REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2010-03699

BETWEEN

RBTT MERCHANT BANK LIMITED

RBTT BANK LIMITED

RBC FINANCIAL (CARIBBEAN) LIMITED

CLAIMANTS

AND

REED MONZA (TRINIDAD) LIMITED

(In receivership)

JAMES W. SNEDDON LIMITED

EUGENE ROBERT GRANSAULL

DEFENDANTS

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimants: Mr. G. Pantin, instructed by Ms. A. Peters-Francis

For the Defendants: No Appearance

Date of Delivery: 25th October, 2012

DECISION

BACKGROUND

[1] The First and Second-named Claimants are affiliated companies both incorporated under the **COMPANIES ACT, CHAP. 81:01** and financial institutions licensed under the **FINANCIAL INSTITUTIONS ACT, CHAP. 79:09**. The Third-named Claimant is the direct parent company of the First and Second-named Claimants and also incorporated under the **COMPANIES ACT**.

[2] The First and Second-named Defendants are companies incorporated under the **COMPANIES ACT**; and the Third-named Defendant is a director of the First-named Defendant and a shareholder in the Second-named Defendant.[1]

[3] By Statement of Case and Claim Form filed on the 14th September, 2010, the Claimants sought the following reliefs against the Defendants:

i. Damages for conspiracy;
ii. Damages for unfair competition; and,
iii. An injunction to restrain the Defendants, each of them, whether by themselves or through their servants and/or agents or otherwise from publishing or causing to be published the allegations contained in the Antigua Publication or St. Lucia Publication or any similar words in respect of the Claimants or any of them.

[4] The First and Third-named Defendants did not file an appearance and by Order dated the 29th March, 2011 the Court granted the Claimants' application for judgment in default against them. In addition, an injunction in

[1] Paragraph 5 of the Statement of Case

the foregoing terms was granted against the First and Third-named Defendants and damages were to be assessed with interest.

[5] The assessment of damages came on for hearing on the 18th June 2012; none of the Defendants appeared either in person or through an attorney at law. At the hearing, the Claimants relied on the evidence contained in the following documents:

i. Witness Statement of Darryl White, Regional Corporate Vice President of the First-named Claimant filed on the 28th May, 2011; and,

ii. Witness Statement of Venishea Paynter, Senior Corporate Counsel for Capital Markets and Wealth Management of the Third-named Claimant filed on the 9th September, 2011.

In addition, Counsel for the Claimants filed written submissions on the issue of assessment of damages on the 24th August, 2012.

THE CLAIM

[6] The essence of the Claimants' claim against the Defendants is that between June 2009 and June 2010 the latter published and/or threatened to publish defamatory material[2] ("the publications") regarding the Claimants in Antigua, St. Lucia and Barbados. The Claimants alleged that the publications were likely to and/or calculated by the Defendants to damage their reputation and goodwill.

[2] Paras. 9-13 of the Statement of Case

[7] The Claimants contended that the Defendants conspired together to cause injury, loss or damage to them by using unlawful means such as:

i. Defaming the Claimants;
ii. Interfering with the Claimants' contractual and business relationships with its customers or potential or prospective customers;
iii. Seeking to obtain money from the Claimants by menaces and/or to extort money from or otherwise blackmail the Claimants by either publishing or threatening to publish a libel upon the Claimants or directly or indirectly threatening to print or publish, or directly or indirectly proposing to abstain from or offering to pervert the printing or publishing of any matter or thing touching the Claimants contrary to **SECTION 33** of the **LARCENY ACT, CHAP. 11:12**; and,
iv. Committing acts of unfair competition against the Claimants contrary to **SECTION 4(1)** and **SECTON 6(1)** of the **PROTECTION AGAINST UNFAIR COMPETITION ACT**, **CHAP. 82:36** ("**PAUCAA**").[3]

<u>ANALYSIS</u>

[8] By virtue of the Claimants having obtained judgment in default of appearance against the Defendants, the issue that remains is that of the quantum of damages to be awarded to the Claimants for unfair competition and conspiracy. It should be noted that the First and Third-named Defendants

[3] Para. 7 of the Statement of Case

not having made any submissions on the issue, pursuant to **PART 16.2(4)**[4] of the **CIVIL PROCEEDINGS RULES 1998** ("**CPR**"), the Court is entitled to rely on what becomes the unchallenged evidence of the Claimant in assessing the quantum of damages.

[] As a result of the paucity of cases, inviting award of damages for unfair competition and conspiracy by unlawful means and analogous cases in the area of defamation have been considered in order to determine the instant matter.

- **UNFAIR COMPETITION**

[9] **SECTION 4** of the **PAUCA** provides:

> *"(1) In addition to the acts and practices referred to in sections 5 to 9, any act or practice, in the course of industrial or commercial activities, that is contrary to honest practices shall constitute an act of unfair competition.*
>
> *(2) Any person damaged or to likely to be damaged by an act of unfair competition shall be entitled to the remedies obtainable under the civil law of Trinidad and Tobago."*

[4] Where a defendant against whom a default judgment is entered wishes to be heard on the issue of quantum and he has not do indicated under rule 10.2(2), he shall within 14 days of receipt of notice under rules 16.2(2) or (3) file and serve a Notice in Form 7A indicating whether he wishes to –

(a) cross examine any witness called on behalf of the claimant;
(b) make submissions to the court; or
(c) call any evidence, in which case he shall file with the Notice a statement of the facts upon which he intends to rely.

[10] The Claimants contended that they are entitled to recover damages for the acts of the First and Third-named Defendants contrary to **SECTION 6(1)** of the **PAUCA** which provides:

> *"Any acts or practice, in the course of industrial or commercial activities, that damages, or is likely to damage, the goodwill or reputation of another's enterprise shall constitute an act of unfair competition, regardless of whether such act or practice causes confusion."*

The evidence in support of this is contained in paragraphs 9 to 18 of the Claimants' Statement of Case.

[11] It is the case for the Claimants that the defamatory publication headed "Beware of these corporations and their leaders" by the First-named Defendant – through its director, the Third-named Defendant – constituted dishonest business practices contrary to **SECTION 4(1)** of the **PAUCA**. This publication was distributed in Antigua and by letter dated June 2009, prefaced to the publication, the Third-named Defendant indicated that he was "available for conference call, radio talk shows, TV interviews, publications or any other function that will further our cause of bringing more compliance and integrity to the Financial Services and Banking sectors in the Caribbean".

[12] By email dated the 2nd June, 2010 to Mr. Darryl White of the First-named Claimant, the Third-named Defendant attached a document dated April 2010 entitled "To whom it may concern" alleging the misappropriation of funds, reckless profiteering and fraudulent misrepresentation on the part of the Claimants and Price Water House Coopers. In the email, the Third-named Defendant admitted to disseminating the documents to "over 1,100 top businesses etc. in St. Lucia".

[13] With regard to the total loss arising from the foregoing acts of the First and Third-named Defendants, the Claimants have not submitted a definite figure but proposed a range between TTD$250,000.00 to TTD$550,000.00 for general damages in keeping with the awards in defamation cases.

[14] Counsel for the Claimants contended that proof and extent of the damage or likely damage from the Defendants' publications can be gleaned from the Witness Statement of Darryl White, where he deposed[5]:

> *"As an investment banker with over 20 years experience in the financial sector, I am aware of the importance to the operation of business of a financial institution's reputation and that any hint of impropriety, fraudulent or questionable business practices can have far reaching effects on a financial institution's ability to operate in the marketplace. The fact that the Claimants operate as part of a conglomerate in several countries means that the potential exposure from an attack of this nature can have far reaching and consequently damaging effects."*

[15] On the issue of uncertainty in assessing damages, the learned author of McGregor on Damages[6] opined:

> *"…where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughn Williams LJ put it in Chaplin v Hicks[7], the leading case on the issue of certainty: "The fact*

[5] Paragraph 20
[6] 18th Edition, p. 326, para. 8-002
[7] [1911] 2 KB 786

that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages."

[16] In light of the fact that the Defendants have not submitted any evidence for my consideration in respect of the assessment of damages, and actual proof of damage has not been given by the Claimants, I am of the view that a nominal award for unfair competition should be made. In McGregor on Damages, the learned author stated:

> *"Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given … In the present case the problem is simply one of proof, not one of absence of loss but of absence of evidence of the amount of loss."*

Further, in **The Medina**[8] the court held that nominal damages does not mean "small damages". Lord Halsbury LC opined:

> *"Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right, which though it gives you no right to any real damages at all, yet gives you the right to the verdict or judgment that your legal right has been infringed ...*
>
> *But the term "nominal damages" does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may also be represented as compensation for the use of something that belongs to him depends upon a variety of circumstances, and it*

[8] [1900] AC 113, 116

certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

In the circumstances, I award the Claimants damages in the sum of TTD$250,000.00 for unfair competition having regard to:

i. The absence of a defence or challenge to the Claim;
ii. The evidence of likely possible harm suffered by the Claimants; and,
iii. The publications distributed by the Defendants designed to cause reputational harm to the Claimants.

- **CONSPIRACY BY UNLAWFUL MEANS**

[17] In **Lonrho Plc. and Others v Fayed and Others (No.5)**[9] Dillon LJ held that a claimant in a civil action for conspiracy must prove actual pecuniary loss, though if he proves actual pecuniary loss the damages are at large, in the sense that they are not limited to a precise calculation of the amount of the actual pecuniary loss actually proved.

[18] Under this head, Counsel submitted that the Defendants circulated defamatory material throughout the Caribbean which questioned the integrity of their business operations and also accused them of dishonest practices. The evidence of the First and Third-named Defendants' conspiracy to defame the Claimants is contained in paragraph 18 of the Witness Statement of Darryl White, where he stated:

[9] [1993] 1 WLR 1489, p. 1494

"This threat by the Defendants to continue its attack on the Claimants' reputation and business relationships with its competitors, clients and customers had the potential to negatively affect the Claimants' standing in the business community throughout the Caribbean region and in other jurisdictions in which the Claimants and their affiliates conducted business, thereby directly affecting the Claimants' ability to operate its business."

In these circumstances, Counsel submitted that the range of an award under this head should be between TTD$400,000.00 to TTD$700,000.00.

[19] In **Ratcliffe v Evans**[10], Bowen LJ discussed the evidence to support such defamatory acts. He opined:

"… in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce and which in the ordinary course of things does produce, a general loss of business, as distinct from loss of this and that known customer, evidence of that general decline of business is admissible."

[20] The Claimants have not put forward actual evidence as that stated in **Ratcliffe v Evans** but Counsel asked the Court to consider the following in arriving at a determination:

i. The wide circulation of the adverse publications in the Caribbean through electronic media; and

[10] [1892] 2 QB 524, 533

ii. The prominence and considerable standing of the Claimants in the banking industry in the Caribbean in addition to the large clientele it hosts.

[21] In arriving at my decision, I had regard to the awards for defamation in the cases of **Pan Trinbago Inc. and Another v Satnarayan Maharaj and Another**[11], **TnT News Center Limited b John Rahael**[12] and **Basdeo Panday v Kenneth Gordon**[13]. I am guided by the learning in **Pan Trinbago Inc. and Another v Satnarayan Maharaj and Another**, where the court considered the likely effect of the words on the reputation of the second claimant and the circulation of the libel through the popular Bomb Newspaper. Bereaux J. opined:

> *"...I regard the action brought by the second plaintiff as sufficient to attract an award of substance ... I am fortified in my view by Lord Atkin's dictum in Ley v Hamilton (1935) 153 LT 384 at 386:*
>
> > *"It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach; it is impossible to weigh at all closely compensation which will recompense a man or a woman for the insult offered or the pain of a false accusations. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times."*

[11] HCA No. 1071/1995
[12] Civ. App. No. 166/2006
[13] UKPC No. 35/2004

The first plaintiff is a prominent, well-known organization. The second plaintiff as its President would also have enjoyed a high level of prominence. The article casts aspersions on the integrity and credibility of both plaintiffs and on the morality of the second plaintiff ... The article speaks for itself."[14]

[22] Again, I note that there has been no evidence on behalf of the Defendants and the Claimants have not proffered actual proof of damage. However, in **Exchange Telegraph Co. v Gregory**[15], a case which concerned inducement for breach of contract the court held that where a breach occurs during the ordinary course of business, it must cause loss and it is unnecessary to demonstrate and prove particular items of loss as damages are at large. Lord Esher MR opined:

> *"To say that the damage must be such as can be measured – that you must show much how the wrongful act complained of would injure the person against whom it was done – is no answer ... In such a case the jury may give any damages. It is not necessary to give proof of specific damage. The damages are at large."*

In the circumstances, I am of the view that a nominal award should be given in the sum of $400,000.00 for conspiracy by unlawful means.

- **SPECIAL DAMAGES**

[14] *Op. cit.* p. 9
[15] [1896] 1 QB 147, 153

[23] The Claimants have submitted that they should recover special damages in the sum of TTD$194,370.43 for the expense of staff time and the cost of external Counsel to remedy the unlawful acts committed by the Defendants.

[24] In **The Susquehanna**[16], Lord Dunedun opined:

> *"It there be any special damage attributable to the wrongful act that special damage must be averred and proved, and if proved, will be awarded."*

The Claimants have not proffered any documentary evidence in the form of bills and/or receipts to support their claim for special damages but urged the Court to consider the unchallenged Witness Statement of Venishea Paynter, Senior Corporate Counsel of the Third-named Claimant as evidence of same. In paragraph 6 and 7, Ms. Paynter stated:

> *"In this regard I expended over 200 hours in having to deal with the matter, which detracted from my abilities to deal with my other duties and responsibilities.*
>
> *As the person who was responsible for liaising with the attorneys advising on this matter, I was also responsible for receiving and reviewing their invoices for the services that they rendered. I am therefore aware that the First Claimant expended at least TTD$194,370.00 on legal fees to Messrs. M. Hamel-Smith & Co. for their services in advising in respect of this matter."*

[25] In support of their contention, Counsel relied on the case of **Grant v Motilal Moonan Limited and Another**[17] , where Bernard CJ opined:

[16] [1926] AC 655, 661

> *"… special damage had to be established on a balance of probabilities. The respondent called no evidence in rebuttal. In the event, the master, in my view, either had to accept the appellant's claim in full, or if for whatever reason she had reservations, she should have approached the matter along the lines in Ratcliffe's case by applying her mind judicially to each item and the cost therefor in the list. This she did not. Instead she merely, as stated earlier, made an ex gratia award. She did so on the premise, wrongly in my view, that the appellant had called no evidence of any kind in support of her claim. The master made this gesture, it would seem, in apparent sympathy for the appellant. In my view, the master erred. The appellant had called prima facie evidence of her … costs the fact of which, as I said, was unchallenged."*

Further, Counsel relied on the case of **R+V Versicherung AG v Risk Insurance and Reinsurance Solutions and Others**[18], where Tomlinson J. upheld the decision of the lower court and opined:

> *"Gloster J held that R+V is entitled to recover as damages for conspiracy the expense of managerial and staff time spent in investigating and mitigating the conspiracy and in handling the run-off of claims after termination of binders … Gloster J held that in this exercise damages are at large and the court is not over-concerned to require a claimant to prove precise quantification of its losses … I respectfully agree with Gloster J's analysis of what is demonstrated by the authorities to be the correct approach."*

[26] In the circumstances, I award the sum of TTD$194,370.43 as special damages for the cost of staff time and external Counsel to the Claimants.

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[17] [1988] 43 WIR 380, 387

[18] [2006] EWHC 1705, paras. 2-3

CONCLUSION

[27] Therefore, I make the following orders:

i. The First and Third-named Defendants to pay to the Claimants the sum of TTD$250,000.00 as damages for unfair competition;
ii. The First and Third-named Defendants to pay to the Claimants the sum of TTD$400,000.00 as damages for conspiracy for unlawful means; and,
iii. The First and Third-named Defendants to pay to the Claimants the sum of TTD$194,370.43 as special damages.
iv. The Defendants to pay the Claimants' cost to be assessed by the Registrar.

JOAN CHARLES
JUDGE