't want anything to do with them, they are cowboys';
>
> (3) 'I watched them milk a fund and no money went back to investors, zero. They collected over $9 Million and they kept it all themselves';
>
> (4) 'So, you have essentially appointed cowboys over all of our money and that's a big problem';
>
> (5) 'Chris Johnson can't handle this shit; this business is bigger than they can handle'; and
>
> (6) 'Chris Johnson and them are not good people, they are not good people'."

[21.] Considering the nature of the conversations and the fact that they happened after the liquidation proceedings had already commenced, Mr Roberts alleged that he *'unilaterally recorded'* the telephone calls without the First Defendant's knowledge *"for his own protection, to resist an*

allegation of crime and threatened prosecutions repeatedly made against him by the 1st Defendant, and *"to preserve evidence of a potential or attempted criminal act".*

[22.] As the proceedings progressed, the transcriptions of several of Mr Roberts' recordings were *"necessarily produced"* to the Grand Court as evidence of the Second Defendant's alleged *"improper attempt* to circumvent the liquidation process and evidence of the First and Second Defendants' *"previous, similar fact, misconduct".*

[23.] The Claimant alleges that the *"necessary re-publication"* of the First Defendant's initial slanders into the public record of the Grand Court has caused it to sustain serious injury to its character, credit, reputation and business and consequently caused it to suffer loss and damage.

[24.] The Defendants denied publishing the alleged defamatory statements and innuendos at all and made the aforementioned applications for strike out and security for costs.

Claimant's Case

[25.] By way of the Claimant's Statement of Claim the Claimant alleges slander, libel by necessary republication and malicious falsehoods against the First and Second Defendants.

Slander

[26.] As regards slander, the Claimant asserts that the First Defendant was the *"servant or agent"* of the Second Defendant at all material times. It is the Claimant's position that, while acting in that capacity, the First Defendant made the series of verbal *"defamatory"* statements concerning the Claimant quoted above.

Malicious Falsehoods

[27.] The Claimant further alleges that the statements made by the First Defendant were *"demonstrably and patently false and malicious"* and that the First Defendant made them *"knowingly, or recklessly, not caring"* about their veracity.

[28.] The Claimant contends, that by their natural and ordinary meaning, the words used by the First Defendant were meant and understood to mean that the Claimant is:

(1) "not worthy of trust and confidence;
(2) dishonest;
(3) staffed with bad people;
(4) criminal; and
(5) had misappropriated $9 Million Dollars which was properly payable to investors of a fund then in process of liquidation".

[29.] In addition to their natural and ordinary meaning, the Claimant alleges that the words, by way of innuendo, were meant and understood to mean that the Claimant as *"cowboys":*

(1) *"was unqualified, unskilled or an unauthorized operator;*
(2) *behaved in a manner which was irresponsible, [and] dubiously legal;*
(3) *provided an inferior service; and*
(4) *employed sharp practices and possible criminality".*

[30.] Accordingly, the Claimant contends that the First Defendant's words were deliberately *"calculated to cause pecuniary damage"* to the Claimant's business, and to secure a clear *"financial advantage"* for the Second Defendant. The Claimant alleges that this outcome was the "*express object"* of the First Defendant's *"malicious outreach"* to Mr Roberts to induce him into executing a resolution on behalf of NY Alaska, removing Russell Homer and Karen Scott as the Joint Voluntary Liquidators of the Mutual Fund, and appointing Keiran Hutchinson and Igal Wizman as Joint Official Liquidators in their place.

[31.] The Claimant further avers, that by procuring the said resolution, it was the *"hope"* of the First Defendant that the Second Defendant would no longer be required to pay legal fees and would thereby secure a financial advantage by shortening the action, while also effecting the removal of the Claimant's employees as JVLs .

Libel by necessary re-publication

[32.] In relation to libel by necessary republication, the Claimant alleges that although the original defamatory words were spoken during private telephone conversations, they were subsequently produced in the form of transcriptions, during the *"contested court proceedings"* before the Grand Court concerning the liquidation of the Mutual Fund.

[33.] The Claimant contends that such republication was a *"reasonably foreseeable consequence"* of the First Defendant's initial defamatory conduct, as in the context of those proceedings, *"full disclosure of all relevant matters"* was required to properly inform both the Court and the newly appointed Joint Official Liquidators of the First Defendant's alleged interference with the liquidation process.

[34.] As a result of this republication, the Claimant argues that its reputation suffered further damage because the *"defamatory, false and malicious statements and aspersions"* made by the First Defendant were *"entered into the public records"* of the Grand Court, causing the original harm that it suffered to be amplified and compounded.

First and Second Defendants' Application for Strikeout

[35.] In response to the Defendants' Application for Strikeout, the Claimant contends that the application is ill-founded and ought to be dismissed on the following grounds:

> " (1) The Defendants base their Application largely upon grounds of defence which have not been pleaded at all, nor particularized as required, in their respective Defences; namely, **Qualified Privilege** and **Fair Comment;**
>
> (2) The 1st Defendant (Kelty) does plead **Justification** in his Defence, but again, in his pleading, does not give the Particulars in support thereof, which are required by Law;
>
> (3) In his Defence and the present Application, the 1st Defendant relies upon **after-acquired** information, which at the material time was unknown to him, and which did not (and could not have) formed the basis (or justification) of his defamatory assertions and commentary; which is specifically prohibited as a matter of Law;
>
> (4) The Claimant is a Limited Company which is lawfully entitled to bring suit in Defamation to protect its name and business interests, and to receive an award of Damages, **without special proof of special damages;**
>
> (5) The Tort of Defamation may be constituted and committed by illicit publication or communication to a single-person;
>
> (6) The Claimant is permitted by the Interception of Communications Act 2018 to rely upon the evidence of the recordings made by Mr Boisy Roberts (to protect his own 'lawful interests') and the automatic transcripts thereof produced by the software utilized on Mr Roberts' cellphone; and
>
> (7) The Claimant is not Mr Christopher D Johnson. Chris Johnson, in any event, has a good name and professional reputation, which is worthy of defence."

Grounds 1 and 2: Defective Defences

[36.] With respect to Grounds 1 and 2, the Claimant argues that the Defendants have failed to meet the required standard of pleading, rendering their respective Defences defective. The Claimant contends that, as *"it is a fundamental rule of litigation that a person is bound by his pleadings"*, the Defendants should be *"precluded"* from raising any defence which they have not specifically pleaded and properly particularized.

[37.] In particular, as regards the First Defendant's defence of Justification, the Claimant asserts that the no particulars have been provided in breach of Rule 61.3(2) of the CPR, which provides:

> *"(2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he*

alleges are statements of fact and of the facts and matter he relies on in support of the allegation that the words are true."

[38.] In support of this view, the Claimant refers the Court to the case of **Zierenberg and another v Labouchere [1891-94] All ER Rep 611** where at page 4 of his ruling Lord Esher MR held that:

(1) *" If you call a man a swindler, and he sues you for libel, you cannot plead merely that he is a swindler, and such a plea is bad if the particular circumstances of fraud are not set out";* and

(2) although the rules of pleading were enlarged to allow a defendant to plead generally in his plea, he was *"not allowed to go to trial upon such a plea if the plaintiff desired to have particulars, but was bound to give particulars to the same extent as he was formerly bound to plead particulars in the plea. The defendant was bound "to state those facts specifically to give the plaintiff an opportunity of denying them".*

[39.] The Claimant further submits that in cases of libel or slander, it is a well-established rule that the Defendant, in a plea of justification, *"must state some specific instances of the misconduct imputed to the plaintiff"* and *"the plea ought to state the charge with the same precision as in an indictment"* **(Hickinbotham v Leach [1842] EngR 799).**

[40.] In this present case, the Claimant contends that the First Defendant has failed to do as prescribed and submits that the misconduct that underpins his plea of Justification, is simply *"impermissible"* for the following reasons:

(1) As *"Christopher D Johnson is not the Claimant",* the First Defendant's reliance on *"his own bad past experiences"* with Mr Johnson is thus irrelevant to a defence of justification against the Claimant's claim;

(2) The Statement of Claim contains *"no allegation"* that Mr Johnson was the "*individual defamed".* Therefore, any reliance on *"adverse findings"* against him, particularly the findings in **Redhouse Holdings Limited et al v. Christopher D. Johnson et al BVIHCM 2010/0138** is improper; *and*

(3) Applying the case of **Bookbinder v Tebbit [1989] 1 All ER 1169**, the Defendant *"is limited to answering the case as pleaded by the Claimant* and cannot reply upon extraneous matters" as it has done.

Ground 3: After-Acquired Information

[41.] Turning to Ground 3, the Claimant argues that the First Defendant cannot rely on the *Redhouse* ruling as justification for making the defamatory statements that he did because he was unaware of that ruling at the time the statements were made.

[42.] On that basis, the Claimant submits, that in the circumstances, the First Defendant cannot then rely on the defence of qualified privilege, as to do so his belief must be *"judged at the time of publication", "judged by reference to facts then known to him",* and *"cannot be judged or justified by reference to facts of which he is unaware"* **(Loutchansky v Times Newspapers Ltd and other [2001] 4 All ER 115).**

Ground 4: Right of a Company to Sue without Proof of Special Damages

[43.] In relation to Ground 4, the Claimant submits that the First Defendant's assertion that his use of the phrase *"Chris Johnson them"* was intended to also include the Claimant's service providers is a *"contrivance".* The Claimant contends that if that is what the First Defendant meant *"he could have said it"*, but as he did not, his allegation is limited to the Claimant as named, and not Chris Johnson personally.

[44.] The Claimant therefore submits that it is lawfully entitled, as a corporate entity, to bring this instant suit for Defamation against the Defendants to protect its commercial reputation and obtain an award of Damages, without having to actually prove special damages for its claim to succeed.

[45.] In support of its position, the Claimant cited the case of **Jameel and another v Wall Street Journal Europe SPRL [2006] 4 All ER 1279** where Lord Bingham beginning at [12], found that:

> "(12) The Tort of libel has long been recognized as actionable *per se.* Thus where a personal plaintiff proves publication of a false statement damaging to his reputation without lawful justification, he need not plead or prove special damage in order to succeed. Proof of injury to his reputation is enough; and
>
> (13) [...] if the case be one of libel, whether on a person, a firm or a company – the law is that damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case **(South Hetton Coal Co Ltd v North-Eastern News Association Ltd [1894] 1 QB 133).**"

Ground 5: Lawfulness of the use of the Recordings under the Interception of Communications Act, 2018

[46.] Addressing Ground 5, the Claimant rebuts the Defendants' contention that the use of *"unilaterally recorded"* telephone conversations between the First Defendant and Mr Roberts was not permissible on the grounds that pursuant to *s 28 of the Interception of Communications Act 2018,* Mr Roberts in recording the conversations, was only acting to protect his own lawful interests after being *"threatened with criminal proceedings"* and *"enticed and cajoled to sign a document created by the First Defendant in order to enable the Second Defendant to save at least One Hundred Thousand Dollars in legal fees".*

[47.] The Claimant further contends that on that basis, it lawfully used the transcripts of the said recordings in earlier Grand Court proceedings and is subsequently able to use them in this action, having obtained the consent of Mr Roberts pursuant to the provisions of *s 34* of the same Act.

Ground 6: Publication of Defamatory Assertion to One Person

[48.] As regards Ground 6, it is the Claimant's position that it has discharged its burden of showing that *"the libel or slander has been published, i.e. communicated to some person or persons other than the claimant himself"* **(Clerk & Lindsell on Torts).**

[49.] In support of its view, the Claimant relies on the facts that the transcripts were *"necessarily produced"* in the Grand Court proceedings and as evidenced by the Third Affirmation of Shameka Fernander, the Second Defendant *"purported to repudiate"* the First Defendant by demanding his resignation from FundHaven, as a consequence of his statements documented therein.

Ground 7: Reputational Standing of Mr Christopher D Johnson

[50.] Finally, as regards Ground 7, the Claimant submits that while it is apparent that Mr Christopher Johnson is not the Claimant, the defamatory remarks made against him *"also legitimately affect the Claimant".*

[51.] In support of its view, the Claimant reiterates its earlier submissions (Grounds 1 and 3) that the First Defendant's reliance on the *Redhouse* ruling is improper, as the relevant ruling was *"at the material time unknown"* to him and therefore could not have informed the statements he made.

[52.] In further support of its case, the Claimant produced the resume of Mr Johnson, to illustrate his *"wide and lengthy experience"* as an insolvency practitioner. The Claimant also relied on the findings of the Institute of Chartered Accountants in England & Wales, in relation to two prior complaints of professional misconduct brought against Mr Johnson. In both instances, the Institute determined that his conduct did not even *"rise to the level of establishing so little as a prima facie case of potential liability for any professional misconduct"* as had been alleged.

[53.] To further its position, the Claimant also addressed a separate instance in which the professional conduct of Mr Johnson was called into question, viz, during his tenure as liquidator of the entity Oxford Ventures Limited. In that regard, the Claimant relied on the Affidavit of Mr John Greenwood, who succeeded Mr Johnson as liquidator, and contended that this too was merely another instance where Mr Johnson's alleged misconduct was wholly unsubstantiated.

First Defendant's Case

[54.] The First Defendant filed his Defence on 8 December 2022, in which he denies publishing any defamatory, false or malicious statements about the Claimant or causing the Claimant to suffer injury, damage or loss.

[55.] While he admits that he was, and is a Director of the mutual fund administrator, FundHaven Ltd., he denies that he was ever a servant, agent or employee of the Second Defendant at any material time.

[56.] It is his position that his involvement with the Second Defendant was limited to his role as Director of FundHaven, which had been engaged by the Second Defendant as an independent contractor to:

(1) Act as Administrator of a certain mutual fund (Accuvest CST Fund, Ltd. SAC) in which the Second Defendant was an investor, including communicating with Investors, ensuring proper administration and following the winding up of any underlying mutual fund;

(2) Provide consultation and administration services in relation to the financial matters of the Second Defendant and the assets of its clients;

(3) Prepare reports as requested by the Second Defendant or its clients; and

(4) Administer subscriptions and redemptions to various mutual funds FundHaven administered.

[57.] Outside of this arrangement, the First Defendant avers that he had no other relationship with the Second Defendant. He further avers that contrary to the Claimant's claims, he was never forced to resign from FundHaven, but he chose to do so to become a full time caretaker of his father who fell terminally ill at that time.

[58.] As regards the alleged defamatory statements, the First Defendant expressly denies that he published them, or that they were published by the Second Defendant acting through him, during any of the telephone conversations he had with Mr Roberts or at all.

[59.] However, it is his position that it was the Claimant itself that published the alleged defamatory statements, by including them in an Affidavit produced by one of its employees, Russell Homer, in support of its appointment as the Official Liquidator of the Mutual Fund (in the persons of Christopher D. Johnson and Russell Homer) during a closed court hearing that took place in the Cayman Islands.

[60.] The First Defendant asserts that he was *"unaware"* that his telephone conversations with Mr Roberts were being recorded and that the recording of their very first telephone conversation had been shared with the Claimant.

[61.] On that basis, he argues that it could not have been foreseeable that the transcripts would have been shared by the Claimant in any court proceeding, particularly as the Claimant was a third party to the conversations they were produced from.

[62.] In any event, he contends that the recording and transcripts produced were *"susceptible to manipulation by the recording party"* and *"do not accurately reflect"* the entirety of the conversations he had with Mr Roberts which save for their first conversation, Mr Roberts had led.

[63.] Further, he avers that their re-publication to the Grand Court which was done *"voluntarily"* by the Claimant was *"not necessary"* and was only done to bolster its case before the Court to remain the liquidators of the said Mutual Fund.

Falsity, Malice and Loss

[64.] As regards the Claimant's allegations that the statements he made to Mr Roberts about the Claimant were false, the First Defendant asserts that he believed what he said to be true as the statements were all either *"based on his personal opinion"* of the Claimant, based on his *"unpleasant experiences"* with the Claimant, or based on the outcome of the *Redhouse* case, in which the Court removed Mr Johnson from acting as a Joint Official Liquidator of another fund due to *inter alia,* a finding of *"improper practice"* and *"lack of discretion"*.

[65.] Further, the First Defendant posits that the Claimant distorted the meaning of his statements by adding its own conjecture and creating a misleading narrative in order to support its claim.

[66.] He denies that his statements were *"calculated to secure an economic advantage"* for either Defendant, and maintains that his statements were justified, as at the time they were made, he

had lost *"any and all confidence"* in the Claimant's ability to perform as the liquidators of the Mutual Fund.

[67.] In particular, regarding the statement *"I watched them milk a fund and no money went back to the investors, zero. They collected over $9 Million and they kept it all themselves"*, he avers that the term "them" refers to both the Claimant and the service providers it had engaged, and that he has *"documented evidence"* to support his claim.

[68.] He asserts that even the Claimant has admitted that this true in paragraph 6 of the Particulars of Falsity in its Statement of Claim.

[69.] Regarding the allegation of malice, the First Defendant asserts that he *"never intended to [or did] cause any financial harm"* to the Claimant. On the contrary, he contends that the resolution presented to Mr Roberts was only intended to reduce the time and expense associated with replacing the Claimants as JVLs.

[70.] He asserts that in any event, the Claimant has not suffered any actual loss or damage but rather was paid excessively in the sum of $1M for the three months it acted as JVL of the Mutual Fund.

Second Defendant's Case

[71.] The Second Defendant filed its Defence on 11th November 2022, in which it also denies acting through the First Defendant to publish any defamatory, false or malicious statements about the Claimant or causing the Claimant to suffer injury, damage or loss.

[72.] It avers that at no time whether during the First Defendant's conversations with Mr Roberts or otherwise was the First Defendant acting as its agent or employee, and further asserts that there was no admission, whether by way of the Third Affirmation of Shameka Fernander, CEO of the Second Defendant, or otherwise, that could reasonably support the Claimant's assertion to the contrary.

[73.] Lastly, the Second Defendant denies having any relationship with the First Defendant outside of the arrangement outlined above. It also joins with the First Defendant in denying that the production of the transcripts in question during the Grand Court proceedings was necessary, whether for the reasons cited by the Claimant or at all.

Application for Strikeout

[74.] In support of their Application for Strikeout, the Defendants rely on the Affidavit of the First Defendant, their Written Submissions and their Supplemental Submissions.

[75.] In the said Affidavit, the First Defendant contends that the Claimant's defamation claim against the Defendants is *"unsustainable as a matter of law"* as the respective defences raised are sufficient to defeat the claim without the need for further investigation by the Court.

[76.] In particular, he submits that the claim is fundamentally flawed because the statements complained of caused no damage, or any likelihood of damage, to the Claimant's reputation. He argues that, since a claim for defamation requires proof of reputational harm, the Claimant's case has no realistic prospect of success.

[77.] In support of his position, the First Defendant asserts that his statements were made in the context of the Claimant's handling of a prior court supervised liquidation matter, in which it had been removed as liquidator. Further, he avers that, at the time the statements were made, they were based on the Court's publicly accessible judgment in the *Redhouse* matter, in which the Claimant was found to be *"incapable of handling a liquidation based on his conduct"*.

[78.] In their written submissions the Defendants aver that in any event the comments made by the First Defendant were *"true and based on information known to the 1st Defendant and [his] personal experiences/interactions with the Claimant"*. Therefore, the Defendants contend that all of statements the First Defendant made fall within the Defence of Justification and or Fair Comment and lack the alleged element of malice.

[79.] For those reasons, the Defendants contend that the Claimant's Statement of Claim raises an "unwinnable case" suitable for summary dismissal **(Partco Group Ltd v Wragg [2002] EWCA Civ 594)** that should be struck out as it is "plain and obvious" that it discloses no reasonable ground for bringing the claim **(Orlean Clarke et al v Kathleen Barry, SCCivAPP no.99 of 2019)**.

The Law

[80.] The law on strike out has long been settled. Pursuant to CPR Part 26.3 (1)(b) and(c), the Court may strike out a statement of case or part of a statement of case on the following grounds:

> "(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim; and
>
> (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings".

[81.] Further, pursuant to Part 26.4 the Court has a general power to strike out a statement of case.

[82.] In **Walsh v Misseldine [2000] CPLR 201**, Brooke LJ held that:

"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."

He said that "the court must thus be persuaded either that a party is unable to prove the allegations made against the other party; [...] that the statement of claim is incurably bad; [...] that it discloses no reasonable ground for bringing or defending the claim; or that it has no real prospect of succeeding at trial."

[83.] In **Purdy v Cambran [1999] Lexis Citation 4011**, May LJ set out in the third paragraph on page 7 of 8 that when assessing Strike Out Applications under the CPR:

"There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case..."

[84.] In **Orlean Clarke et al v Kathleen Barry, SCCivAPP no.99 of 2019** at [14] Sir Michael Barnett referencing The White Book (1999) edition, Notes 18/19/10 clarified that:

" A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out.

[85.]

The Issues

[86.] As it relates to the Application to Strike Out, the issues to be determined by this Honorable Court are as follows:

(1) Does the Claimant's Statement of Claim disclose a reasonable cause of action?; and
(2) Is the claim frivolous, vexatious or an abuse of the Court's process?

Analysis and Disposition

Application to Strike Out

[87.] The power to strike out a claim must be exercised carefully, and only in cases where it is "plain and obvious" that an action is "certain to fail" **Shamon Rodgers v Bahamasair Holding Ltd** (supra).

[88.] In assessing this Application, I have considered the relevant legal principles as set out under Part 26.3 and 26.4 of the CPR and in the referenced jurisprudence, viz., **Walsh v Misseldine, Purdy v Cambran, Orlean Clarke et al v Kathleen Barry**, and **Shamon Rodgers v Bahamasair.**

[89.] In particular, I have considered the relevant tests which are whether the statement of case discloses a reasonable ground for bringing the claim or is otherwise so deficient that it amounts to an abuse of the Court's process. I have also considered the general power of the Court in such an application, pursuant to Part 26.4.

[90.] A claim has long been accepted to be considered reasonable where it has *"some chance of success when only the allegations in the pleadings are considered"* **(Orlean Clarke et al v Kathleen Barry, SCCivAPP no.99 of 2019**. The Court accepts that the mere fact that the case is weak, and not likely to succeed is no ground for striking it out, so long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury.

[91.] In this instant action, the Claimant's Statement of Claim sets out a cause of action in defamation against the First and Second Defendants by way of slander, malicious falsehood, and libel by necessary republication.

[92.] The Claimant has pleaded that its claims are based on the alleged false and disparaging statements the First Defendant published to a third party, while acting in his capacity as an agent of the Second Defendant. Further, the Claimant alleged that the aim of the statements was to cause injury to the its reputation and secure a financial advantage for the Second Defendant.

[93.] It is undisputed that the statements were in fact made by the First Defendant to the third party, but what is disputed is whether the statements were (i) defamatory; (ii) made on behalf of the Second Defendant; (iii) initially published by the Defendants, (iv) necessarily re-published, and (iv) whether any actual harm was sustained by the Claimant. While the Court accepts that all of these issues go to the heart of the factual dispute, it is my view that they cannot be determined without the benefit of a trial.

[94.] On the other hand, the Defendants argue that the claim is not sustainable because the Claimant cannot prove reputational harm or malice. The Defendants assert that this is because at the time the statements were made they were true, supported by readily available documentary evidence, the personal experiences of the maker and the admissions in support by the Claimant.

[95.] The Defendants further argue, that in any event, the statements made by the First Defendant are protected by the defences of justification, qualified privilege and fair comment. In my view, this determination is also a matter for trial, as at this juncture, the Court's determination is limited to

whether or not the Claimant's claim is so *"incurably bad"* **Walsh v Misseldine** (supra), that it should not be allowed to proceed at all.

[96.] In any event, while the First Defendant's defence raises the defence of justification, it does so without the particulars required under Rule 61.3(2) of the CPR. Therefore, in the absence of those particulars, the Court cannot assess at this stage whether his defence is capable of defeating the Claimant's claim as asserted without further factual inquiry being carried out.

[97.] Lastly, I have considered that it is well recognized in law that corporate entities, such as the Claimant may bring in a suit in defamation without having to plead or prove special damage where the statements are actionable *per se* **(Jameel and another v Wall Street Journal Europe SPRL [2006] 4 All ER 1279 ; South Hetton Coal Co Ltd v North-Eastern News Association Ltd [1894] 1 QB 133).** While I have already found that the determination of whether or not the statements are defamatory is a matter for trial, I find this provision to be instructive and do not therefore accept that the claim is frivolous, vexatious, or otherwise an abuse of the Court's process.

[98.] In the circumstances, I am satisfied that the Statement of Claim discloses some reasonable cause of action and raises questions *"fit to be decided by a judge" (***Orlean Clarke et al v Kathleen Barry, SCCivAPP no.99 of 2019)** and therefore, I do not accede to the Defendants' application for the Statement of Claim to be struck out on either of the grounds relied on.

Conclusion

[99.] Accordingly, for the reasons I have set out above, the Court makes the following orders:

(i) The Defendant's Application to Strike Out the Claimant's Statement of Claim is dismissed;

(ii) The costs of and occasioned by the Application are awarded to the Claimant, to be summarily assessed pursuant to Part 24.6 of the CPR unless otherwise agreed between the parties.

Dated this 25th day of August, 2025

Camille Darville Gomez

Justice