

CANADA / JUDGMENT

Burns v. Pollock

2001 BCSC 986

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DANIEL BURNS AND GREG BELZBERG
PLAINTIFFS

AND:

STEVEN POLLOCK
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE RALPH

Counsel for the plaintiffs John D. Shields

Counsel for the defendant Roger D. McConchie

Date and Place of Hearing/Trial: February 1, 2001

Vancouver, BC

- [1] In February 2000, the Century Grill Restaurant in Vancouver was faced with serious financial problems. Information concerning those problems was exchanged by electronic mail among the principals of the ten limited companies who held the shares of Yagletown Ventures Inc., the company which owned and operated the restaurant. Mr. Burns and Mr. Belzberg were two of those principals. Mr. Burns is also a lawyer by profession. Mr. Pollock

was the president and a director of Yagletown Ventures Inc. The issue raised in this Rule 18A application is whether in some of those e-mails Mr. Pollock defamed Mr. Burns and Mr. Belzberg.

- [2] It is not necessary to review the content of all of the e-mails that were exchanged in January and early February 2000 but some reference to the content gives an indication of the nature of some of the exchanges taking place. On January 13, 2000, Mr. Pollock sent an e-mail to the principals of the shareholder companies describing the economic and monetary difficulties facing Century Grill. They included poor sales, payment demands from suppliers and lease renewal problems.
- [3] In a January 19 e-mail to the group of principals but directed to Mr. Pollock, Mr. Burns stated that, "Management has put us in the position that we are in today." In a further e-mail on January 21 directed to Mr. Pollock but also copied to the other principals, Mr. Burns stated that in his opinion Mr. Pollock had put his interests ahead of those of the company. Subsequent e-mails reported increasing financial problems, an offer by Messrs. Burns and Belzberg to purchase the shares of Yagletown Ventures Inc. and sharper criticism of Mr. Pollock's management of the company by Messrs. Burns and Belzberg.
- [4] The alleged defamatory statements of Mr. Pollock are set out below, but as an example of the tone of some of the exchanges I note Mr. Burns' e-mail message of February 4, 2000, to the group and directed to Mr. Pollock where he states:

It is unreasonable to expect the shareholders to sell the business, that you have ruined through mismanagement and misappropriation, to you for pennies on the dollar and then release you from liability considering the outrageous nature of your conduct.

- [5] I also note Mr. Belzberg's e-mail of February 5 to the group in which he states:

Steve [Pollock] created and then buried what could have been a very lucrative and fun business for all of us. His ego and poor judgment got the best of him. His friends turning a blind eye to his actions has done a disservice to everyone involved.

In addition, Mr. Belzberg's e-mail of February 6 directed to Mr. Pollock but sent to the group uses the greeting, "Sphincter".

- [6] On February 5 Mr. Pollock sent an e-mail message to each of the principals with one paragraph directed to Mr. Burns and one to Mr. Belzberg. While the statement of claim states the date of the e-mail as April 3, 2000, it seems clear that the reference is in fact to the February 5 e-mail. A further e-mail was sent to each of the principals but directed to Mr. Burns on February 6. It is the February 5 and 6 e-mails which are alleged to be defamatory of Messrs. Burns and Belzberg.
- [7] The alleged defamatory statements in the February 5 e-mail about Mr. Burns are:
- a) You are a joke!

- b) If you believe that I think for one second that your claims against me have even the slightest bit of merit then you are even stupider than I thought.
 - c) My intentions have nothing whatsoever to do with escaping liability for your bogus claims.
 - d) I would venture to say that you are even dumber than Mr. Burns, but you can't help it so I won't.
- [8] The plaintiffs say that in their natural and ordinary meaning the words meant Mr. Burns:
- a) is a joke - not capable of being taken seriously;
 - b) is stupid;
 - c) had advanced a bogus claim; and
 - d) is dumb.
- [9] The alleged defamatory statements in the February 5 e-mail about Mr. Belzberg are:
- a) I would venture to say that you are even dumber than Mr. Burns, but you can't help it so I won't.
 - b) I suggest you take a breather from your hectic workaholic lifestyle and put another bud in your bowl. Unfortunately, due to your slight retardation, you don't understand how to read our financial statements so I will do my best to explain things in the simplest way possible.
- [10] The plaintiffs say that in their natural and ordinary meaning the words meant Mr. Belzberg is dumb, retarded and stupid.
- [11] The alleged defamatory statements in the February 6 e-mail about Mr. Belzberg are:
- I think, perhaps, you have been sharing the same pipe with Mr. Belzberg; Nonetheless, I'll respond to your hallucinations.
- [12] The plaintiffs say that in the natural and ordinary meaning the words meant Mr. Belzberg suffers from hallucinations.
- [13] The alleged defamatory statements about Mr. Burns in the February 6 e-mail are:
- a) You and Greg are vindictive and immature and I am not interested in investing fresh capital that you bozos can justify using to fund your ludicrous accusations.
 - b) Dan buddy, if you would like me to look into arranging a room at Essendale (sic) or Riverview, I'd be happy to assist.
 - c) Please stop these ridiculous lies.
 - d) You were denied control of the company and it drove you mad. Perhaps a stint in the psychiatric ward would do the trick.
- [14] The plaintiffs say that in their natural and ordinary meaning the words meant Mr. Burns:

- a) suffers from hallucinations;
- b) is immature;
- c) is a "Bozo" or "clown-like";
- d) requires treatment for mental illness;
- e) is a liar; and
- f) is mad.

[15] The defendant says that the words complained of in the statement of claim are not capable of being defamatory of the plaintiffs, and are not in fact defamatory. The defendant also says that the words complained of do not in their natural and ordinary meaning bear the meanings attributed to them in the statement of claim. Alternatively it is submitted that the words may well be insults and reflect a juvenile reaction to a dispute but they are not defamatory because they do not tend to injure the reputation of either plaintiff. As a result the defendant says that the action should be dismissed pursuant to Rule 18A.

[16] Counsel for the plaintiffs submits that rough language and unmannerly jests are defamatory when private character is attacked or one's reputation is injured. He referred to a number of cases in which insulting words were found to be defamatory, particularly where the words of insult or abuse are written. He submitted that, as a result, the case is not suitable for resolution under Rule 18A.

[17] At paragraph 26 of *Grassi v. WIC Radio Ltd. (c.o.b. CKNW/98)*[2000] B.C.J. No. 170 (B.C.S.C.), Mr. Justice Lysyk stated:

In a trial without a jury, where the judge will decide both issues, the questions of whether the words are capable of being defamatory and whether they are in fact so are likely to run together. Thus, in *Slim v. Daily Telegraph Ltd.* [1968] 2 Q.B. 159 (C.A.) Diplock L.J. after discussing the respective roles of judge and jury, stated at 176:

But where a judge is sitting alone to try a libel action without a jury, the only questions he has to ask himself are: "Is the natural and ordinary meaning of the words that which is alleged in the statement of claim?" and: "If not, what, if any, less injurious defamatory meaning do they bear?"

[18] In *Color Your World Corp. V. Canadian Broadcasting Corp.* (1998), 156 D.L.R. (4th) 27 (Ont. C.A.) Abella J.A. adopted at para. 14 the definition of defamation in *Salmond on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at p.140:

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one...

[19] At para. 15, Abella J.A. went on to state:

The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate. It should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of any broadcast - or written statement - should be assessed from the perspective of someone reasonable, that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers.

[20] In *Charleston v. News Group Newspapers Ltd.*, [1995] 2 A.C. 65 (H.L.) Lord Bridge of Harwich adopted at p. 70 the "long and unbroken line of authority the effect of which is accurately summarised in *Duncan & Neill on Defamation*, 2nd ed. (1983), p.13, para 4.11 as follows:"

In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage.

[21] A review of the e-mail messages of February 5 and 6, and a further 20 messages beginning January 13, reveals a series of discussions taking place about the financial peril of the restaurant, options to alleviate the difficulties, and increasing anxiety about the likely outcome. The exchanges were taking place among the principals of the companies who held shares in Yagletown Ventures Inc.

[22] In the context of that situation I am satisfied that the recipients of the e-mail messages would understand the statements of Mr. Pollock to reflect his own state at the time but would not see them as a basis for lowering their estimation of Mr. Burns or Mr. Belzberg. I conclude that an ordinary, right-thinking member of society informed as to the context and the overall content of the e-mail exchanges would not tend to regard either plaintiff with feelings of contempt, ridicule, fear, dislike or disesteem.

[23] In *Roth v. Aubichon*, [1998] S.J. No. 520 (Sask Q.B.) the plaintiff was a lawyer. In concluding that the offensive words used by the defendant were not defamatory, Noble J. stated at para. 6:

...No reasonable person, in my opinion, would take that meaning from the words used. If anything, the defendant probably reflected badly on his own reputation to a far greater extent than the plaintiff's. As I said earlier he should know better than to use that kind of language in a public meeting.

- [24] Rule 18A provides that on the hearing of the application the court may grant judgment unless it is unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application. Counsel for the plaintiffs has submitted that this is a matter which should proceed to a conventional trial because it would provide the plaintiffs an opportunity to explain the nature of the dispute.
- [25] The plaintiffs' claims are not complex and there is not a great deal of material involved. All of the alleged defamatory e-mails were before the court and the additional e-mail messages served to provide a context in which to assess the statements that were made by Mr. Pollock. The critical issue the court is called upon to decide in the application is whether the alleged statements are defamatory. I am of the opinion that it is not unjust to decide this issue on an application under Rule 18A. I have decided that the statements are not defamatory. The defendant is entitled to an order dismissing the plaintiffs' action.
- [26] No submissions were made on costs. If the parties are unable to agree on the issue of costs they make written submissions through the registry.

"Bryan F. Ralph, J."

The Honourable Mr. Justice Bryan F. Ralph

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