In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 404

BETWEEN:

MICHAEL DUNKLEY, JP, MP

Plaintiff

-v-

MARC BEAN, JP, MP

Defendant

RULING ON APPLICATION TO STRIKE-OUT DEFENCE

(in Chambers)[1]

Date of hearing: November 14, 2014
Date of Ruling: December 3, 2014

Mr. Alan Dunch, MJM Ltd., for the Plaintiff
Mr. Eugene Johnston, J[2] Chambers, for the Defendant

Introductory

1. The Plaintiff is currently Premier and Minister of Public Safety but was Deputy Premier and Minister of Public Safety when he issued the Specially Endorsed Writ in

[1] This is an edited version of the full judgment.

the present action on October 31, 2013. The Defendant was at all material times and continues to be Leader of the Opposition. The Writ seeks damages for defamation in relation to a "thread" allegedly written or published on 30 September 2013 by the Defendant on the Facebook page "Bermuda Elections 2012".

2. By a Summons dated October 8, 2014, the Defendant applies to strike-out paragraph 7 of the amended Defence on the grounds that it:

> "*(a) discloses no reasonable defence to the claim; and/or*
>
> *(b) it is an abuse of the process of the Court or otherwise likely to obstruct the just disposal of the proceedings.*"

Applicable legal principles

Overview

3. Mr. Dunch essentially submitted that as a matter of law the sting of the libel was really a question of fact, not comment, and facts which the Defendant had to prove were true, but could not. Accordingly, the defence was not available and should be struck-out. Mr. Johnston responded that the impugned words were comment and, in any event, it would be for the jury[2] at trial to determine whether or not the defence was available on the facts.

4. In these circumstances the strike-out application requires the Court not simply to consider the merits of the arguments in the unfamiliar context of defamation law (possibly the last fully-fledged defamation trial occurred in Bermuda in 1981[3]). The Court is required to carry out the relevant analysis on the assumption that a jury trial will be ordered and to bear in mind that the jury will be the ultimate arbiter of facts.

5. The present application, to borrow the words of Lord Phillips in *Joseph-v-Spiller* [2011] 1 AC 852 at 857, "*involves consideration of one of the most difficult areas of the law of defamation, the defence of fair comment*". The Bermudian legal position is complicated by the fact many of the authorities cited in argument were English authorities decided in a context where a statutory defence of fair comment exists. For some 60 years in England, the statutory underpinning for the common law defence was found in section 6 of the Defamation Act 1952:

> "**Fair comment.**

[2] Under Order 33 rule 2(2)(b), either party may apply for trial by jury and prolonged examination of documents ground for refusing any such application would not appear to apply.

[3] Hellman J recently tried a defamation claim without a jury in an action which included other causes of action in Dr. C *Curtis-Thomas-v- Bermuda Hospitals Board et al* [2014] SC (Bda) 68 Civ (28 August 2014), but no findings were made on the defence of fair comment and a defence of qualified privilege succeeded.

6. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

6. A similar statutory defence existed in section 9 of the Singaporean Defamation Act, which informed the judgment of the Privy Council in *Jeyaretnam-v-Goh Chok Tong* [1989] 1 W.L.R. 1109. As Mr. Dunch correctly submitted, there is no statutory provision which affords a defamation defendant a valid fair comment defence where each allegation of fact upon which the comment is based is not proved to be true. The Libel Act 1857 of Bermuda contains no equivalent statutory expansion of the fair comment defence as it existed in the common law of England prior to 1952. The Plaintiff's counsel quite appropriately relied upon the following pre-1952 English state of the law. In *Hunt-v- Star Newspaper Company Limited* [1908] 2 KB 309 at 320, Fletcher Moulton LJ stated as follows:

> "*It would have startled a pleader of the old school if he had been told that, in alleging that the defendant 'fraudulently represented', he was engaging indulging in comment. By use of the word 'fraudulently' he was probably making the most important allegation of fact in the whole case. Any matter, therefore, which does not indicate with a reasonable clearness that it purports to be comment, and not a statement of fact, cannot be protected by the plea of fair comment. In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it…Finally, comment must not convey imputations of any evil sort except so far as the facts truly stated warrant the imputation…*"

7. I therefore decline to follow the *dicta* relied upon by Mr. Johnston and found in post-1952 English cases to the effect that the Defendant is not required to prove the truth of every allegation upon which the comment relied upon as a defence is based.

8. I mention for completeness that under section 3 of the Defamation Act 2013 (UK), a new defence of "honest opinion" is created, the common law defence of fair comment is abolished and section 6 of the Defamation Act 1952 is repealed.

Elements of defence of fair comment

9. The elements of the defence of fair comment were, subject to the above qualifications, common ground. They were summarised by Lord Nicholls (sitting in the Hong Kong Court of Final Appeal in *Tse Wai Chun-v-Cheng*[2001] EMLR 777) and cited with apparent approval by Lord Phillips in the UK Supreme Court decision of *Joseph-v-Spiller* [2011] 1 AC 852 at 852-859:

> "*16. . . . First, the comment must be on a matter of public interest. Public interest is not to be confined within narrow limits today: see Lord Denning in London Artists Ltd v Littler[1969] 2 QB 375, 391.*
>
> *17. Second, the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New SouthWales case of Myerson v Smith'sWeeklyPublishing Co Ltd (1923) 24 SR (NSW) 20, 26: 'To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment'.*
>
> *18. Third, the comment must be based on facts which are true or protected by privilege: see, for instance, London Artists Ltd v Littler [1969] 2 QB 375, 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of fair comment is not available.*
>
> *19. Next, the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded.*
>
> *20. Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in Turner v Metro- Goldwyn-Mayer Pictures Ltd [1950] 1 All ER 449, 461, commenting on an observation of Lord Esher MR in Merivale v Carson (1888) 20 QBD 275, 281. It must be germane to the subject matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in Gardiner v Fairfax (1942) 42 SR (NSW) 171, 174. 21. These are the outer limits of the defence. The burden of establishing that a comment falls within these limits, and hence within the scope of the defence, lies upon the defendant who wishes to rely upon the defence.*"

10. Mr. Johnston referred the Court to the above case. Mr. Dunch relied upon the distillation of the same principles unequivocally described as reflecting the law in '*Duncan and Neill on Defamation*', 3rd edition, at paragraph 13.07 and '*Gatley on Libel and Slander*', 12th edition at paragraph12.2. No issue was joined on the question of whether the subject matter of any comment met the public interest requirement.

Is there a comment?

11. Applying the principles to paragraph 7 of the Amended Defence (as re-amended), I find that the body of the paragraph does plead facts coupled with a comment. As Ferguson J of the New South Wales Supreme Court put in *Myerson* (quoted by Lord Nicholls above):

> "*'To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment'*"

12. Similar observations were made by the Judicial Committee of the Privy Council (Lord Ackner) in *Jeyaretnam-v-Goh Chok Tong* [1989] 1 WLR 1109 at 1113G, upon which Mr. Johnston relied:

> "*In their Lordships' judgment it was clearly open to the judge to take the view that the observations following the statement of facts were expressions of opinion or conclusions or inferences drawn from those facts and therefore capable of being comment.*"

13. There is no rational connection between any additional comment (pleaded in paragraphs (1) and (2) of the 'Particulars of Honest Comment'. So these averments are wholly irrelevant and cannot possibly constitute a defence to the Plaintiff's claim in the present action. I shall return to this aspect of the pleading below.

14. However, the other averments under paragraph 7 of the Defence do amount to a "comment" linked to factual assertions. In my judgment this is not a " *'currant bun' defence stuffed with assertions of fact*" to use the words Nicholls LJ in *Control Risks Ltd.-v-New Library Ltd.*[1990] 1 W.L.R. 183 at 189. On the other hand, the Defendant admits that the words he used accused the Plaintiff of "*being a dishonest hypocrite*". Unlike the position in *Hunt-v- Star Newspaper Company Limited* [1908] 2 KB 309 where the allegation of fraudulent conduct was "*the most important allegation of fact in the whole case*", the allegation of dishonest hypocrisy is merely a comment which is parasitic on the more serious innuendo.

Is the factual foundation for the comment true?

15. It is true that on a very literal reading of the pleading, it might be said that the Defendant is "*willing to wound, and yet afraid to strike, just hint a fault, and hesitate dislike.*" Should he wish to pursue the fair comment defence at trial, however, he will have to do more than "*hint a fault, and hesitate dislike*".

16. Mr. Johnston, when invited by the Court to clarify the Defendant's case, insisted that he would if necessary seek to prove at trial that the Plaintiff was guilty of the criminal conduct alleged in the Facebook "thread" of which complaint is made in this action. It is an essential requirement for a valid defence of fair comment that any defamatory facts upon which the comment is based must be proved by the Defendant to be true.

17. It is accordingly difficult to imagine at this juncture what evidence the Defendant will be able to adduce at trial which could justify leaving the fair comment defence to the jury. The Defendant can only make such egregious allegations and escape liability for damages through his fair comment defence if, amongst other things, he proves the factual foundation for what he contends was a fair comment to be true. However, the Court cannot properly conclude at this juncture, before the Defendant has served and filed his evidence, that he will be unable to adduce sufficient evidence to prove the truth of the facts upon which the comment are based.

18. For the avoidance of doubt I am only assuming for the purposes of the present interlocutory application that the Plaintiff will succeed in proving that the Defendant's words bear the disputed defamatory meaning complained of. It will of course be for the jury to determine whether or not the words complained bear the disputed defamatory meaning contended for by the Plaintiff, it being common ground that the words used are defamatory to some extent.

Are the facts upon which the comments are based sufficiently identified?

19. Paragraph 7 of the Defence (including paragraph (3) of the Particulars) does in my judgment sufficiently identify a factual foundation for the hypocrisy comment. Mr. Johnston referred the Court to Lord Phillips' observation that a defence of fair comment could not be defeated solely because it failed to sufficiently identify supporting facts in such a manner as to allow the reader to form his own opinion: *Joseph-v-Spiller* [2011]1 AC 852 at 885A.

20. Because the exceptional nature of the strike-out remedy and its availability only in plain and obvious cases, I find that I should err in favour of the Defendant in construing the Amended Defence and not adopt an interpretation which resolves ambiguities of drafting in favour of the Plaintiff, the strike-out applicant.

Is the comment germane to the conduct or matter criticised?

21. Mr. Dunch was clearly right to complain that paragraphs (1) and (2) of the Particulars provides no factual foundation for the pleaded comment at all. Although the Defendant sought to rely upon this plea as a pure comment which is not based upon verifiable fact, even such comments must have some connection with an identifiable factual matrix. There is no sufficient connection as regards paragraphs 7(1) and (2).

22. I am guided in this respect by the following passage in Lord Phillips' judgment in *Joseph-v-Spiller* [2011] 1 AC 852 at 859 where he described what he characterised as the "*pertinence*" requirement as one that that had never arisen in any reported case:

> "*6 The fifth proposition. The requirement to show that the comment is germane to the subject matter criticised and is one that an honest person could have made, albeit that that person may have been prejudiced, or have had exaggerated or obstinate views, is one that is bizarre and elusive. I am not aware of any action in which this has actually been an issue. I shall describe this element as 'pertinence'.*"

23. Paragraphs 7(1) and (2) are not "*germane to the subject matter criticised*".

Conclusion

24. Particulars (1) and (2) of paragraph 7 of the Amended Defence are struck-out on the grounds that the averments are wholly irrelevant to the defamatory matters complained of in the present action.

25. The Defendant is granted leave to re-amend the paragraph 7 of the Amended Defence substantially in the terms set out in paragraph 23 of the Skeleton Argument of the Defendant. However, if the Defendant wishes to pursue this limb of his Defence, he must add one or more words into the body of paragraph 7 of the Defence to clarify his case as to the factual foundation for the comment relied upon. Unless he files an appropriately Re-Amended Defence within 28 days, paragraph 7 shall be struck-out in its entirety.

26. Rather than dismissing the balance of the Plaintiff's strike-out Summons at this stage, in the event that the Re-Amended Defence is filed as directed above, I would adjourn the Summons to be relisted for hearing after witness statements have been served and filed. If the Defendant fails to adduce evidence on its face capable of proving the factual allegations upon which the fair comment defence is based, the balance of paragraph 7 will potentially be liable to be struck-out at that stage of the present action.

27. Unless either party applies by email or letter to the Registrar to be heard as to costs within 21 days of the present Ruling, the costs of the present application shall be reserved generally with liberty to apply.

Dated this 3rd day of December 2014 _____

IAN R.C. KAWALEY CJ