

INDIAN CHAMBER OF COMMERCE, BRUNEI DARUSSALAM	...	1st Appellant
MOHAMED ZACKIRIAH NAZEER AHMAD	...	2nd Appellant
JAMNU PUNJABI	...	3rd Appellant
ABD MALICK MOHAMED BATCHA	...	4th Appellant
ABDUL RAHIM KAMALDEEN	...	5th Appellant
MOHAMED ZUBAIR HAMIM BASHEER	...	6th Appellant
MOHAMED ABDULLA INAMULLA@YUNUS	...	7th Appellant
VENUGOPAL JAYAKUMAR	...	8th Appellant
ABDUL PACKIR MAIDEEN	...	9th Appellant
PUNJABI VISHNU TARACHAND	...	10th Appellant
NOORSA AHMAD SULTAN NOOR MOHAMED	...	11th Appellant
DAWOO BATCHA MOHD JAFARULLAH	...	12th Appellant
SHAIKH MOHAMED SABURDEEN	...	13th Appellant
ABDUL SHEIK DAWOOD MUNAFF	...	14th Appellant
MUTHIAH CHETTIARMANI	...	15th Appellant
VADAKOOT SANKUNNI AZHUTCHAN		
RAMESH CHANDARAN	...	16th Appellant
POONDIYAR SHAIK PEER MOHAMED		
SHEIK DAWOOD	...	17th Appellant
ASIQURAHMAN BIN HJ ABD HALEEM	...	18th Appellant
HAJI BADURUDEEN S/O TN MOHAMED ISMAIL	...	19th Appellant
UBAYATHULLAH HAMIM BASHEER	...	20th Appellant
HIDHAYATULLA BIN TAJUDDEN	...	21st Appellant
MOHAMED HUSSAIN MOHAMED ALI	...	22nd Appellant
SULAIMANAYUB KHAN	...	23rd Appellant
HJ MOHAMED ALI	...	24th Appellant
HJ MOHAMED ASRAF@ABDUL KADER ASRAF ALI	...	25th Appellant

AND

RAMESH JIWA TRAM BHAWNANI	...	1st Respondent
ABDUL HAMID BIN ABAS	...	2nd Respondent

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 7 of 2014)

Before: Mortimer P, Leonard and Burrell JJ A.
24th of November, 2014

Civil Law – whether a letter written by a private person to a diplomatic mission may be adduced in evidence – Vienna Convention on Diplomatic Relations 1961 considered.

Mr Sivabalan S/O Sankaran for Plaintiff
Mr Pg Izad Ryan bin PLKD Pg Haji Bahrin for Respondent

Cases cited in the judgment

R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3) [2014 1 WLR] 2021

Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd (No 2) [1988] 1 WLR 16 ; [1988] 1 All ER 116, HL(E)

Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460.

Warren v Warren (1834) 1 CM & R 250.

Leonard, JA.:

This appeal arises out of a libel action. The respondents allege that they were libeled in a letter dated the 5th of April 2010 sent by the appellants to the Indian High Commissioner in Brunei and in a letter dated the 29th of November, 2010 sent to a subsequent Indian High Commissioner. Having failed to persuade first the Registrar and then the Chief Justice to strike out the action the appellants came before this court on appeal, the Chief Justice having given leave.

The purported basis set out in the Summons in Chambers dated 9th July 2013, containing the application to strike out was that the proceedings were

- a) Scandalous, frivolous and vexatious: Order 18 r18(b) Supreme Court Rules (SCR);
- b) Otherwise an abuse of the court's process: Order 18 r18(d) SCR and
- c) That the respondents had failed to generally endorse the Writ: Order 6 r.2 SCR;

When the matter came before the Chief Justice it was argued that

- i) The Writ was not specifically endorsed as to the relief and remedy sought by the respondents;
- ii) That the respondents were unable to prove or quantify damages on the face of the pleadings;
- iii) That the action could not be maintained as the court was not competent to entertain a suit relating to communications relating to matters of State pursuant to Article 27 of the Vienna Convention on Diplomatic Relations 1961 (Article 27);
- iv) That the respondents had failed to show and/or prove publication of the letters.

At the hearing of the appeal Mr Siva Sankaran for the appellants did not press his argument on grounds i), ii) and iv), with which we will deal briefly below. He concentrated on ground iii).

Before this court the appellants applied for leave to argue a new point, namely that Brunei was not the right forum because the alleged publication was in India (inside the Indian High Commission). We refused leave. The question of the appropriate forum was not raised below and the appellants' proposed argument seemed to us to have no prospect of success.). Brunei is undoubtedly the correct forum. See *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

Complaint that the writ was not specifically endorsed as to the relief and remedy sought.

There was no basis for this complaint, the Statement of Claim being endorsed upon the writ.

Complaint that the respondents were unable to prove or quantify special damage on the face of the pleadings

In the circumstances of this case, where libel is alleged against a person's business or trading reputation, there is no requirement to prove or plead special damage; *Jameel (Mohammed) and Another v Wall Street Journal Europe* [2007] 1 AC p359. This complaint failed, the respondents having sufficiently pleaded their claim..

Complaint as to the issue of publication

It is not necessary in all cases for a plaintiff to prove by direct evidence that the libellous matter was actually seen and read by some third party. If it is a matter of reasonable inference that this happened, a prima facie case of publication will be established. Proof that a libellous letter was sent through the post is prima facie evidence of publication to the person to whom it was addressed: *Warren v Warren* (1834) 1 CM & R 250. In the present case there is evidence in the 2nd appellant's affidavit sworn on the 4th of July, 2013 that the original of the letter dated the 4th of April, 2010 was personally delivered by hand to the High Commissioner and Mr Sankaran maintained that position in court. It is a matter of strong inference that the High Commissioner read it. The assertion that there was no publication is not supported by the evidence. In the same affidavit the 2nd appellant says "I aver and state that the two letters respectfully (*sic*) dated 5.4.2010 and 29.11.2010 are correspondence communicated and received between the Indian Chamber of Commerce and the High Commissioner in office not for the purpose of publication." That is evidence incompatible with any suggestion that there was no publication.

After considering the submissions of the parties we find that grounds i), ii) and iv) have not been established.

The Vienna Convention

Mr Sankaran's main argument was based on the provisions of the Vienna Convention on Diplomatic Relations (the Convention), which took effect on the 23rd of June, 2013.

Article 24 of the Convention reads:

“The archives and documents of the mission shall be inviolable at any time and wherever they may be”.

Article 27(2) reads

“.2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.”

The appellants’ case seems to depend on an assumption that the respondents seek to put in evidence the letters sent to the High Commissioner and that they must have been obtained by improper means from the archive of the Indian High Commission. There is nothing to support that assumption. In fact the respondents do not seek to put in evidence any document taken from the archives of the Indian High Commission. They say that a copy of each letter was received by the respondents from an anonymous source in December 2012. There is no evidence as to when or where the copies were made. The appellants suggest that they were made in the High Commission but this appears to be pure speculation. Mr Siva Sankaran conceded at the hearing that it is reasonable to assume that a copy of the letter was kept by the appellants. It remains to be seen how many copies existed but the respondents have pleaded that the contents of the letters were also published to numerous other persons. It is not possible to assume that the copy received by the respondents came from the High Commission. In those circumstances, it is difficult to see how the question of the inviolability of the High Commission’s official correspondence can arise. There is nothing to suggest that the Indian High Commission wishes to object to the contents of the letters being put in evidence.

The appellants’ bundle of authorities contained a number of cases on the question of inviolability but there is very recent authority to show that inviolability is not synonymous with inadmissibility.

See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3) [2014 1 WLR] 2021* According to the headnote, which is an accurate summary of the decision it was there held that

“...the immunity of diplomatic documents from use in legal proceedings was not absolute; that inviolability connotes freedom from any act of interference on the part of the receiving state but did not refer to admissibility and so there were circumstances in which a mission document which was inviolable might nevertheless be admitted in evidence; that if a document found its way into the hands of a third party, even in consequence of a breach of inviolability, it was prima facie admissible in evidence in proceedings if, although obtained by a third party without the consent of the sending state, it had been put into the public domain for all the world to see, the person wishing to adduce it in evidence was not complicit in its publication and the government of the sending state had no objection to its admission...”.

The judgment of the Court of Appeal of England and Wales, which was delivered by Lord Dyson MR, contains a masterly analysis of the relevant law. It is of strong persuasive authority and we adopt its conclusions. After considering in detail the

principle of inviolability the Court decided the case on the issue of admissibility. In addressing itself that issue it needed to consider the case of *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd (No 2)* [1988] 1 WLR 16 ; [1988] 1 All ER 116, HL(E) where Lord Bridge had said

“The underlying purpose of the inviolability conferred is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host state should countenance the violation by permitting the violator, or anyone who receives the document from the violator, to make use of the document in judicial proceedings.”

The Court of Appeal took the view that the statement of Lord Bridge quoted above was not part of the ratio of the case and not binding upon it and in any event could be distinguished on its facts, since Lord Bridge was not addressing a case such as the one before the Court of Appeal where the document in question on the assumed facts had not been obtained from the mission illicitly or by improper means, was in the public domain for the whole world to see and the party wishing to adduce the document in evidence had not been complicit in the publication of the document. It found that

“Even if inviolability can in principle extend to inadmissibility of documents in some circumstances, it should not do so where the inadmissibility cannot promote or contribute to the efficient performance of the functions of a mission. The protection against the disclosure and use of the archives and documents of a mission can unquestionably promote and contribute to the efficient performance of a mission’s functions in some cases. But it cannot do so where any damage that is done to a mission by the disclosure of an archive or document has already been done by their disclosure to a third party for which the party who wishes to adduce the evidence has no responsibility.”

We respectfully agree. The facts of the case on the evidence before us are different from those contemplated by Lord Bridge. The respondents say that the copy letters were received from an anonymous source and that more copies were given to a number of people other than the appellants inside and outside the High Commission. The contents of the letter are now in the public domain and as we have said there is no objection by the High Commission to its use in these proceedings. If the High Commission did give out copies that would not constitute publication by the appellants but it would be relevant to the issue of admissibility. The Convention does not assist the appellants who have failed at this stage to show that either copy delivered anonymously to the respondents was taken from the original in the archive. They have also failed to show that the respondents were complicit in the act of making either copy. On the evidence as it stands at present we find that the letters are admissible.

The appeal is dismissed. There will be an order that the respondents’ costs of this appeal be taxed if not agreed and paid by the appellants.

Mortimer, P.

Leonard, J.A.

Burrell, J.A.