

SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC 48
(CS16 of 2018 and CS03 of 2020)
(Consolidated)

In the matter of:

Etelle Butler-Moos

(rep by Mr. R. Durup assisted by Mr A. Govinden)

Plaintiff

and

Jack Butler

(rep by Ms. E. Wong)

Defendant

AND

Fred Butler-Moos

(rep by Mr R. Durup assisted by Mr A. Govinden)

Plaintiff

and

Jack Butler

(rep by Ms E. Wong)

Defendant

Neutral Citation: *Butler-Moos & Anor v Butler* (CS16 of 2018 and CS03 of 2020) [2021] SCSC 48 (08 March 2021)

Before: Andre J

Summary: Defamation - statements sent via messenger and email - publication to third parties - presumed and special damages, exceptions to special damages

Heard: 9 December 2020 (last hearing date closure of pleadings)

Delivered: 08March 2021

ORDER

The Court makes the following orders:

- (i) Consolidated complaints stand dismissed for reasons given.
 - (ii) In the interest of justice to all the parties and to restore fraternity in the family of the parties, the court hereby exercises its inherent discretion and orders that the defendant offers a formal apology in writing regarding the statements made and same shall be addressed to both 1st and 2nd plaintiffs and all the recipients copied in prior communications subject matter of this case.
 - (iii) Both parties shall bear their own costs.
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JUDGMENT

ANDRE J

Introduction

- [1] This Judgment arises out of two consolidated Supreme Court cases CS16/2018 and CS03/2020 whereby the plaintiffs are Etelle Butler-Moos (1st plaintiff) and Fred Butler-Moos (2nd plaintiff) (cumulatively referred to as the (plaintiffs). The plaintiffs are husband and wife. The defendant, Jack Butler, is the brother of the 2nd plaintiff Fred Butler-Moos and brother-in-law of the 1st plaintiff Etelle Butler-Moos.
- [2] In the *Etelle Butler-Moos* case, the 1st plaintiff by way of plaint of the 6th February 2018 as filed on the 8th February 2018 and amended on the 11th March 2020 filed on the 12th March 2020, prays that this Honourable Court enters judgement against Jack Butler, the defendant, for writing defamatory statements against her and published them to third parties. Plaintiff is claiming a sum of Seychelles Rupees One Million (SCR1,000,000/-) and also that the defendant gives her an apology and any other Order that the Court deems fit.
- [3] The defendant by way of statement of defence of the 22nd March 2018 as filed on the 3rd March 2018 and amended defence of the 14th July 2020 admits to a series of emails between the parties as averred in the plaint to the extent that the defendant has written the words stated in inverted commas in a private message to the defendant's brother, as Facebook messages and emails and that the estimation of the sum claimed is denied and in the alternative that if the court finds that the plaintiff has been defamed that the sum claimed is grossly exaggerated.

- [4] In the *Fred Butler-Moos* case, the 2nd plaintiff by way of plaint of the 15th January 2020 as filed on the 17th January 2020, prays the Court to enter judgement against Jack Butler, the defendant, for writing defamatory statements against him and published them to third parties. The plaintiff is claiming a sum of Seychelles Rupees Four Hundred Thousand (SCR400,000/-) and also that the defendant gives him an apology and any other Order that the Court deems fit. The 2nd plaintiff is the brother of the defendant.
- [5] The defendant by way of statement of defence of the 14th July 2020 as filed on the 14th July 2020, agrees to a series of emails between the parties but denies the defamatory remarks and in the alternative that the sum claimed as damages is grossly exaggerated.
- [6] The defendant apologised further to the plaintiff for calling him a swindler and testified that he had realised his mistake.

Factual and procedural background in the *Etelle Butler-Moos* case

1st Plaintiff's case

- [7] The plaintiff is the wife of Mr. Fred Butler-Moos and the sister-in-law of the defendant. The plaintiff claims that the defendant wrote defamatory statements against her and published them to third parties.
- [8] In April/May 2017, the defendant sent to his brother several messages on Messenger, which were intended to refer to the plaintiff. The said statements referred to her as a whore and denigrated her appearance by calling her a plastic body.
- [9] Subsequently, on 20th June 2017, the defendant wrote an email with the plaintiff's husband as recipient, which she read and understood to mean that the defendant alleged that the plaintiff's husband molested

members of their family. On that same date, the defendant wrote further emails with Mr. Butler-Moos as recipient. One of the emails was also copied to brother of Mrs. Butler-Moos and referred to plaintiffs as swindlers. Another email was copied to siblings of Mr. Butler-Moos and referred to him as swindler.

[10] The plaintiff further claims that the above-mentioned statements by natural and ordinary meaning or by innuendo, refer to her and that it is understood to mean that she is promiscuous, a prostitute, committed adultery, is dishonest and a swindler.

[11] Plaintiff avers that the statements are malicious and was calculated to expose her to public ridicule, odium and hatred and constitute a grave libel. She further claims that because of these statements, her credit, character and reputation has been injured, especially in her capacity as a sister and a wife.

[12] Therefore, the plaintiff prays the Court to enter judgement against the Defendant, in the sum of Seychelles Rupees One Million (SCR1,000,000/-) and that the defendant gives an apology to the plaintiff.

Defendant's case

[13] The defendant claims that the email was not communication as per the Defamation Act 1952 and that the 1st plaintiff has failed to show proof that the statements made damage to her reputation. The defendant further submitted that the 1st plaintiff's case does not fall under any of the categories that are actionable per se hence, the plaintiff having to prove that the words stated indeed caused her damage.

[14] Furthermore, the defendant prays that the Court dismisses the plaint with costs or in the alternative should the court decides otherwise that damages are grossly exaggerated.

Evidence adduced

[15] At the hearing the 1stplaintiff testified and called one other witness her husband Fred Butler Moos and the defendant testified on his own behalf.

[16] The 1stplaintiff testified that the defendant made a series of defamatory remarks against her, implying that she was, including others, a slut, a whore and an adulterer. The 1stplaintiff produced a bundle copies of the messages (Exhibit P1), being a series of conversation that occurred in 2017 between the defendant and the plaintiff's husband.

[17] The 1stPlaintiff testified that her and her husband have been married for a long time, although they conceded in evidence that they faced difficulties in their marriage, they were in fact fixing and reconciling their marriage, and as a result having access to each other's email accounts became a normal course of event.

[18] The 1stplaintiff's second witness was her husband, Fred Butler-Moos and he testified that the other recipients were his brothers and sisters and the defendant maintained that he published this email to them because he was replying on a previous email thread, in which the plaintiff had included all of the recipients. He further testified that although he did in fact send a previous email with all his siblings including the defendant as recipient the subject matter of that email was dissimilar to the contents of the defamatory email sent by the defendant.

[19] The defendant testified that the Court must restrict itself on the law and development available at the time in 1976, and no new developments or new law may be taken into account in considering this case.

Factual and procedural background in the *Fred Butler-Moos* case

[20] The 2nd plaintiff is the husband of Etelle Butler-Moos, 1st plaintiff and the brother of the defendant. The 2nd plaintiff claims that the defendant wrote defamatory statements against him and published them to third parties.

[21] On 20th June 2017, the defendant wrote an email with the 2nd plaintiff as recipient and alleged that the 2nd plaintiff molested members of their family. On that same date, the defendant wrote further emails with the 2nd plaintiff as recipient and copied to the brother of Mrs. Butler-Moos and another email which copied the siblings of the 2nd plaintiff identifying him on multiple occasions as a swindler.

[22] The 2nd plaintiff further claims that the above-mentioned statements by natural and ordinary meaning or by innuendo, refers to him and that it is understood to mean that he is a sex molester and is dishonest and a swindler.

[23] The 2nd plaintiff averred that that the statements are malicious and was calculated to expose him to public ridicule, odium and hatred and constitute a grave libel. He further claims that because of these statements, his credit, character and reputation has been injured especially in his capacity as a husband and a trusted family member.

[24] As a result, the 2nd plaintiff prays that this Court to enter judgement against the defendant, in the sum of Seychelles Rupees Four Hundred Thousand and the defendant gives an apology to the 2nd plaintiff.

- [25] The defendant claims that the email was not communication as per the Defamation Act 1952 and that the 2nd plaintiff has failed to show proof that the statements made damage to his reputation. The defendant further submitted that the 2nd plaintiff's case does not fall under any of the categories that are actionable per se. This means that the 2nd plaintiff must prove that the words stated indeed caused him damage.
- [26] Furthermore, the defendant pray for the court to dismiss the plaint with costs.

Evidence

2nd Plaintiff's case

- [27] At the hearing the plaintiff testified and called one other witness namely his wife Etelle Butler-Moos and the defendant testified on his own behalf.
- [28] The plaintiff testified in gist that, the defendant, his brother, in a series of emails, called him a swindler and alluded that he was a child molester. He testified that the emails were published to his brother-in-law, his brothers and sister.
- [29] The plaintiff testified further that an email (exhibit P2) that was addressed to him was read by his wife and that it caused her shock, he added that his wife had a frequent habit of reading his emails and that she had come across this email and it had caused her to breakdown emotionally.
- [30] The plaintiff's witness his wife, Estelle Butler-Moos, testified that the defendant was aware that she read her husband's email and that the other recipients of the email were her brother and brothers and sisters in law and the defendant maintained that he published this email to

them because he was replying on a previous chained email that the plaintiff had included all of the recipients.

[31] The plaintiff further testified that although he did in fact send a previous email with all his siblings including the defendant as recipient the subject matter of that email was dissimilar to the contents of the defamatory email sent by the defendant.

Defendant's case

[32] The defendant testified that he had apologized towards the plaintiff and his wife, after realizing his mistake. He further testified that he was unaware that the email communications were being read by the plaintiff's wife and that every time he would reply, to the plaintiff's email he usually replied to every copied on the email.

[33] The defendant further denies that he was alluding to the plaintiff when stating "who molested a lot in the family". Instead, he was referring to the relative of the plaintiff's wife.

Legal analysis and Discussion of evidence (consolidated)

[34] As it transpires from the factual background and evidence (supra), the defendant on several occasions made certain statements via messenger and email regarding the plaintiffs who claim that these statements amount to defamation and pray this Court to enter judgement against the defendant, to award damages in the sum of Seychelles Rupees One Million to the 1st plaintiff and Seychelles Rupees Four Hundred Thousand to the 2nd plaintiff, and that the defendant gives an apology to both plaintiffs.

[35] The allegedly defamatory statements that were sent by the defendant can be summarised as follows:

1. Statements regarding 1st plaintiff sent to her husband, the 2nd plaintiff (Exhibit P1 in CS16/2018):

“she is a whore Fred Butler-Moos’, ‘Your wife is a whore Fred!!! That’s what she’s been doing men she was in U.K... First class whore man!!!!’, ‘enjoy your silicon tits...’, ‘I know I have heard so many thinks brother’. No, not my intention to fuck a plastic body...’. ‘slut’, ‘My wife just got on to me....Please tell your wife Fred not to get my wife involved in her freaking business with John and Monica... My wife has nothing to do with that, if your wife had to do with John that’s her freaking business, please let my wife out of that. Wake up Fred!!!Wake up...Wake up!!!Sorry your fucking bling Fred!!!, ‘Please tell your wife not to get in touch with her freaking nonsense with my wife...’

2. Statements regarding the 2nd plaintiff sent to the email of the 2nd plaintiff as recipient and read by the 1st plaintiff (Exhibit P1 in CS03/2020):

“who molested a lot in the family and now he is fucked????????????? Hahahaha”;

3. Email referring to both plaintiffs sent to 2ndplaintiff email address copied to 1stplaintiff’s brother (Exhibit P2 in CS03/2020):

‘American Swindlers’: “what a bunch of crap Fred Butler and Etele Butler-Moos are swindlers, ha ha. Trying to get \$492 out of me. You should be ashamed of yourself freaking American swindlers”;

4. Email to 2nd plaintiff, copied to sibling of defendant and 2nd plaintiff(Exhibit P3 in CS03/2020):

“Fred Butler Moos this is what I call Swindling!!!!”; ‘NOW FRED BUTLER-MOOS WHO OWES WHO?????????YOU’RE CLAIMING I OWE YOU \$492, YOUR EMAIL IS HERE. YOU OWE ME RS 650.35 AND YOU’RE TAKING ME TO COURT BECAUSE YOU OWE ME!!!!You are sick Fred, you need help!!!!”

Applicable law

[36] Article 1383(3) of Civil Code of Seychelles (Cap 33), provides that the civil law of defamation is governed by English Law. Even though Article 1383(3) does not specify year of the mentioned English Law and Civil Code was also amended several times during the years, case law established that the law of defamation applicable in Seychelles is the law in force in the United Kingdom in 1976 and therefore the law is “frozen in time”(reference is made to: *Kim Koon v Wirtz (1976) SLR 101; Prea v Seychelles People Progressive Front & Anor (CS 7/2004) [2007] SCSC 10 (28 September 2007)*;

Ramkalawan v Parti Lepep & Anor. (CS 458/2006) [2017] SCSC 445 (30 May 2017); Talma and Ors v Printec Press Holdings Pty Ltd (SCA37/2017) [2020] SCCA 8 (21 August 2020)).

[37] In **Prea v Seychelles People Progressive Front & Anor (CS 7/2004) [2007] SCSC 10 (28 September 2007)**, the Court considered whether Seychelles should apply stagnant old English Law on defamation or evolved English Law and turned to analysis of intention of the ‘Civil Code makers’. D. Karunakaran, J stated as follows:

“To my mind, their intention should have been to make it a temporary or transitional measure in order to govern our law of defamation, until we enact our own legislation to replace it. Undoubtedly, they must have intended to do so, in the hope that one day in future we would replace the foreign law with our indigenous one and make it a permanent source or feature in the body of our civil law jurisprudence. The said intention of the makers of the Civil Code is evident from article 4 thereof . . .”

[38] Article 4 of the Civil Code states that, *“The source of the civil law shall be the civil Code of Seychelles and other laws from time to time enacted”* (emphasis added). Karunakaran, J interpreted the Article to mean that the law is “frozen in time”:

“The cut-off date thus set by the commencement of the Civil Code has obviously, stagnated our law on defamation and the old English law as it stood on the 1st January 1976 continues to rule us from the archives.”

[39] The wording ‘from time to time’, however, could also be interpreted as ‘occasionally’, therefore, the meaning may also be ‘occasionally enacted’ and intention of the ‘Civil Code makers’ may have been not to make the laws of defamation “frozen” in 1976 but to evolve with the applicable English Law until special provisions on defamation is provided in Seychelles Law. Nevertheless, it is accepted and established by Seychelles case law that defamation law in Seychelles is “frozen in time”.

Elements of defamation

[40] **Esparon v Fernez (1980) SLR 148**, provides a test for defamation:

To succeed in a defamation action, the plaintiff must prove that -

The statement is defamatory;

It has been reasonably understood to refer to the plaintiff, and

It has been published to a third person.

[41] A defamatory statement is one which injures the reputation of another by exposing them to hatred, contempt, or ridicule, or which tends to lower them in the estimation of right-thinking members of society generally by making them shun or avoid them, or by causing them to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem (***Regar Publications v Pillay (1998-1999) SCAR 131; Talma v Henriette (1999) SLR 108***).

[42] ***Savy v Affif [2019] SCSC 702*** defined defamation as:

“the intentional and unlawful publication of defamatory matter by someone about another person. Whatever has been published must be shown by the victim to have caused damage to his reputation. The publication must therefore have caused the victim to suffer prejudice to his reputation and/or social standing and/or have caused him to endure ridicule.”

[43] ***Pillay v Pillay (CS 15/10) [2013] SCSC 68 (16 October 2013)*** summarised the elements for a claim of defamation and stated that a plaintiffs must prove that: (a) a false statement or accusation was made against them; (b) that impeached their character; (c) damaged their reputation; (d) because it was published to a third person; and (e) it was done intentionally or with fault.

Statements refer to Plaintiffs

[44] The defendant did not deny in evidence that statements 1, 3 and 4 as above summarised were made and were referring to the plaintiffs. However, he testified that statement 2 “*who molested a lot in the family*” did not refer to the 2nd plaintiff and referred to an uncle of 1st plaintiff who was, according to the defendant, the victim of molestation. The defendant testified that he, “*made these statements but the first one you mentioned was not targeting him [2nd plaintiff], it was not meant to be him like I have said previously*” and that the statement “*related to an extended family member of Fred Butler-Moos, not to him. The uncle of his wife from what I have been told personally who was the victim of molestation*”.

- [45] It is not, however, a defence to say that the statement targeted someone else or that it was not intended to be defamatory (reference is made to: ***Regar Publications v Pillay (1998-1999) SCAR 131; Garcia v Soomery (CS352/2009) [2016] SCSC 1005 (06 December 2016)***). Although, the statement “*who molested a lot in the family*” is a bit vague in wording, and if word ‘was’ can be inserted – ‘who was molested a lot’ –statement could have a different meaning that defendant is referring to someone else, as he claims.
- [46] The explanations given by the defendant in evidence to my mind are irrelevant for the purpose of the proceedings as the defendant should have been more explicit in his choice of words if he was referring to someone else other than the 2nd plaintiff in that respect. Noting the legal analysis above, the Court considers that this statement qualifies as referring to the 2nd plaintiff.
- [47] However, this statement was sent in the email only to the 2nd plaintiff and was read by his wife (1st plaintiff) because she has access to his emails as it transpires in evidence. The issue thus arises as to the publication requirement to third parties, which will be addressed below.

Publication, Defamation Act 1952

- [48] Section 1 of the Defamation Act 1952 provided that, “*For the purposes of the law of libel and slander, the broadcasting of words by means of wireless telegraphy shall be treated as publication in permanent form*”. The plaintiff submitted that this section should be treated to “*extend broadcasting of words via wireless telegraphy to be treated as a publication in permanent form*” and that, “*the absence of other mediums of communication platforms in the Defamation Act 1952 ought not to limit the ability of the Courts to interpret the common law principle of permanence to extend to type written mails on Email applications and type written messages on Messenger application and determine them as libels*”.
- [49] The defendant submits that, “*given that the medium through which the alleged publication occurred was not one which was available in 1952, at the time of the Defamation Act, or in 1976, at which point our law is “frozen”, the 1st plaintiff has*

failed to prove that the statements written by the defendant to the 2nd plaintiff were “published” to a third person as required under Pillay, supra”.

[50] In general, legal meaning of “published” in defamation cases can be interpreted as communicated, made known to another or public in general. Furthermore, and in general terms, in libel law the statement is a written one and is received by at least one third party apart from the defamed person and person making statement; and in the law of slander the term publish refers to situations where statement is spoken in the presence of at least one third person.

[51] In ***Talma v Henriette (CS 338/1996) [1999] SCSC 12 (28 October 1999)*** it was stated that:

“It is a pre-requisite that for any defamatory statement to be actionable, there should be publication, in the sense that the words complained of were brought to the actual knowledge of some third person, that is a person other than the person defamed. If the plaintiff proves facts from which it can be inferred that the words were brought to the knowledge of some third person, he would have established a prima facie case.”

[52] ***Gatley on Libel and Slander 12th Edition, Published 2013*** stated that, “*In order to constitute publication, the matter must be published by the defendant to (communicated to) a third party, that is to say, at least one person other than the claimant”.*

[53] Therefore, in general terms, requirement that the defamatory statement is published to third party means that it must be communicated. Section 1 of the Defamation Act 1952 does extend the means of communication to wireless telegraphy and provides that it will be treated as publication in permanent form. Provision does not list specific mediums of communication via wireless telegraphy and therefore should not be taken as an exclusive provision and can potentially cover various means of wireless telegraphy.

Publication to Third Party

[54] In the *Talma* case(supra) it was stated that:

“A libel or slander does not require publication to more than one person. However, the uttering of a libel to the party libelled is no publication for the purposes of a civil action. Hence a defamatory statement made to a husband about his wife, or to a wife about her

husband is a sufficient publication, although it may not be actionable at the suit of one of the parties”. (emphasis added)

- [55] Therefore statements 1, 3 and 4 (supra) made by the defendant can be considered as communicated to third parties and published for the defamation requirement.
- [56] Statement 2 was sent to Mr. Butler-Moos’s email and accessed by his wife, 1st plaintiff. Both plaintiffs testified that the defendant knew that the 1st plaintiff has access to the 2nd plaintiff’s email. The Plaintiffs’ Counsel in written submissions filed relies on ***Theakerv Richardson [1962] 1 WLR 151*** where the defendant sent a letter to claimant (which would not usually be publication to third party) but letter was opened by the husband and Court of Appeal refused to overturn decision of the jury that it would have been foreseeable for the defendant that letter can be opened by husband.
- [57] In ***Huth v Huth [1915] 3 KB 3*** in contrast, a letter was sent in an unsealed envelope by defendant to claimant and a butler opened it in breach of his duty and out of curiosity. The Court of Appeal held that there was no publication to third party. The distinction was also made from cases where a clerk, for example, usually opens letters addressed to claimant in the course of duties (which were not duties of butler in *Huth v Huth (supra)*). Such cases are more likely to amount to publication and even more so where a defendant is aware of this and a letter is addressed to a place of business (eg. ***Delacroix v Thevenot, 2 Starkie, 63; Pullman v. Hill, 1 Q. B., 52. Theaker v Richardson***(supra) also considered decisions in ***Huth, Delacroix, Pullman*** and ***Sharp v. Skues (1909) 25 T. L. R 336*** and Harman, LJ stated:

“A number of cases on publication were cited to us, but each obviously depends on its own facts and no one is very pertinent to the instant case. In the leading case, Delacroix v Thevenot, the plaintiff’s success depended on the facts that the libel was addressed to his place of business and that the defendant knew that a clerk employed there read his master’s letters. To a similar effect are Pullman v Hill & Co, and Gomersall v Davies, though the report of the latter is not satisfactory. In Huth v Huth the publication was said to be to the butler who opened the letter out of mere inquisitiveness, and the claim failed because this was a breach of the butler’s duty not to be anticipated by the defendant. In Sharp v Skues, the jury answered in the negative a question as to knowledge on the defendant’s part of the likelihood of the letter being opened by a clerk or partner of the plaintiff. COZENS-HARDY, MR, said this:

“It would be a publication if the defendant intended the letter to be opened by a clerk or some third person not the plaintiff, or if to the defendant’s knowledge it

would be opened by a clerk; but the jury had negated this in the clearest terms, and under these circumstances it was impossible to hold that some act done by a partner or a clerk of the plaintiff by his direction and for his own convenience when absent from the office could be a publication by the defendant under circumstances which the jury have found, in answer to question 2, the defendant knew could not possibly happen."

It thus appears that the answer to the question of publication of a libel contained in a letter will depend on the state of the defendant's knowledge, either proved or inferred, of the conditions likely to prevail in the place to which the libel is destined." (emphasis added)

- [58] Furthermore, the court also considered behaviour of the defendant in writing the letter to support the conclusion that he might have known of a possibility that letter would be opened by someone else:

"The defendant, having, according to his own evidence, first written or started to write the letter in his own handwriting, changed his mind and typed the whole of it on a new sheet of paper. He did not sign it and did not state his own address. Several reasons might be suggested for the defendant acting in this way, but a possible reason, which it would be open to the jury to consider correct, was that the defendant anticipated that someone other than the plaintiff would open the letter, and the defendant did not wish to reveal his identity to such other person. On this question also I should not think it right to substitute the opinion of this court for the opinion of the jury."

- [59] The defendant's Counsel in Submissions states that, *"in the ordinary course of things, a person does not expect that an email will be read by any person other than those to whom it is addressed"* and relies on **Gatley on Libel and Slander, 6th Edition**, paragraph 1218 on page 524, which states:

"And there is evidence of publication if it be proved that the defendant knew when he posted a letter defamatory of the plaintiff that some other person, for example, the plaintiff's partner or clerk was likely to open it and the person did so".

- [60] The defendant submits that the plaintiff *"has not brought any evidence to show that the defendant was aware that some other person was reading his email"*.

- [61] The defendant testified that he is unaware that Mrs. Butler-Moos has access to her husband's laptop and when the defendant sends email to his brother he expects *"the recipient to read the email. So if I send it to Fred Butler-Moos I expect Fred Butler-Moos to read his email"* (page 22 Court Proceedings of 10th November 2020 at 2 PM). He

further stated that he does not “*hold conversations with Mrs Butler-Moos*” (page 4 Court Proceedings of 10th November 2020 at 2 PM).

[62] Mrs. Butler-Moos verily believes that the defendant knew that she had access to her husband’s email. However, apart from claiming that the defendant has been told so previously, she cannot show any previous emails sent to the defendant from husband’s email ‘signed’ by her. She testified that she had drafted the emails before. She also agreed with the defendant’s Counsel that, “*it is normal to expect that when you write an email to one person that email is going to that person only, correct*”. Relevant extract from testimony at pages 18-19 of the Court Proceedings of 14thSeptember 2020 at 2 PM:

“Q: *Mrs. Butler-Moos, it is normal to expect that when you write an email to one person that email is going to that person only, correct?*

A: *That is under the normal case I suppose, but there are many people who share their emails. This Defendant absolutely knew that I had access to my husband’s emails. He had been told that before quite a few times. He absolutely knew that whatever comes in to my husband’s emails that I have access and I take care of whatever needs to be taken care of, I reach out to my husband. If something needs to be written I write it in draft, if he has sometime he takes a look at it or he looks at it when get home and we sort everything out. This Defendant knew that I had access to my husband’s email and computer, he knew.*

Q: *But you don’t have any written proof or anything to show that he knew, we just have your word on this correct?*

A: *No, I do. I have emails that I have sent prior that talks about this, that talks about me having access because he kept accusing my husband that he – that my husband has this advisor and that I was one doing all of this behind my husband’s back and my husband knew nothing about it. He was trying to make others believe that and I don’t know if he believed that himself but that’s exactly what he was portraying me as being, as this very, very bad person who was keeping all of this in the dark without even my husband knowing. . . .*” (emphasis added)

[63] Mr. Butler-Moos testified that his wife had access to his laptop and could go through it with his authorization, especially if it had anything to do with the purchase of La Digue land. However, he cannot state with certainty whether the defendant knew about that and/or intended for the ‘molester’ statement email to be read by wife, and agreed that the email was sent to him directly. Relevant extract from testimony at pages 34-36 of the Court Proceedings of 14thSeptember 2020 at 9:30 AM:

“Q: Now you can confirm that this email was sent only to you directly. Correct?
 . . .

A: That was sent to me, yes.

Q: Now you had not told your brother in the past that you share a laptop with your wife. Did you?

A: I do not know if he knew that or not, I have no idea, but my wife, I communicate with my brother on this laptop, and my wife also communicated with him on this same laptop and my wife has full access, with my authorization to use my laptop at any given time. It is a household laptop, she use it whenever she needs to. . . .

Q: But you would agree with me Mr Moos that this email was meant for you only. Correct?

A: Well, he had emailed it to me. I can say that much

Q: Okay, so he did not intend for your wife to read it then?

A: I do not know that. I cannot tell you that.

Q: And in fact it would be logical for you to expect that only you would read it. Would you agree?

A: I would not say that. I would not agree to that because at the time there was a lot going on with the purchase of the property, and everything else, so my wife, whenever I was at work, my wife had access to the email, she will go through email to see if anything had came in that we had to take care of, but this laptop, with my full authorization, my wife puts it to use at any given time.

Q: But like you said you are unaware if your wife ever told Mr Butler-, your brother Mr Butler that she also accesses this email?

A: I do not know that, but I know they were on this laptop communicating, because of the deal we had going on with the purchase of La Digue, of the property on La Digue.

Q: I put it to you that in the past when there was communication between your wife and Mr Butler the Defendant, it is through her email, and not through your email. Correct?

A: Sometimes it is through hers, but it has been through mine with my authorization. If it had anything to do with the purchase of La Digue, she has on my email.

Q: So she is responding on your behalf you are saying?

A: With my full authorization. Because if there is anything of importance that comes in, my wife and I, she waits for me to get home, I sit with her, we sat together, we discuss what we need to discuss and we come to an agreement, I dictate to her what needs to be in writing. She writes. There are times that I do it on my own, there are times that she does it in my presence, with my- . . . with my authorization to my email, and everything. I hide nothing from my wife. (emphasis added)

[64] Analysing the evidence, it cannot be said that the defendant knew with certainty that 1st plaintiff, Mrs. Butler-Moos, reads her husband’s emails on regular basis as for example in

situations where a letter is sent to work place and opened by clerk in their ordinary duty. It also cannot be said with certainty whether Mrs. Butler-Moos actually reads all the emails or just some, related to specific matters. It is certain that Mrs. Butler-Moos has access to emails but it is not certain whether the defendant was aware of it. Even if the defendant was so told on some previous occasion regarding access to emails (provided that he actually remembered it), it does not mean that he was fully aware that “molester” email would be read by the wife.

[65] The defendant testified that he has no correspondence with the 1st plaintiff, thus, it is reasonable to suggest that it was his intention that email sent to his brother would be read by his brother only. For example, in situation where he added 1st plaintiff’s brother, he testified that he intended to do so in retaliation. The Defendant did not send “molester” email to anyone else in the ‘cc’ apart from his brother, the 2nd plaintiff. Therefore, in the circumstances of this case it is more likely that with regards to this particular email, sending it privately to 2nd plaintiff does not amount to publication of defamatory statement about 2nd plaintiff (if it indeed was about 2nd plaintiff as discussed earlier) as it was communicated only to the “defamed” person.

[66] Alternatively, in strict terms, any communication sent via email, messenger, text have a potential to be read by someone else (eg notification on the phone with locked screen) and thus may amount to publication as soon as one presses ‘send’. However, should such general possibility of being read by third party mean that the sender intended it to be so read or was fully aware of it? In Canadian case of *McNichol v. Grandy* [1931] SCR 696 a third party overheard the defendant’s oral statement and it was considered to be publication, however, that was due to the defendant speaking in a loud and angry voice. It was held that another person hearing him was a natural and probable consequence and a *prima facie* case of publication by him was made out. In order to displace such finding the onus was on him to prove that he did not intend for anyone else to hear it and also that he did not know or had no reason to expect that anyone else within hearing distance would hear the statements. Applying this reasoning to modern times of technology, was it natural and probable consequence of the defendant sending email only to his brother that his wife read it? Some couples indeed have shared or open access email address/social

media account etc. However, unless it is very obvious or well-known from the conduct or address of the accounts or some other factors, it can be said that a person sending private message to personal account of one person is not expecting it with certainty to be read by another.

- [67] I therefore find that the statement falls short of publication to third parties. It was emailed only to the 2nd plaintiff. It was read by the wife, however, in light of the analysis above, the plaintiff has failed to prove on a balance of probabilities that the defendant knew that he 1st plaintiff had permanent access to the 2nd plaintiff's email.

Damages to reputation

- [68] Apart from a simple distinction between libel and slander being in written or oral form, the distinction is also in that libel is in a 'permanent' form and in general it can be easier to obtain damages (no need to prove special damages). For slanderous statement to be actionable, special or actual damages must be shown apart from several exceptions (prior to Defamation Act 2013: statements relating to commission of crime, infectious diseases, profession, and unchastity and adultery by women).

- [69] The distinction between libel and slander being in written/oral form in accessing proof of damages is often criticised. In some situations, a written letter read by one person can be less damaging than words spoken in front of a large public; damage caused by commercial publication in the newspaper available to public at large, for example, could also be quite different from damage caused by statement said orally or in private letter to one another person. In a digital modern world, where our communication so often takes written form rather than verbally spoken one, should each and every statement we digitally utter 'in private' automatically amount to libel with no need to prove damage done? Or should the focus be on whether these words written or spoken are made available to large number of people and intention behind it? It was stated in ***Jones v Jones [1916] 2 AC 481*** that, "*The greater importance and scope of the action for libel was mainly attributable to the appearance of the printing press*".

[70] The defamation laws taking into account online communications have and are still developing, addressing various challenges faced due to ever evolving means of communication, libel and slander distinction in terms of damages. Being “frozen in time” with the applicable law of course limits the considerations available.

[71] Seychelles case law established that an action for defamation will lie without proof of special damage only if it comes under four specific categories (English common law exceptions in slander). These exceptions were listed in *Talma v Henriette (1999) SLR 108*:

“1. Where the words impute a crime for which the plaintiff can be made to suffer physically by way of punishment.

2. Where the words impute to the plaintiff a contagious or infectious disease.

3. Where the words are calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication.

4. By the Slander of Women Act 1891, where the words impute adultery or unchastity to a woman or girl.”

[72] In the present case, the statements amount to libel as they are in written and permanent form. Therefore, the Plaintiff do not need to show special damages caused by statements. It was stated in *Prea v Seychelles People Progressive Front & Anor (CS 7/2004) [2007] SCSC 10 (28 September 2007)* and *Meme v Seychelles National Party and Others (73 of 2002) [2004] SCSC 3 (27 January 2004)*:

“As regards damages in matters of this nature, it is hackneyed to say that in all cases of libel-actionable per se- the law assumes that the plaintiff has suffered damage and no special damage need be alleged or proved. Damages depended on all the circumstances of the case including the conduct of the plaintiff, his position and standing, the nature of the defamation, the mode and extent of the publication, the absence or refusal of any retraction or apology and the whole conduct of the defendant. See, Derjacques v. Louise SLR (1982)”.- against Mrs. Butler-Moos (supra) sent to her husband

[73] The Plaintiff’s Counsel submits that, *“ordinary, reasonable or right-thinking member of the society would think less of the Plaintiff as a result of the imputations of these defamatory statements, and in fact both the Plaintiff and her husband gave evidence that the defamatory statements alleged in exhibit P1 had an emotional impact on their marriage”*.

[74] It should also be taken into account that both plaintiffs admitted to having prior issues in the marriage and that the 2nd plaintiff was aware of some situation involving John: “*John is a person my wife met while we were on an emotional separation*”. Therefore, it cannot be concluded with certainty that emotional impact was caused solely by the statements made by the defendant and not by combination of factors including previous marital history of the plaintiffs.

[75] Furthermore, the only third party the statements were communicated to was 1st plaintiff’s husband and, although he was understandably upset about it and stated that, “*those words come out of my brother’s mouth was just devastating*” (page 9 of his testimony) he also testified that he did not believe these words to be true at page 11:

“Well, I know my wife is not a whore, I know my wife is not a slut. So I cannot believe that. So the ones where he talks about my wife communicating with his wife, I do believe that.”

[76] ***Latour v Maillard CS No 120 of 2011*** held that where a third party do not believe defamatory statement to be true, there is no injury to the reputation and therefore no recourse:

[17] There is however one basic and fatal flaw to the Plaintiff’s case. As was borne out by the authorities of Regar Publications v Pillay SCA3/1997 and Talma v Henriette (1999) SLR 108, a defamatory statement is one injuring the reputation of another as it exposes them to hatred, contempt, ridicule or lower them in the estimation of right-thinking members of society.

[18] The words published in this case were not believed by the only person it was published to. . . .

[19] This is a case where although there is publication to a third party, the third party hearing the defamatory statement did not believe the statement. There was therefore no real or substantial wrong visited onto the Plaintiff and in the circumstances no injury, and so, no recourse for the Plaintiff.”

[77] ***Talma 1999*** case (supra) earlier held the same with regards to special damages applicable in slander:

“The wife of the plaintiff, who was the sole witness for the plaintiff, when questioned by counsel for the defendant whether it was true that the plaintiff was a homosexual, stated “I do not think so. I have never heard or seen him.” Therefore, she did not believe in that allegation and hence the plaintiff had failed to establish special damages.”

[78] Although *Latour and Talma* (supra) involved slander rather than libel, the reasoning can be considered in assessing quantum of damages in present case as communication to third parties involved only one other person, the husband of plaintiff, rather than public at large, where it would have been difficult to assess whether public believed the statement. In the present case the husband did not believe these statements.

[79] Therefore, while the statements made by the defendant can be capable of causing damage to reputation, the element of actual injury to reputation as per *Pillay v Pillay* (supra) is lacking in the present case. Statements were communicated only to the husband and did not lower the Plaintiff “*in the estimation of right-thinking members of society generally by making them shun or avoid them*” (*Regar Publications v Pillay (1998-1999) SCAR 131; Talma v Henriette (1999) SLR 108*). Husband did not believe the statements to be true and therefore there is no injury to reputation (*Latour v Maillard* (supra)). Considering all the circumstances of the case as a whole the Plaintiff did not suffer “*prejudice to [her] reputation and/or social standing and/or have caused [her] to endure ridicule*” (*Savy v Affif [2019] SCSC 702*).

Statement 2– “Molester” statement (supra) against Mr. Butler-Moos

[80] As already stated, I find that this statement is not communicated/published to third party for the reasons stated above. I note that even if the statement would have been considered as published, *Latour and Talma 1999* (supra) principle would be considered as the 2nd plaintiff’s wife, although confronted him about the statement, did not believe it to be true testifying that: “*No, no, I do not believe my husband molested many in the family, absolutely not. I’ve known my husband, I’ve married to him for 26 years and I’ve him practically my entire life. My husband has to undergo background checks, random drug test, no absolutely not*” (page 11 of her testimony).

Statement 3 – “Swindler” statement about both plaintiffs copied to Mrs. Butler-Moos’s brother

[81] The 1st Plaintiff testified that her brother was upset about statement but did not believe it to be true. The brother did not testify.

[82] The 2nd Plaintiff testified that the statement had effect on his life because:

“ . . . I have never taken anything from anybody. I have never swindle anything from anybody. I work very very hard for my living. I work very hard, and to have such an accusation made towards me is-, there is practically no words for it, but very nightmarish if you want to say that, and it is something I would never thing, I was taught better by my father, and that is an example I lead by and I make it my way of life. I do not owe anybody a penny, and I have never taken a penny from somebody.”

[83] In relation to his brother-in-law being privy to this statement, the 2nd plaintiff stated:

“ . . he [brother-in-law] does his best not to get involved in such a thing. Matter of fact, I do not recall him approach me about such a thing, but knowing that my information, a private discussion that I had between-, that my brother had between him and I was shared to my brother in law and for him to see such a thing about me is something I truly do not appreciate, and knowing that I am not a swindler, I am not a crook, and never once was I trying to pull \$492 somewhat dollars from the Defendant. So to see that goes to Herve, somebody that I respect, and knowing that Herve respect me, definitely was not something positive at all.”

[84] I find that while it is unfortunate and upsetting that the brother-in-law had to be made privy to this statement wrongfully made by the defendant, the Plaintiffs did not show sufficient proof of injury to their reputation.

Statement 4 – “Swindler” statement about Mr. Butler-Moos copied to his siblings

[85] The 2nd plaintiff testified that he had to cut off ties with his siblings, however, it is not clear with certainty whether that was specifically due to that email or that the relationship was already strained prior to that. The relevant parts of testimony are as follows:

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“ . . . and I had actually to cut ties with them completely because once they received all that, they pretty much, I would say disowned me, disowned me pretty much, and I have had no ties with them for a given amount of years now

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“ . . . So it has been very difficult, and he has caused me depression on top of this which has been very very hard to deal with. I had to cut ties with my family and my family meant a lot to me, and so I am asking the Court to do the right thing.

- Q: *Okay. Are you telling the Court today that the reason you had to cut off ties was because of the allegation that you were a swindler?*
- A: *That had quite a bit to do with it, and in the past my family had given myself a hard time. They had given my wife definitely a hard time, and I am an adult, they really got into my private business. So I figure it would be best to do so, and actually I had to move out of the city I was living prior, to get away from them. So it was a must because there was a lot of havoc being created.”*

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- “Q: *Yes, but if they had told you the reason they are cutting off ties was because of the swindling, there must have been something in writing or some communication, but you do not have any of that evidence today. Do you?*
- A: *No, I do not. I can only tell you actually what I see and what I felt. I cannot speak on their behalf, I can only speak on my behalf.*

[86] In slander cases, for example, serious breakdown of relationship may be considered as potential proof of special damages in certain circumstances (loss of a marriage prospect in *Speight v Gosnay* [1891] 60 LJQB 231, and loss of consortium, *Lynch v Knight* [1861] 9 HLC 777). I reiterate that it is not clear that relationship with siblings broke down as a result of that email and considering that the defendant did admit to his mistake in calculation, I find that damage to reputation in the context of the case remains unproven to the required standard.

Further Considerations – “Swindler” statement in relation to profession

[87] General statement imputing deception to deprive someone of money has a potential to damage professional reputation. *Jones v Jones* [1916] 2 AC 481 discussed considerations whether imputation has to be directed to reputation against the particular profession and whether words implying immoral conduct were not actionable without proving special damage unless statement related to conduct in person’s office or profession.

[88] The general rule cited in *Jones v Jones* from *Comyns' Digest*, "*Action upon the Case for Defamation*" was: "*But words not actionable in themselves, are not actionable, when spoken of one in an office, profession or trade, unless they touch him in his office, & c.*". It was pointed out that there are some exceptions to this, namely “*readiness to make a presumption as regards language which might affect the credit of a trader of damage arising from words alleging insolvency, notwithstanding that the imputation is not in*

terms made about him in his capacity of trader” and “in the case of a clergyman who holds a benefice or an ecclesiastical position of temporal profit which may, by the very terms on which it is held, be put in peril of forfeiture by the slander” unless “the clergyman does not hold his benefice or position actually on these terms”. The court also considered previous authorities and concluded that:

“In Doyley v. Roberts(1) Tindal C.J. applied the law as laid down in this passage by refusing relief to an attorney of whom it was falsely said that he had defrauded his creditors and been horsewhipped off the course at Doncaster. That this is the basic principle which limits the cases in which the common law permits general damages to be awarded was laid down in striking language in the judgment of the Court of King's Bench in Ayre v. Craven(2), delivered by Lord Denman C.J. "Some of the cases," he said, "have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery; and a schoolmistress having been declared incompetent to maintain an action for a charge of prostitution. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay." There a physician had been accused of adultery, but the words did not in terms connect the imputation with anything done by him when acting in a professional capacity. This decision was followed in James v. Brook(3), when it was said that "even if the words have a natural tendency to produce injury in the profession, the declaration is wholly wanting in any explanation of the way in which the speaker connected the conduct with the profession."

My Lords, I think that these authorities and others which were referred to in the arguments at the Bar have settled the law too firmly to admit of our extending the exceptions which have been made further than the decided cases go. I agree with what was said by Lord Herschell in the judgment in Alexander v. Jenkins(4), which I have already quoted, and with the carefully-guarded judgment of Swinfen Eady L.J. in the present case. If we were to admit that an action for slander can lie in the case of a schoolmaster who has not proved either that the words were spoken of him "touching or in the way of his calling," or that he has suffered the actual damage which is the historical foundation of the action, and is even now its normal requisite, I think we should be overruling Ayre v. Craven(1) and other decisions of great authority, and should be doing what only the Legislature can do to-day. It required an Act of Parliament, the Slander of Women Act, 1891, to enable a woman to recover general damages for an imputation of unchastity. In my opinion it would require an analogous Act to enable the present appellant to recover such damages for an imputation of adultery which was not obviously directed to his reputation as a schoolmaster. I am therefore of opinion that we have no option to do anything but dismiss this appeal with costs”

[89] **Jones v. Jones** also mentioned earlier decision in **Alexander v. Jenkins, [1892] I Q.B. 797**, where it was alleged that town councillor “*is never sober*”. Judgement was first given in favour of plaintiff but reversed on appeal dismissing the action. It was held that a statement, to be actionable without proof of damage, must impute conduct which would

be sufficient to remove a person from his position. At that time being “unfit” or “often drunk” was considered as not capable of depriving a person from position.

[90] To apply and interpret this analysis in modern times and more particular in relation to statement that imputes dishonest deprivation of money, it can be said that in very wide and moral terms such imputation may affect most professional positions. However, in narrower terms, such statement can potentially cause more damage to a reputation of a person holding a fiduciary position, for example, dealing with clients’ money rather than a profession where dealing with money in such context is not essential part of the profession.

[91] Noting the above legal analysis of the position of the law, I find that the 1st plaintiff, albeit considering herself as the ‘CEO of her household’, the statement referring to her as swindler does not affect her profession.

[92] With regards to 2nd plaintiff, being “*fishing tool Supervisor in the oil and gas industry and also a consultant in the oil and gas industry*” and as per wife’s testimony having to “*subject himself to random checks, background checks*” in his profession, statement accusing him of dishonesty in very wide terms is damaging. However, considering that this message was only shared among family members (as revealed in evidence), I find it difficult to conclude with certainty that it can damage his professional reputation to such extent that no special damages must be shown. Furthermore, the context of this statement relate to an argument between siblings, in which the defendant later admits to being wrong in calculations, apologizes for that and admits that it is the defendant who owes money to the 2nd plaintiff. I thus find that the ‘swindler’ statement would not in the specific circumstances of this case (noting context as explained), would affect 2nd plaintiff’s profession.

Quantum of Damages Considerations

[93] It was stated in **Gatley on Libel and Slander 12th Edition, Published 2013:**

“Since publication to one person will suffice [Capita and Counties Bank v Henty (1882) 7 A.C. 741 at 756], it is clearly not necessary that there should be a

“publication” in the commercial sense though the scale of publication will of course affect the damages [John v Mirror Group Newspapers [1997] Q.B. 586 CA.]” (emphasis added)

[94] In addition to the submissions made by plaintiff and defendant regarding quantum of damages and general considerations such as ‘the conduct of the plaintiff, his position and standing, the nature of the defamation, the mode and extent of the publication, the absence or refusal of any retraction or apology and the whole conduct of the defendant’ (**Prea v Seychelles People Progressive Front & Anor (CS7/2004) [2007] SCSC 10 (28 September 2007)**); **Derjacques v Louise (1982) SLR 175**; **Pillay v Regar Publications 1997 SLR 125 (CS 11/1996) [1997] SCSC 2 (22 January 1997)**), the court takes into account that in the present case the communication of the statements was done to a small group of family members.

[95] In libel damages are presumed and the plaintiff does not need to show special damages. However, considering the nature of defamation, the mode and extent of publication of libellous statements I find that given circumstances of this case do not call for award of monetary damages.

[96] However, that is not to say that actions of the defendant taken as a whole were not wrong and should not be stopped and thus in the interests of justice to all the parties the Court hereby exercises its inherent discretionary powers and orders that albeit its findings and conclusions, in order to restore fraternity and understanding amongst family members involved in this case, the Court hereby orders that the defendant offers a formal apology in writing regarding the statements made and same shall be addressed to all the recipients copied in prior communications subject matter of this case.

Obiter

[97] Although, as decided by Seychelles case law that the Defamation Act 2013 should not apply to defamation cases in Seychelles as the law is “frozen in time”, it is worth to note that circumstances of this case would not have been sufficient to establish defamation under the current English Law.

Adultery or unchastity to a woman or girl exception for slander

- [98] In modern times, while words expressed by the defendant may still be considered derogatory, offensive, unpleasant and upsetting, under modern English Law they would not qualify for *defamation per se* and the claimant would have to prove special damages.
- [99] This category of exception for slander has more of a historical significance as some cultures considered adultery as a serious crime and reputation of unmarried women was greatly affected by false statements regarding to her chastity. As was put in ***Tort Law, Elliott & Quinn, 11th Edition, 2017, page 233:***

“at one time, for example, it would certainly have been defamatory to say of an unmarried woman that she spent the night with her boyfriend; this would not be the case today, unless, for example, that particular woman had presented herself as being against extra-marital sex, in which case she might be able to argue that the claim made her appearance to be a liar and a hypocrite”.

- [100] Defamation Act 2013 has actually removed this exception (as well as infectious diseases) and special damage must be proved. Section 14 of the Defamation Act provides:

“(1)The Slander of Women Act 1891 is repealed; (2)The publication of a statement that conveys the imputation that a person has a contagious or infectious disease does not give rise to a cause of action for slander unless the publication causes the person special damage.”

- [101] Defamation Act 2013 Explanatory Notes provides:

“78. This section repeals the Slander of Women Act 1891 and overturns a common law rule relating to special damage.

79. In relation to slander, some special damage must be proved to flow from the statement complained of unless the publication falls into certain specific categories. These include a provision in the 1891 Act which provides that “words spoken and published... which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable”. Subsection (1) repeals the Act, so that these circumstances are not exempted from the requirement for special damage.

80.Subsection (2) abolishes the common law rule which provides an exemption from the requirement for special damage where the imputation conveyed by the statement complained of is that the claimant has a contagious or infectious disease. In case law dating from the nineteenth century and earlier, the exemption

has been held to apply in the case of imputations of leprosy, venereal disease and the plague.”

Defamation Act 2013, UK – serious harm requirement

[102] Section 1 of the Defamation Act (supra) introduced requirement of “serious harm” in defamation cases:

“1 Serious harm

(1)A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2)For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.

[103] While the section expands requirement of damages from being caused to also “likely to cause”, at the same time it provides “potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake”. Defamation Act 2013 Explanatory Notes state:

“Section 1: Serious harm

10. Subsection (1) of this section provides that a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant. The provision extends to situations where publication is likely to cause serious harm in order to cover situations where the harm has not yet occurred at the time the action for defamation is commenced. Subsection (2) indicates that for the purposes of the section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.

11. The section builds on the consideration given by the courts in a series of cases to the question of what is sufficient to establish that a statement is defamatory. A recent example is Thornton v Telegraph Media Group Ltd(1) in which a decision of the House of Lords in Sim v Stretch(2) was identified as authority for the existence of a “threshold of seriousness” in what is defamatory. There is also currently potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In Jameel v Dow Jones & Co(3) it was established that there needs to be a real and substantial tort. The section raises the bar for bringing a claim so that only cases involving serious harm to the claimant’s reputation can be brought.

12. Subsection (2) reflects the fact that bodies trading for profit are already prevented from claiming damages for certain types of harm such as injury to feelings, and are in practice likely to have to show actual or likely financial loss. The requirement that this be serious is consistent with the new serious harm test in subsection (1).”

[104] It was also noted in **Gatley on Libel and Slander**(supra) that, “a failure to prove that the words were published to more than an insignificant number of people, may mean that the claimant will be unable to establish that serious harm has been or is likely to be caused to his reputation under Defamation Act 2013, s.1.”

[105] In a recent case **Lachaux v Independent Print Ltd and Evening Standard Ltd [2019] UKSC 27**, the Supreme Court held that application of the new threshold of serious harm to reputation must now be determined by considering the actual facts about its impact, and not merely the meaning of the words and solely making reference to inherent tendency of specific words to harm reputation, as under older common law presumption of damage to reputation, will not be sufficient. The cause of action depends upon assessment of actual consequences from the publication of defamatory statement which may include size and characteristics of audience that it was published to, quality of publication and whether claimant had any good standing reputation to begin with. Lord Sumption stated that section 1 of the Defamation Act 2013, should be interpreted taking into consideration the common law background:

“6. [A] working definition of what makes a statement defamatory, derived from the speech of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237, 1240, is that 'the words tend to lower the plaintiff in the estimation of right-thinking members of society generally.' Like other formulations in the authorities, this turns on the supposed impact of the statement on those to whom it is communicated. But that impact falls to be ascertained in accordance with a number of more or less artificial rules. First, the meaning is not that which other people may actually have attached to it, but that which is derived from an objective assessment of the defamatory meaning that the notional ordinary reasonable reader would attach to it. Secondly, in an action for defamation actionable per se, damage to the claimant's reputation is presumed rather than proved. It depends on the inherently injurious character (or 'tendency', in the time-honoured phrase) of a statement bearing that meaning. Thirdly, the presumption is one of law, and irrebuttable.

7. In two important cases decided in the decade before the Defamation Act 2013, the courts added a further requirement, namely that the damage to reputation in a case actionable per se must pass a minimum threshold of seriousness.”

[106] Furthermore, as a matter of illustration of other jurisdictions' approach to matters relating to Facebook and WhatsApp messengers, although not applicable to Seychelles law, German Courts went even further to decide that "*WhatsApp Messages to Close Family Members Are "Defamation-Free Zone"*"(OLG Frankfurt, Jan. 13, 2019, Docket No. 16 W 54/18, ECLI:DE:OLGHE:2019:0117.16W54.18.00, Hessenrecht, Landesrechtsprechungsdatenbank website; see <https://www.loc.gov/law/foreign-news/article/germany-court-holds-whatsapp-messages-to-close-family-members-are-defamation-free-zone/>). However, Israeli court fined Facebook user for defamatory statement made in private Facebook message to only one person (see <https://www.haaretz.com/israel-news/.premium-watch-your-messenger-mouth-israeli-court-fines-facebook-user-for-defamation-1.5457150>).

[107] The case law on defamation in social media and using information technology is vast and growing and outcomes can be different. Nevertheless, in the new era where everyone can post statements and opinions online with much ease, it is also important to remember historical purpose of defamation laws and historical purpose of difference between libel and slander to balance cases where, even though statement is in writing, it is communicated to a very small closed group of people and where communication is available to public at large; as well as cases of 'hurt feelings' and cases where actual damage has been caused by statements made; and also allowing space for exceptions where statement made are so offensive and serious in modern world terms that they should be presumed to be damaging.

Conclusion and final determination

[108] Noting the analysis of the legal position above, the Court considers that statement 2 ("molester") qualifies as referring to the 2nd plaintiff, however, falls short of publication to third parties. It was emailed only to the 2nd plaintiff. It was read by the wife, however, in light of the analysis above, the plaintiff has failed to prove on a balance of probabilities that the defendant knew that the 1st plaintiff had permanent access to the 2nd plaintiff's email.

[109] With regard to statements 1, 3 and 4, I find that there was publication – communication to third party. I find that statements are libel as they are in written and permanent form. Under old English law the damages in libel are presumed and the plaintiffs do not need to prove special damages. However, in assessing the quantum and form of damages, the Court takes into account the nature of defamation statements, the mode and scope of publication. I do not find that monetary damages should be awarded in this case.

[110] Statement 1 was communicated only to husband of the 1st plaintiff and the husband did not believe it to be true. The plaintiffs stated that these statements had emotional impact upon them and their marriage. However, considering that marital history between the plaintiffs, I find that the emotional impact could have been caused by combination of factors, not solely by the defendant's statements.

[111] Similarly, I find that with regard to Statement 3 and 4 referring to plaintiffs as swindlers, element of actual harm to reputation is not established. The 1st plaintiff's brother, as indicated by the 1st plaintiff did not believe the statement. Breakdown in relationship between 2nd plaintiff and his siblings could have been caused by other factors and prior to the statements made. I also note that defendant did admit to being wrong in calculations and stated that it was the defendant who owed money to the plaintiff not the other way round. The plaintiffs also did not show that statements had direct impact on their professional reputation.

[112] Further, though not applicable in this case for reasons given, under current English Law, Defamation Act 2013, if it applied in Seychelles, the circumstances of this case would fall short from establishing serious harm introduced by section 1 of the Defamation Act (supra).

[113] It follows, thus that while the damages are presumed under libel law, considering the nature of defamation statements and the mode and scope of publication, I do not find that monetary damages should be awarded in this case. However, considering actions of the defendant taken as a whole, the Court exercises its inherent discretionary powers and in the interests of justice to all the parties and in order to restore fraternity and understanding amongst family members involved in this case, I order that the defendant

offers a formal apology in writing regarding the statements made and same shall be addressed to all the recipients copied in prior communications subject matter of this case.

[114] Subject to the above condition of formal apology, the complaints of both 1st and 2nd plaintiffs are dismissed and both parties shall bear their own costs.

Signed, dated and delivered at Ile du Port on 8th March 2021.

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ANDRE J