



In The Supreme Court of Bermuda

**CIVIL JURISDICTION
2006: No. 377**

BETWEEN:

DEAN O. MING

Plaintiff

-and-

RICHARD HORSEMAN

-and-

YOGA HORSEMAN

-and-

HECTOR, WAKEFIELD, DWYER & PETTINGILL

-and-

WAKEFIELD QUIN

Defendants

REASONS FOR DECISION

Date of hearing: March 5, 2008

Date of Reasons: March 31, 2008

Plaintiff in Person

Mr. Jai Pachai, Wakefield Quin, for the Defendant

Introductory

1. The Plaintiff sued the Defendants for \$400,000 in damages in respect of various legal improprieties allegedly committed by them over a six-year period while acting for the co-respondent in the Plaintiff's divorce proceedings. The First Defendant is a partner in the Fourth Defendant law firm, and was formerly employed by the Third Defendant law firm. The Second Defendant is a lawyer formerly employed by the Third Defendant and currently employed by the Fourth Defendant.
2. The one clearly defined cause of action which has been pleaded is defamation; other complaints are either criminal (perverting the course of justice/theft) or quasi-criminal matters which can only be raised in the proceedings in which the matters complained of allegedly occurred (contempt of court). The common thread which seemed to run through all of the Plaintiff's claims was the fact that the Defendants at all material times were accused of breaching the Plaintiff's legal rights while acting for his litigious opponent, Curtis Simmons ("Simmons").
3. The Plaintiff's divorce proceedings as against Simmons appear to have concluded with the determination of an appeal in respect of the costs order made in favour of the Plaintiff as Petitioner at first instance on November 27, 2003 in Civil Appeal 2003: No. 12. The Plaintiff successfully sued Simmons for assault and battery in a trial before me in respect of which judgment was delivered on August 16, 2006, Civil Jurisdiction 2001: No. 192. Another action against Simmons is still pending before the Chief Justice. The present action was commenced by Writ of Summons issued on December 11, 2006.
4. On January 31, 2008, the Defendants sought to set aside the Writ herein on technical grounds. I declined to set aside service of the Writ, and ordered that a further hearing should take place to determine whether the Plaintiff's claim was liable to be struck-out on the grounds that it disclosed no reasonable cause of action as regards the claims for (a) defamation, (b) failure to comply with a court order and (c) withholding evidence/perverting the course of justice, and (d) whether the claim for misappropriation of funds was liable to be struck-out on the grounds that it is frivolous or vexatious.
5. Because the plaintiff was appearing in person, I indicated that I would review the law on his behalf. At the conclusion of the hearing of the strike-out application on March 5, 2008, I struck-out the Plaintiffs' claims. I now give reasons for this decision.

Defamation claim

6. The Plaintiff complained that he was defamed by the Defendants when they (a) copied a letter written (on behalf of Simmons) on December 12, 2000 to himself

to the Commissioner of Police, and (b) presented evidence to the Court on December 13, 2000 which defamed him.

7. The letter was copied to the Commissioner of Police pursuant to section 19(d) of the Summary Offences Act 1926, which makes it an offence to enter property which the owner has formally notified a person they do not have permission to enter. It was written while the Defendants were representing Simmons who had been joined as a co-respondent in the Plaintiff's divorce proceedings. The Petition was heard on December 19, 2000.
8. It is extremely clear that that absolute privilege attaches to any statements made in the course of judicial proceedings, as Mr. Pachai for the Defendant contended in reliance on '*Gatley on Libel and Slander*', 8th edition, paragraph 381. This text (at page 158 note 2) suggests that, where a claim to absolute privilege "*is at all open to discussion*", the issue should be tried as a preliminary issue and not dealt with by way of strike-out. Having regard to this procedural principle I had little difficulty in concluding that the complaint made about any defamation occurring in the context of judicial proceedings was liable to be struck-out.
9. Although this legal principle is somewhat less familiar, I was satisfied that the complaint about the Section 19(d) of the Summary Offences Act 1926 letter also disclosed no reasonable cause of action, because absolute privilege clearly applied by virtue of the following principle set out in *Gatley* at paragraph 410:

"No action will lie for defamatory statements contained in any document which is incidental to the proper initiation of judicial or quasi-judicial proceedings..."

Failing to comply with Court Order

10. The Plaintiff complained about the Defendants' alleged failure to comply with an Order of the Chief Justice made on December 8, 2005 in the assault action which is now concluded by not disclosing a tape recording in a timely manner. I find that it is plain and obvious that the remedy for non-compliance with a Court Order is to initiate contempt of court or similar enforcement action within the proceedings where the non-compliance occurs. No claim in damages can be asserted for such non-compliance in wholly independent proceedings.

Perverting the course of justice

11. The Plaintiff further complains that the Defendants (a) perverted the course of justice, and (b) defrauded the Legal Aid Fund by, *inter alia*, telling the Plaintiff on April 6, 2001 that he did not have to attend a Magistrates' Court hearing and by setting aside an order for costs made against Simmons in the Court of Appeal with the result that the Legal Aid Fund had to pay costs on behalf of his legally-aided wife, and pursuing an appeal without his ex-wife's authority.

12. Perverting the course of justice is a criminal offence but there is no equivalent claim in tort known to the law. The closest civil equivalent to this criminal offence is the tort of abuse of process. According to *Halsbury's Laws*, 4th edition, Volume 45(2) paragraph 501:

“ It is a tort to use legal process in its proper form in order to accomplish a purpose other than that for which it was designed and, as a result, to cause damage. The claimant need not prove want of reasonable and probable cause, nor need the proceedings have terminated in his favour. He must show that the defendant has used the proceedings for some improper purpose.”

13. Such a claim would normally be asserted against a litigant, not their lawyer. There may be circumstances in which a lawyer might become liable for abuse of process if they misused the Court's machinery for their own purposes in circumstances where it might be suggested they were doing more than to properly represent their own client. The Plaintiff's extensive pleadings (original plus additional claims) do not allege that the Defendants had any ulterior purpose of their own in performing the acts complained of. I do not believe any such assertions could properly be pleaded had leave to amend been granted.
14. It is suggested that the Defendants coerced the Plaintiff's ex-wife's lawyer to file an affidavit on behalf of the ex- wife without her authority in connection with the appeal in the divorce proceedings, but only she can complain that something was done improperly on her behalf. Moreover, there is no plea that this was done for the Defendants' own purposes as opposed to for the benefit of their client. The obvious result of the appeal was that Simmons did not have to contribute to the Plaintiff's costs because the divorce was not granted on the grounds of adultery. The only need for the appeal arose because it was unclear from the costs order made whether or not Simmons as the co-respondent was liable to contribute to the Plaintiff's costs. One would hardly expect a co-respondent to be ordered to bear the costs of a divorce granted on the grounds of unreasonable behaviour.
15. No reasonable cause of action for the tort of abuse of process was disclosed in the Plaintiff's claim and no damages are recoverable in law for the criminal offence of perverting the course of justice. For these reasons, the perverting the course of justice claims were dismissed.

Attempt to defraud claim and misappropriation claims

16. The Plaintiff complains that the Defendants attempted to defraud him of \$5000 by seeking his agreement to his ex-wife's attorneys paying \$5000 owed by his ex-wife to them in their capacity as Simmons' attorneys in settlement of monies the Plaintiff owed Simmons. On the face of this allegation, no cause of action was

disclosed because (a) damages cannot be obtained for attempts in civil law, and (b) no fraudulent conduct was alleged.

17. It was further alleged that \$500 was not credited to the Plaintiff's account with the Defendant firms. The proper remedy for this complaint would be an action for money had and received. The tort of conversion does not apply to money, only goods. However, Simmons has deposed that his account with the Defendant firms was credited with the \$500, so any claim for money had and received linked to an allegation of fraud was in my judgment liable to be struck-out on the grounds that it was bound to fail.

Conclusion

18. Even if the Plaintiff's claims had not been liable to be struck-out on the aforesaid grounds, I would in the inherent jurisdiction of the Court have struck-out the claims because in my judgment it is was a misuse of the Court's machinery to attempt to either (a) re-litigate issues which had or should have been raised in previous proceedings, and/or (b) to seek, in effect, to punish lawyers for acting on behalf of their client. It seemed obvious to me that the Plaintiff's true grievance lay not with the Defendants, but with their client whom he believes committed adultery with his ex-wife.

19. The constitutional right to a fair hearing under section 6(8) of the Constitution requires that lawyers be able to represent their clients independently, subject only to (a) liability for breaches of the Barristers Code of Professional Conduct, (b) civil liability to their own clients, and (c) liability for breaches of the criminal law. Lawyers generally owe civil law duties only to their clients, statutory exceptions such as wasted costs orders, or exceptional cases where by their conduct they assume a duty of care to non-clients (e.g. *Longstaff-v-Birtles* [2002] 1 WLR 470) apart.

20. In the present case there is no suggestion that the Defendants have done any more than vigorously advance their own client's case. The Plaintiff ought not to be permitted to proceed with claims which do not disclose any reasonable or arguable cause of action against the Defendants or any of them.

Dated this 31st day of March, 2008

KAWALEY J.