IN THE COURT OF APPEAL OF BELIZE, A.D. 2009

CIVIL APPEAL NO. 8 OF 2008

BETWEEN:

ARA MACAO DEVELOPMENT LIMITED
PAUL GOGUEN **Appellants**

AND

PENINSULA CITIZENS FOR SUSTAINABLE DEVELOPMENT
MARY TOY **Respondents**

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Dr. Elson Kaseke for the appellants.
Oscar Sabido SC for the respondents.

17 March, 19 June 2009

MOTTLEY P

[1] This appeal arises from the ruling by Chief Justice Conteh on 7 May 2008 that the words set out in the plaintiffs' statement of claim do not amount to defamation. The ruling was made pursuant to Part 58 rule 4 of the Supreme Court Rules of Procedure.

The Statement of Claim

[2] In so much as the ruling was made on the basis that the words set out in the statement of claim were not defamatory, it is not necessary to set out the defence in detail as it is not required for the determination of this case.

[3] In the statement of claim, it is alleged that Ara Macao Development Limited (hereinafter referred to as "AMDL") was at all material times a company incorporated under the laws of Belize. AMDL was involved in a development project (hereinafter referred to as the "Project") in the Stann Creek District north of the Placencia Peninsula and south of Riversdale Village. Included in this Project, was the construction of a marina with various slips, a 260 room hotel, 456 condominiums along the sea front. 296 villas were to be built around the marina along with a commercial centre covering 410,000 square feet. A 18 hole golf course and a casino are also included in the Project. Paul Goguen was the Managing Director of AMDL.

[4] Peninsula Citizens for Sustainable Development (hereinafter referred to as "PCFSD") was, at all material times, a company incorporated under the Companies Act and limited by guarantee. PCFSD was established, inter alia, for the purpose of promoting sustainable development of Belize with special emphasis on the Placencia Peninsula. The objects were also to "promote and procure the awareness of the culture, ecologies and environments."

[5] The appellants allege that on 12 June 2006 PCFSD published two articles on the worldwide web through its internet service at infor@placenciadocuments.infor relating to the Project. The first article entitled "A Reality Check for Ara Macao" was for immediate release. The second article was entitled "Setting the Record Straight-From The Peninsula Perspective." Mary Toy also published these articles on her worldwide web through the internet

service at www.destinationbelize.com. These publications were admitted by PCFSD and Mary Toy.

[6] In paragraphs 5 and 6 of the statement of claim, the appellant set out the defamatory words contained in the two articles about which complaint is being made. These paragraphs are set out in detail:

> "5. The article entitled "A Reality Check for Ara Macao": contained the following defamatory words and statements:
>
> - **...**
> - That the developer of the Ara Macao Project was "attempting to set village against village and to drive a wedge among people now living harmoniously on the Placencia Peninsula.
> - …
> - The "representatives of Ara Macao either gloss over or dismiss community concerns and at tempt to divert attention from the serious flaws in their development plans by promising golden dreams of prosperity and plenty."
> - **...**
>
> 6. The article entitled "Setting the Record Straight – From the Peninsula Perspective" contained the following defamatory words and statements:
>
> - That the Second Claimant was a liar who was staging a "media show" and a "media circus" on behalf of the First Claimant in order to lie and convince people to support the Ara Macao Project."

[7] In so far as the appeal is concerned, the appellants pleaded that words in their natural and ordinary meaning meant and were understood to mean:

> (a) …
>
> (b) that the Claimants in order to get approval for the Ara Macao Project, were attempting to cause disunity disharmony and division among the people of the Placencia Peninsula by attempting to "set village against village and drive a wedge among people now living harmoniously on the Placencia Peninsula."
>
> (c) …
>
> (d) that the representatives of Ara Macao "gloss over or dismiss community concerns" and are therefore unethical, unprincipled, unconscionable, hypocritical and amoral.

[8] When the matter came on for trial before the Chief Justice, he invited counsel to avail themselves of the provision of Part 68 rule 4 of the Supreme Court Rules of Procedure. This was done as the Chief Justice discovered that during "the hearing the case was beginning to become convoluted." Both counsel accepted the invitation of the Chief Justice.

[9] Under Part 68 rule 4 of the Supreme Court Rules of Procedure, a court is empowered after the service of the statement of claim but prior to the trial on the application of either party to determine whether the words complained of are capable of bearing the meaning attributed to them in the statement of claim. Part 68 rule 4 provides:

> "68.4(1) At any time after the service of the statement of claim, either party may apply to a judge sitting in chambers for an order determining whether or not the words

complained of are capable of bearing a meaning or meanings attributed to them in the statement of claim.

(2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statement of case, the judge may dismiss the claim or make such other order or give such judgment in the proceedings as may be just."

[10] At paragraph 6 of his judgment, the Chief Justice said:

> "I have had the benefit of reading the two publications as a whole and in particular the sections the claimants take issue with. In my view, I do not think they bear the meanings contended for by the Claimants. They certainly may not be friendly or even welcoming of the Ara Macao Project itself, but they are views held by the defendants of the project. The comments do not, in my view, in any way, reflect ill on the Claimants or indeed the reputation of Mr. Goguen himself. Only a heightened sensitivity would read in between the lines of the publications to find that they are truly defamatory. The project itself because of its nature and size has evidently attracted publicity, both radio and television; and the defendants have, as it were, tried to put their own case against the project in their publications in their web sites. Some strong views perhaps, and strongly put, but they do not, in my view, rise to the level of defamation. One is entitled to hold strong view and even strongly to express them. I therefore rule that the publications as a whole and read in context and in the setting of the development on the Placencia Peninsula are not capable of bearing the defamatory

meanings sought to be contended for by the Claimant. I therefore rule that there is no defamation in the publications."

The Appeal

[11] It is against this ruling that the appellants have appealed. In his written submissions, Dr. Kaseke contends that the Chief Justice erred in law and did not correctly apply the legal test and principles governing the determination of whether words of which complaint is made are defamatory. In addition, it is said that the Chief Justice also erred in law and failed to apply the correct test of whether the ordinary man would have decided the words were defamatory. Instead the Chief Justice applied his role as a lawyer and jurist to determine the question.

[12] At the hearing, counsel for the appellants, limited the appeal to the finding by the Chief Justice that the words that the developer of the Project was "attempting to set village against village and drive a wedge among people now living harmoniously on the Placencia Peninsula" and that representatives of Ara Macao either gloss over or dismiss community and attempt to divert attention from the serious flaws in their development plans by promising golden dreams of property and plenty were not capable of bearing a defamation meaning for which the plaintiffs were contending. The statements are contained in the article "A Reality Check for Ara Macao." The allegations of defamation in respect of the statements contained in the article Setting the Record Straight – from the Peninsula's Perspective are not being pursued by the appellants.

[13] During the course of his oral submission, counsel submitted that under the provision of Part 68.4 of the Supreme Court Rules of Procedure all that the Chief Justice was required to determine was "whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the Statement of Claim."

[14] The Chief Justice invited counsel to utilize the provisions of Part 68 rule 4 at a stage when the trial had commenced. What the Chief Justice was required to do is simply to rule whether the words complained of were capable of bearing the meaning attributed to them by the plaintiff. In **Mapp v News Group Newspaper Ltd. [1998] 2 WLR 266**, the Court of Appeal was required to consider the effect of Order 82 Rule 3A of the then Rules of Supreme Court of England. That rule which was not in paria materia provides as follows:

> "(1) At any time after the service of the statement of claim either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings. (2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the pleadings, he may dismiss the claim or make such other order or give such judgment in the proceedings as may be just."

[15] In explaining the proper role of the judge in these circumstances, Hirst LJ said at p 265:

> "In my judgment, the proper role for the judge, when adjudicating a question under Ord., 82, r. 3A, is to evaluate the words complained of and to delimit the range of meanings of which the words are reasonably capable, exercising his own judgment in the light of the principles laid down in the above authorities and without any Ord. 18, r. 19 overtones. If he decides that any pleaded meaning falls outside the permissible range, it is his duty to rule accordingly. It will, as is common ground, still be open to the plaintiff at the trial to rely on any lesser defamatory meanings within the permissible range but not on any meanings outside it, The whole purpose of

> the new rule is to enable the court in appropriate cases to fix in advance the ground rules on permissible meanings which are of such cardinal importance in defamation actions, not only for the purpose of assessing the degree of injury to the plaintiff's reputation, but also for the purpose of evaluating any defences raised, in particular, justification or fair comment. This applies with particular force in a case like the present where there is a defence of justification of a lesser meaning than that pleaded in the statement of claim."

[16] All that the Chief Justice was required to do at this stage was to examine the words of which complaint was made and to ascertain whether the words were reasonably capable of bearing the meanings which were being ascribed to them. However the Chief Justice ruled that the words complained of did not bear the meaning contended for by the appellant. He did not limit his ruling to whether the meaning was reasonably capable of bearing the meaning. The Chief Justice went on to state that "only a heightened sensitivity would read in between the liens to find that they were truly defamatory." The Chief Justice then concluded "that the publication as a whole read in the context and in the setting of the development on the Placencia Peninsula are not capable of bearing the defamatory meanings sought to be contended for" by the Appellant. This indicates that the Chief Justice at this stage was deciding whether the article as a whole was defamation. This was not his function at this stage.

[17] In the article entitled "A Reality Check for Ara Macao", the appellants complain about the words that the developer of the Project was "attempting to set village against village and to drive a wedge among people now living harmoniously on the Placencia Peninsula." The appellants contend that these words meant that the appellants "in order to get approval of the Project was attempting to cause disunity disharmony and division among the people of Placencia Peninsula.

[18] In respect of the statement that the representatives of AMDL either gloss over or dismiss community concerns and attempt to divert attention from the serious flaws in their development plans by promising golden dreams of prosperity and plenty, the appellants alleged that the words meant that the appellants were unethical, unprincipled, unconscionable, hypocritical and amoral.

[19] Under Part 68.4 the Chief Justice had to determine whether or not these words were reasonably capable of bearing these meanings. In my view, the words were capable of bearing the meanings for which the appellants were contending.

[20] It was for those reasons that I agreed that the appeal should be allowed and the judgment of the court below should be set aside in respect of that set out in paragraph 7 and that the matter be remitted to the Supreme Court for hearing before another judge.

The Court made no order as to costs.

MOTTLEY P

CAREY JA

[21] The appellants, a development company, and its Managing Director have plans for massive development in the Stann Creek District north of the Placencia peninsula to include among other things, a marina with various slips, a two hundred and sixty room hotel, 456 condominiums, 296 villas, a 410,000 ft. commercial centre, a casino and an 18 hole golf course. The first respondent, of

which the second respondent is a member, is a non-profit organization, whose objects are "to promote the sustainable development of Belize, especially in the Placencia peninsula, and to protect the cultures, ecologies and environment in that area". The respondents, doubtless concerned about these plans, published two articles on their website, critical of the proposed scheme. The appellants launched an action for libel, pleading that the articles gravely injured their reputations, "exposed them to public scandal and contempt, seriously damaged their standing as professional real estate developers and caused them great embarrassment, humiliation and distress".

[22] The words in respect of which complaint was made are as follows:

(a) that the Ara Macao Project was "ill conceived from the outset".

(b) That the developer was "attempting to set village against village and to drive a wedge among people now living harmoniously on the Placencia peninsula"

(c) That the project was "not carefully planned" and did not "substantively address environmental or economic issues".

(d) That representatives of Ara Macao either gloss over or dismiss community concerns and attempt to divert attention from the serious flows in their development plans by promising golden dreams of prosperity and plenty".

(e) That "we have more to say to Mr. Goguen. We can only hope he and Belize – is listening".

(f) That the appellants were staging a "media show" and a "media circus".

It is right to note that the actual article in which the words appear, was not set out in the pleadings which does not accord with traditional precedents of pleadings. This departure from orthodoxy deprives the court of examining the context in which the words fall to be considered. Thus, the full paragraph in which the complaint at (b) appears states:-

"unfortunately, in order to obtain approval for this massive development in an environmentally sensitive area, [the developer is attempting … peninsula".]

[23] The respondents put in a defence in which they pleaded that the words were not defamatory and also fair comment. They also counter-claimed alleging that the appellants had published an article which defamed them.

[24] When the matter came on for trial before the Chief Justice, he invited both counsel to make an application under Order 68, as he said, "to get to an end of this case on the meaning of meaning". Both counsel agreed. Mr. Sabido said he had no problem and Dr. Kaseke said- "in the interest of justice, it should be determined…". In the result, the Chief Justice having heard submissions, ruled that the publications were not capable of bearing the defamatory meanings contended for and dismissed both the claim and the counter-claim. The developers appeal to this court.

THE APPEAL

[25] A useful starting point is to set out Order 68 rule 4, the order invoked by the Chief Justice. It states as follows:

"68.4(1) At any time after the service of the statement of claim either party may apply to a judge sitting in chambers for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statement of case.

(2)If it appears to the judge on hearing of an application under paragraph (1) that none of the words…

The role of the judge in an application made under this order is to determine a question of law whether the challenged article is capable of bearing a defamatory meaning. It then becomes thereafter the function of the jury or the judge sitting as a jury to determine the actual meaning of the words, in the event the judge answers the question affirmatively. That this represents the law is borne out in the advice of Lord Morris of *Borth-y-Gest in Jones v. Skeleton [1963] 1 WLR 1362 at 1370 – 1371* where he said:-

> *"It is well settled that the question whether words complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for decision by the court. If the words are so capable then it is a question for the jury to decide whether the words do in fact convey a defamatory meaning".*

As to the test which should be applied, Lord Morris formulated it in these terms:-

> *"… In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation … The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense".*

[26] Dr. Kaseke helpfully provided us with a case from the Court of Appeal of Jamaica, *United Printers Ltd. V. Bernard and others [1967] 11 WIR 269* where the test was also articulated. Duffus P cited with approval the words of Fox J (the trial judge in the action)-

> *"To determine whether these statements of fact are defamatory of the plaintiff it is not sufficient to examine each phrase of the article in isolation. The offending words must be read as a whole and considered in the entire context in which they appear. In making this consideration, the words are not to be construed in their most innocent sense but must be given the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence".*

[27] The question which is prompted from this synopsis of the authorities, is, did the Chief Justice exercise the proper role of a judge in the context of Part 68.4 of the Civil Procedure Rules 2005? The appellants contend that he erred in that regard as he did not correctly apply the test as ordained by the authorities. In the grounds of appeal filed on behalf of the appellants, Dr. Kaseke has indentified passages from the articles published on the internet at the websites of the respondents and these have been set out in paragraph 2 of this judgment. In my opinion the statements at (a) and (c) may be grouped together because they share a similar characteristic. Both express the negative opinion of the writer, criticizing the skills of the developers. The reasonable person of ordinary intelligence through whose eyes these statements must be viewed, I suggest, would say the words meant no more than that those developers would not score high marks in planning and development skills. With all respect to Dr. Kaseke, I do not think it can fairly be said that those words, viewed in that way, are capable of bearing an injurious or damaging imputation to the appellants. It is not, I suggest, tendentious to say that the words would not likely be understood in a libelous sense. It would be beyond hyperbole to say that those criticisms would be understood by the reasonable man as exposing the appellants, the object of the articles, to public scandal and contempt. The reasonable man, that is a person neither unusually suspicious nor unusually naïve (see Lord Reid in *Lewis v. The Daily Telegraph [1963] 2 ALL ER 151 at p 153)* is not likely to think that the mere criticism of the efforts of the appellant, could mean anything more than

that these developers were not of the highest standard. That meaning which is the natural and ordinary meaning of the criticism, I would think, is the most damaging meaning that the reasonable man could put on the words.

[28] I turn then to consider the pleaded defamatory statements set out in paragraph 2(b) and (d) of this judgment. It would be useful to repeat them. In the case of the former, the words appear in this statement:-

> *"unfortunately, in order to obtain approval for this massive development in an environmentally sensitive area, the developer is attempting to set village against village and to drive a wedge among people now living harmoniously on the Placencia Peninsula"*

The other statement is in these terms:-

> *"unfortunately, representatives of Ara Macao either gloss over or dismiss community concerns and attempt to divert attention from the serious flaws in their development plans by promising golden dreams of prosperity and plenty".*

It becomes necessary to examine each of the set of words informed by the approach articulated in the authorities mentioned in this judgment. With respect to the former, the reasonable reader would understand that the writer was suggesting that in order to obtain approval for their project, the developers were willing to stir up discord and disharmony between the different villages where none presently existed. Understood in this way, it cannot be doubted that the words were calculated to convey an injurious imputation with respect to the developer.

[29] So far as the other statement is concerned, what is the fair and natural meaning which would be accorded to these words by reasonable persons of

ordinary intelligence? See *United Printers Ltd v. Bernard & Ors. [1967] III WIR 269 at p. 272 – 273*. I must bear in mind that the ordinary man and woman have different outlooks and that I must try to envisage between the two extremes of the unusually suspicious ("the person of heightened sensitivity" per Conteh CJ at p. 118 of the Record) and the unusually naïve. See the observations of Lord Reid in *Lewis v. The Daily Telegraph [1963] 2 ALL ER 151 at p 153*. In my opinion, a person between these extremes, could understand the statement as a deliberate attempt on the part of the developers to make light of community concerns regarding flaws in the development plans and to make unrealistic promises of untold wealth. In his skeleton arguments, Dr. Kaseke suggested that the words meant "that representatives of Ara Macao refused or failed to address community concerns and attempted to shift focus from the serious deficiencies in their development plans by lying to people about plenty and prosperity. Howsoever expressed, the meaning is damaging and, in my opinion, is capable of holding the developers up "to hatred, contempt or ridicule", the traditional way of saying that the words are capable of conveying an injurious imputation.

[30] I am constrained, with respect, to differ from the conclusion of the learned Chief Justice because, in my view, he did not ask himself the right questions in determining the question whether the statements were **capable** of bearing an injurious imputation. He stated as follows (at p. 118 Record):-

> *"In my view, I do not think they bear the meanings contended for by the Claimants. They certainly may not be friendly or even welcoming of the project itself, but they are views held by the defendants of the project. The comments do not, in my view, in any way, reflect ill on indeed the reputation of Mr. Goguen himself. Only a heightened sensitivity would read in between the lines of the publications to find that they are truly defamatory. The project itself because of its nature and size has evidently attracted publicity, both radio and television; and the defendants have, as it were, tried to*

put their own case against the project in their publications in their websites. Some strong views perhaps, and strongly put, but they do not, in my view, rise to the level of defamation. One is entitled to hold strong views, and even strongly to express them. I therefore rule…"

One cannot help feeling that the Chief Justice was making a determination as regards liability and considered the defence of fair comment as bound to succeed. With respect, his role in this procedure which he himself suggested, was, as Hirst LJ in *Mapp v. News Group Newspapers Ltd [1998] 2 WLR 260 at p.265 observed:-*

"to evaluate the words complained of and to delimit the range of meanings of which the words are reasonably capable, exercising his own judgment in the light of the principles laid down in the authorities".

I do not think that any meaningful evaluation of the statements pleaded as defamatory took place nor was there a delimiting of the range of meanings, undertaken. I am not unaware of the opinion expressed by Hirst LJ in the Mapp case (supra) that the purpose of the Order (Order 68 Rule 4), was also for the purpose of evaluating any defences raised. But that statement, I venture to suggest, does not in any way derogate from the primary purpose of the Order, which, is to fix the permissible meanings of the allegedly defamatory words. It is plain that it was not intended that the judge should make a determination of ultimate liability in the action. It is not easy to conceive how an evaluation of the defences of fair comment or justification, the defences mentioned by Hirst LJ in the Mapp case (supra), means a determination. From a practical point of view, evidence would have to be led to deal with those defences and certainly, in the case of fair comment, the issue of malice would arise.

[31] For all these reasons, I agreed with the other members of the court, that the appeal succeeded in part. We ordered that the judgment of the court below would be set aside in respect of paragraphs (b) and (d) of the statement of claim and directed that the case be remitted for hearing before another judge. We also ordered that there would be no order as to costs and intimated that we would put our reasons in writing.

CAREY JA

MORRISON JA

[32] I entirely agree and have nothing to add.

MORRISON JA