THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO. SVGHCV2009/0221

BETWEEN:

DR RALPH GONSALVES

Claimant

AND

JUNIOR BACCHUS

First Defendant

BDS LIMITED

Second Defendant

Before:
Master Cheryl Mathurin

Appearances:
Mr. Graham Bollers for the Claimant
Mrs. Kay Bacchus-Browne for the Defendants

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2010: July 22nd, October 6th

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RULING

[1] MATHURIN, M: During a broadcast on the second defendant's radio station (BDS Limited) on the 16th March 2009, the first defendant (Mr. Bacchus) made the following remarks;

*"But lo and behold you are telling me that the Prime Minister, his wife, the chairman of National Properties, Hadley, you know they are finding themselves owning the state lands and we have not seen anything coming to the public in the form of a tender for anybody to have a choice… There is information that would be unearthed in due course of members of his family and others involving in deals that are taking place in this country. I wouldn't identify the location, but let him come and say he has no, no, no, no, he and his family have no need to purchase or have himself purchasing*

*lands in this country… I would leave that there, we would continue the research and we would come back to the issue of lands in due course"*

[2] Dr Gonsalves who is the Prime Minister of Saint Vincent and the Grenadines, alleges that these words are defamatory of him and subsequently filed an action against the defendants on the 4th July 2009 and at a hearing on the 22nd July 2010, it was ruled that these words were capable of meaning as alleged that the claimant (a) corruptly and illegally used his office as Prime Minister to acquire state lands and (b) that he corruptly and illegally used his office as Prime Minister to assist his family and others to acquire state lands.

[3] The defendants in the amended defence of the 9th September 2009 admit use of the words, deny that the first four lines of the quotation in issue are defamatory and state that the latter part of the quotation is true in substance and fact, fair comment on a matter of public interest and that the defendants have qualified privilege on matters of political social and moral interest or the common convenience and welfare of society.

[4] On the 23rd April 2010, the claimant applied to the Court for an order to strike out the defences as not establishing reasonable defences to the claim. The application was made pursuant to Part 26.3(1)(b) which gives the Court the power to strike out a statement of case or part thereof if it does not disclose any reasonable ground bringing or defending a claim. The defendants' submission opposes the application *ab initio* on the ground that Part 15.3 excludes the Court from granting summary judgment in proceedings for defamation and quotes The Caribbean Civil Court Practice 23:23 that "*the Court may treat an application to strike out as an application for summary judgment*"

[5] I fail to appreciate this argument because if the Court may not enter summary judgment on a defamation matter, it is unlikely that it will treat this particular application as one for summary judgment. In keeping with the overriding objective of CPR 2000 to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases, it is part of the court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.

[6] In Three Rivers District Council and others v Bank of England (No.3) (2001)2 AER 513 Lord Hope explained the difference between the test for an application for summary judgment and an application to strike out a statement of case. He stated (at page 541, paras 91-92):

> *"The difference between a test which asks the question "is the claim bound to fail?" and one which asks "does the claim have a real prospect of success?" is not easy to determine. In Swain's case, Lord Woolf MR (at 92) explained that the reason for the contrast in language between r 3.4 and r 24.2 is that under r 3.4 (Part 26), unlike r 24.2 (Part 15), the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim.*
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> *In Monsanto plc v Tilly (1999) Times, 30 November 1999; Stuart Smith LJ said that r 24.2 (Part 15) gives somewhat wider scope for dismissing an action or defence. In Taylor's case he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.*

The application before me to strike out the defences therefore requires an examination of the pleadings to determine whether it discloses any reasonable ground for defending the claim.

[7] The grounds of the application of the claimant are (a) a general denial that the words are capable of the meanings that the claimant has attributed to them; (b) that in pleading the defence of fair comment the defendants must show that the words are comment and not fact, that there is a substratum of fact in the comment, that the comment is fair and on a matter of public interest and (c) that the defence of qualified privilege is without legal foundation in that it is not properly pleaded, that there is no duty to communicate false allegations and no corresponding public right or interest to receive it, that the defendants took no steps to verify the truth or seek comment from the claimant.

## Denial that the words were defamatory

[8] The issue of whether or not the words used are capable of being defamatory was determined at the hearing on the 22nd July 2010 where it was determined that the words in issue were capable of

meaning that the claimant (a) corruptly and illegally used his office as Prime Minister to acquire state lands and (b) that he corruptly and illegally used his office as Prime Minister to assist his family and others to acquire state lands. The sting of the words which suggests that the Prime Minister did not follow the normal procedure in purchasing state lands clearly comes from the statement *"But lo and behold you are telling me that the Prime Minister, his wife, the chairman of National Properties, Hadley, you know they are finding themselves owning the state lands and we have not seen anything coming to the public in the form of a tender for anybody to have a choice…"* I ruled on the capability of the words being defamatory after consideration of the test laid down by Alleyne J. in Gonsalves v Gibson and others SVGHCV2006/405 and 406 which succinctly encapsulated the principles by which a court should be guided in arriving at its determination by referring to the words of Lord Bingham MR in the case of Skuse v Granada Television Limited (1996) EMLR 278 at 285.

[9] The claimant submits that the pleadings in the defence merely deny that the comments made were defamatory and hence fall afoul of Part 10 which delineates what the contents of a defence should comprise of. The defendants respond that apart from admitting that those words were used, they have pleaded the defences of fair comment and qualified privilege. Examination of the pleadings reveal that they allege that the words are true in substance and fact, are fair comment on a matter of public interest and that the words were published on an occasion of qualified privilege.

Fair comment

[10] Rule 69.3 of the CPR 2000 as follows;

> "*Where the Defendant … alleges that, insofar as the words complained of consist of statements of facts, they are true in substance and in fact, and insofar as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."*

[11] Counsel for the claimant submits that the defendants clearly have not complied with the requirements of the CPR2000 in that the defence does not give particulars of which of the words complained of are statements of fact and which of the words are comments based on those facts.

In response to this submission, Counsel for the defendants states that the Mr. Bacchus has shown the basis for his comments and that Mr. Bacchus did not say that his comments were based on facts contained in his statement. Counsel also states that as long as the words are capable of being fair comment on facts indicated, Mr. Bacchus has made out the elements of the Defence. Counsel further reiterates that it is no part of the defendants' case to prove that he was grounding his comments on any particular fact.

[12] The ingredients of the defence of Fair Comment were canvassed in the judgment of Thom J. in the case of Gonsalves v Lynch and another where in this regard, she quoted the Lord Nichols in Tse Wai Chun Paul v Albert Cheng (2001) EMLR page 777.

> *"(1) The comment must be on a matter of public interest.*
> *(2)The comment must be recognizable as comment as distinct from an imputation of fact.*
> *(3) The comment must be based on facts which are true or protected by privilege*
> *(4) The comment must explicitly or implicitly indicate at least in general terms what were the facts on which the comment was being made.*
> *(5) The comment must be one which could have been made by an honest person, however prejudicial he might be and however exaggerated or obstinate his views. It must be germane to the subject matter criticized."*

In short, the defence applies to words that are based on true facts made honestly without malice with reference to a matter of public interest.

[13] Further the distinction between fact and comment is addressed in Gatley 10th edition at paragraph 12.6 where comment is described as follows;

> *"More accurately it has been said that the sense of comment is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc"*

I am also guided by the words of Fields J in O'Brien v Salisbury (1889) 54 JP 215 at 216 where the distinction between fact and comment was put as follows;

> *"If a statement in words of fact stands by itself naked, without reference either expressed or understood to other antecedent or surrounding circumstances notorious to the speaker*

*and to those to whom the words were addressed, there would be little, if any room for the inference that it was understood otherwise than as a bare statement of fact…"*

[14] The question then is whether or not the impugned words are indeed comments and if so do they meet the requirements of the defence of fair comment by being supported by particulars or being supported by facts within the public domain. An examination of the defence and the particulars provided indicates not only that the provisions of Part 69.3 have not been complied with but also that there is no indication as to the factual basis of what is proffered by the defendants as fair comment. The particulars, whilst clearly making reference to the basis upon which Mr. Bacchus felt entitled to make the comments he did as political and social commentary, do not make any reference to facts which support the comment that the claimant and his family own state lands without any form of tender to the public. Paragraph G of the Particulars of the defence merely states that "*the defendant's comments were deduction, inference, conclusion, criticism, remark and/ or observation upon facts indicated and was fair and made without malice on a political programme".*

[15] That Mr. Bacchus is entitled to comment clearly and freely on matters of public interest and to criticize acts of public officials presents no difficulty but that right to comment must be based on facts that exist and should be made without malice. Fair comment is one of the fundamental rights of free speech and it is one that is zealously guarded as long as it meets the necessary criteria discussed above i.e. a general indication of the basis for the comment. The defence in its entirety however makes no reference to any facts within the public domain or otherwise upon which it could be said that the comments were based and clearly, without any such particulars they are understood to be imputations of fact and as such, the defendants cannot avail themselves of the defence of fair comment.

Qualified Privilege

[16] Thom J in the case of Dr Ralph Gonsalves v Edwardo Lynch and BDS Limited Claim No 406 of 2002 St Vincent and the Grenadines at paragraph 66 referred to the case of Adams v Ward (1917) AC 309 at 333 in which Lord Atkinson said

"*… a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty legal, social or moral to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.'*

[16] Rawlins JA (as he then was) in Bristol v St Rose in Civil Appeal 16 of 2005 Saint Lucia pages 9 and 10 further clarified the basic principles that relate to qualified privilege as follows;

"*The principle is that an occasion is privileged where the person who makes the impugned statements has an interest, or a social, moral or legal duty to make them to the person to whom they are made, while the person to whom they are made has a corresponding or reciprocal interest or duty to receive the communication. In determining whether the reciprocal duties or interests are present and ultimately, whether the defence is available, the court must have regard to the relevant circumstances of the communication."*

[17] In that case Rawlins JA made it clear that the case of Reynolds v Times Newspaper (1999) 4 AER 609 extended the principle relating to qualified privilege in which a newspaper or other news media publishes a libel to the world at large to include additional circumstances i.e. the seriousness of the allegations, the nature of the information, the extent to which the subject matter was a matter of public concern, the source of the information, the urgency of the matter, whether comment was sought from the claimant, whether the article contained the gist of the claimant's story, the tone, circumstances and timing of the publication and other factors, this list not being exhaustive. The House of Lords in that matter also cautioned that a court should have particular regard to the importance of freedom of expression and be slow to conclude that an article was not in the public interest especially when the information is in the field of political discussion.

[18] Thom J also referred to Loutchansky v The Times Newspapers Ltd & Ors [2001] 3 WLR 404 on the issue of qualified privilege and stated in detail as follows;

*" Similarly in Loutchansky v Times Newspapers Ltd and Others… in an action for libel where the defendants published articles accusing the claimant of serious international*

*criminal activities, the defendants claimed that the occasion of publication attracted qualified privilege since the allegations were of great public interest and concern the public were entitled to know of them. The Court of Appeal in dismissing the appeal by the defendants held that a publication of an untrue defamatory statement was only protected by the defence of qualified privilege where the defendant was under a duty, legal or moral, to publish it to a person or persons having a corresponding interest in receiving it; that that duty had to exist at the time of publication and the defendant must have had an adequate knowledge of the facts that gave rise to it, that in deciding whether an occasion of publication attracted qualified privilege, the Court was required to consider objectively in the light of the matter known to the publisher at the time of the publication all the circumstances surrounding the publication when it considered whether the publisher had a duty to publish the information in question on that particular occasion; that the public had no right to know untrue defamatory matter about which the publisher had made no sufficient inquiry before deciding on publication."*

[19] In the circumstances of this case, the claimant submits that the defendants cannot rely on the defence of qualified privilege as there is no duty to publish or broadcast charges of criminality to the public particularly if they are not investigated or subject to any of sufficient or authoritative inquiry and if the claimant's comments were not sought. He states that the guidelines set out in the cases referred to above have not been satisfied because the allegations are false, unsubstantiated, that no steps were taken by the defendants to verify, confirm or substantiate the comment in issue before it was broadcasted to the public and that they acted irresponsibly and/or maliciously.

[20] In response, the defendants state that the allegations were not serious as no one called into the programme to make any significant comments and that is why the entire tape of the broadcast is needed. I pause here to note that the issue of context is to be raised in the pleadings and that at no time have the defendants pleaded that the offending words were taken out of context. It would necessarily have been the responsibility of the defendants to show the context in which the words were used. See Barrow JA in Edwardo Lynch v Ralph Gonsalves Civil Appeal No;18 of 2005 at paragraph 16 quoting Gilson LJ in Bookbinder v Tebbit (1989) 1 WLR 640

*"The onus was on the Defendants to plead the relevant context and adduce evidence of that context. They have not done so in their pleadings, witness statements or documentary evidence. The court therefore cannot speculate as to what was said before or after the words complained of."*

The defendants make several references to requiring full transcripts of the tape of the relevant broadcast to examine the context of the words used. Apart from the obvious position that the defendants were in the best position to access these tapes, the comment having been broadcasted out of the second defendant's radio station, there has never been a request for particulars or further information of the claimant.

[21] The defendants also suggest that the correct approach is to allow the matter to proceed to trial and not to consider the application to strike out at this point. Counsel refers to LJ Neil in McDonald Corp v Steel (1953) 3 AER 615

*"I understand that it has become the practice in actions for defamation to consider at the outset of the trial whether some parts of the defence should be struck out on the basis that it has become apparent that some of the matters pleaded are not going to be supported by evidence. I can understand that in an appropriate case this is a sensible course which is likely to shorten the trial. On the other hand there may be cases where a Defendant pleads some matter that he believes to be true but which he may still be unable to prove by admissible evidence otherwise than by eliciting an answer in cross examination. Each case will have to be considered on its own facts.*

*I am satisfied that the correct approach is to consider whether or not the defendant's case in relation to a particular passage is incurably bad. The power to strike out is a draconian remedy which is only to be employed in the clear obvious cases. I have already set out the wide variety of the evidence, which a defendant may be able to rely upon at the trial. I anticipate therefore that it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved."*

[26] Applying the law then to this case, I would conclude that in order for a defence of qualified privilege to be available to the Defendants, they would have to establish that they acted in accordance with

the tenets of responsible journalism and had a duty to publish the words complained of and the public had an interest in receiving it in accordance with the guidelines in Reynolds. Necessarily, it would require the Defendants to put forward in their defence, pleadings which detail the facts on which they intend to rely to show that they acted in accordance with those tenets.

[27] I have no doubt that the ownership of state lands by the Prime Minister without a tender to the public would ordinarily be a matter of public interest but the fact that a subject is of public interest does not automatically make the publication of it in the public interest. In Reynolds, Lord Hobhouse stated "*On the other hand the publisher must show that the publication was in the public interest and he does not do this by merely showing that the subject matter was of public interest*" Additionally the fact that the subject matter related to political discussion and criticism does not mean that the publication is privileged. The duty/interest test has to be satisfied.

[28] The serious allegation that "*the Prime Minister, his wife, the chairman of National Properties, Hadley, you know they are finding themselves owning the state lands and we have not seen anything coming to the public in the form of a tender for anybody to have a choice*" was presented as a fact and there is no indication in the defence that any steps were taken to verify this information or that any comment was sought from the claimant. Further, there is no indication that even the very obvious step to verify ownership of land by way of search at the Land Registry was undertaken. There is no gist of the claimant's side of the story and the tone of the article is not investigative and does not raise questions as to if and how the claimant came to own state lands as alleged. There is no suggestion anywhere that there was any urgency in informing the public of this matter.

[29] In the premises, having examined the pleadings of the defendants, I conclude that they have no prospect of establishing that they acted in accordance with the tenets of responsible journalism or that they had a duty to broadcast to the public and that the public had an interest in receiving the broadcast in issue.

[30] In conclusion, I find that the defendants have no prospect of succeeding on the defences pleaded of fair comment and qualified privilege and that these defences are incurably bad and as such the defences are struck out with costs to the claimant to be assessed upon application.

CHERYL MATHURIN

MASTER