IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

CLAIM NO: SLUHCV2012/0776

BETWEEN:

DR. ERNEST HILAIRE

Claimant

and

DELDRIDGE FLAVIUS

Defendant

Appearances:
Mr. Thaddeus Antoine of Counsel for the Claimant
Mr. Horace Fraser of Counsel for the Defendant

2013: December 2nd
2015: January 19th

DECISION

[1] **TAYLOR-ALEXANDER. M**; The Claimant is the former Chief Executive Officer (CEO) of the West Indies Cricket Board (WICB) and is currently the High Commissioner for Saint Lucia to the United Kingdom. His pleadings aver that he is a well known figure throughout Saint Lucia, the Caribbean and the world; given his extensive work as an international management consultant and political consultant to several companies and governments; as attaché to the Prime Minister of Saint Lucia; as a former Permanent Secretary of the Ministry of Sports; and the face of West Indies cricket throughout the world. These facts were not admitted by the Defendant. The Defendant is averred to be an insurance agent, a cricket player

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and cricket administrator well known to the sporting community of Saint Lucia particularly cricketers. It is averred that he is a frequent caller to the "Morning Rumble" a sports radio call in programme which airs on RCI. His voice is recognizable to the frequent listeners of the programme.

[2] It is alleged that the Defendant was a caller into the sports radio programme, on the 24th of July 2012, when it is alleged, he uttered words referring to and which were understood to refer to the Claimant, to the effect that as CEO of the WICB, although accomplishing a few good things, he has done a lot more damage to the board of the WICB and to the board's image. It is alleged that he uttered of the Claimant, that it is unfortunate this is the same person chosen to be sent to London as a Diplomat, he showing that he knows nothing about diplomacy. It is alleged that he further averred that should the Claimant disagree with you his response is irrational. It becomes a public thing and he might assault you verbally, physically or whatever and that during his tenure at the National Youth Council (NYC), he assaulted somebody and in fact he assaulted the caller himself.. These words the Claimant avers were defamatory of him.

[3] This decision is pursuant two applications. One brought by the Defendant filed on the 9th January 2013, pursuant to CPR 2000 part 26.3 (1) (b) and (d), seeking to strike out the claim filed on the basis that it is prolix and does not disclose any ground for bringing the claim, alternatively that paragraphs 6, 7,8,11,12,13,15 and 19 are struck out as being oppressive irrelevant and lacking in evidential value. The second application filed on the 18th January 2013, is by the Claimant who advances largely similar grounds and is seeking to strike out the defence as disclosing no reasonable ground for defending the claim and as being prolix.

The pleadings

[4] According to the Claimant's pleadings, the words uttered meant, and were understood to mean that the Claimant is an unfit person to hold office as CEO of the WICB, or any organization; that he is an unfit person to be an Ambassador to

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Saint Lucia, or anywhere; that he assaults and has assaulted persons he disagrees with and has the propensity to engage in assaults.

[5] The Claimant pleads, that not only were the words defamatory, but were malicious and were calculated to disparage the Claimant and to portray him as incompetent , unfit to hold high position, lacking credibility and respect and not to be trusted.

[6] The defence denies the utterance of the words, or that the Defendant was the person who was the caller into the programme and has put the Claimant to proof of these facts. Despite pleading that he did not utter the words complained of, the defence nevertheless contends that the words spoken were true or substantially true and were not actuated by express malice. The words were fair comment, on a matter of public interest.

The Applications

[7] It is the Defendant's application that paragraphs 7, 8, 11 12, 13 15 and 19 are argumentative, oppressive, irrelevant, are hearsay and not matters of evidence. These paragraphs obstruct the just disposal of the claim and should be struck out. In particular the Claimant has offended part 69.2 (c) of CPR 2000 by pleading only commentary, and has failed to plead evidence of malice, rendering the claim unsustainable, and an abuse of the court's process.

Requirements for pleading defamation

[8] The Claimant's obligations in relation to the pleadings for defamation are articulated in Part 69.2 of the CPR 2000, which provides:—

> "The statement of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 —
>
> (a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified;

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(b) if the Claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning —give particulars of the facts and matters relied on in support of such sense; and

(c) if the Claimant alleges that the Defendant maliciously published the words or matters — give particulars in support of the allegation."

Additionally Part 8.7 (1) provides that a Claimant must include in the claim form or in the statement of claim a statement of all the facts on which the Claimant relies and The statement must be as short as practicable.

A Prolix Claim?

[9] The Defendant has specifically challenged the mentioned paragraphs as being prolix and has invited the court to exercise its obligation under Part 26.3 to strike out these offending paragraphs as obstructing the just disposal of the claim.

[10] Claims are prolix when they contain long recitations that render the scope of the claim undecipherable. A claim prolix in verbiage, renders it liable to be struck out under CPR 26.3.

[11] During the hearing of the application I requested that the Defendant take me through the offending paragraphs to which his application referred, so as to better assess the substance of his averments. I had earlier ruled that paragraphs 7 and 8 as worded was more prejudicial than probative as it offered nothing by way of identification of the caller, but attempted by reference to unrelated circumstances to portray the Defendant as irresponsible with his words generally. I disagreed with the Defendant's submissions with respect to the context of paragraph 6 which pleads, relevantly, how the Defendant was identified and to whom he was identified. In so far as the Defendant alleges that the Claimant was required to plead evidence of the "frequent listeners" to the programme to whom he referred, this is an allegation that certainly requires proof

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in order to substantiate a case against the Defendant. But an application to strike this paragraph at this stage is perhaps premature as the Claimant's case is still undeveloped and we have not had the benefit of discovery, witness statements and the taking of evidence.

[12] As regards paragraph 11 of the claim, I am in agreement that in part, in particular paragraph 11.4 is wordy and ought in more precise language to indicate why the statements of the caller were a direct reference to the Claimant.

[13] Similarly paragraph 12 in so far as it is a paragraph pleaded to infer the meaning of the words uttered, makes unnecessary references to the Criminal Code, which goes beyond what would be in the consideration of the ordinary listener. The reference in paragraph 12 to paragraph 10 does not offer an explanation of the natural and ordinary meaning of the words used and is misplaced. The reference there under to paragraph 10(1) and to the Criminal Code and likely sentence is clearly an exaggeration of the meaning imputed by an ordinary listener. In any event this, if relevant, it is a matter of submissions at trial to explain the legal import of the allegation and is not a matter of pleading.

[14] I take no issue with paragraph 13 which, in my view is pleaded to establish malice on the part of the Defendant. Similarly I find the Defendant's objection to paragraph 15 and 19, to be unsustainable. These paragraphs are not prolix, irrelevant or hearsay.

[15] There is no basis to strike out the entirety of the case. I am satisfied that the claim pleads sufficient particulars of the publication to enable the Defendant to determine the basis upon which liability renders. The pleadings are sufficient so as to enable the Defendant to appreciate where, the time when and the person to whom the words alleged to be defamatory were spoken.

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That the words were uttered on a radio programme is sufficient to identify to whom the words were spoken, and in so far as the Claimant alleges that the Defendant was identified by frequent callers to the program, the Claimant has tied his case to the Defendant.

[16] I am satisfied that the Claimant has complied with its duty under Part 8 to set out its case and as such it would be injudicious to strike out the entire claim. Support for that view may be found in **Biguzzi v Rank Leisure plc** [1999] 4 All ER 934. In that case, Lord Woolf MR, in explaining the sanction of striking out of a statement of case in the regime of the UK CPR said:—

> "a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

[17] A more appropriate exercise of my discretion under the overriding objective and under part 26.3 would be to allow an amendment of the claim, to remove the offending references alluded to earlier and generally tidying up the claim.

Pleading Malice

[18] Reference to malice in defamation cases means spite or ill-will. It is usually raised to defeat a defence of publication on a privileged occasion, where a Defendant claims that the statement he made was borne out by a legal, moral or social duty to speak. A defence of fair comment is analogous to a defence of qualified privilege, in that a defence of fair comment will be unsuccessful if it is proven to be done dishonestly and actuated by malice. A Claimant who pleads malice therefore submits that there is an actionable statement with the required intent.

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[19] The Defendant has challenged the Claimant's pleadings of malice submitting that the particulars do not justify the assertion that the statements made were maliciously, and the Reply is bereft of any evidence of malice. In the absence of proper pleadings and particulars he submits, the court is obliged to accept the defence of fair comment in defeat of the claim.

[20] Fair comment is a legitimate defence to a claim for defamation recognizing that there are matters with which the public is legitimately concerned and on such matters it is desirable that all should be able to comment freely. The authors of **Gatley on Libel and Slander 10th Ed** provide that commentary must be done honestly and without malice.

[21] Although it is usually raised to challenge the averments of a Defendant, Part 64 provides that a Claimant who wishes to plead malice must do so in its claim. Practically, it is good sense to specifically rebut allegations of fair comment, but the court is not prevented from consideration of the allegations of malice merely because it was pleaded in the claim and not in the reply. The English position referred to by the Defendant can be distinguished from this case as there is no similar position in the UK CPR, that particulars of malice are to be pleaded in the claim when malice is alleged. Certainly, my view is that where the defence of fair comment is discounted, the only logical inference that a court can draw is that the comments were actuated by malice. The court is entitled to make that assumption whether it was pleaded in the Reply or not. I subscribe to the view of the authors of **Gatley on Libel and Slander** who state that if malice is published without lawful excuse the law can conclusively presume that the publisher is actuated by malice. A trial judge is able to consider the pleadings in the round to determine the case of each party. As regards the Reply, there is in any event an implied surrejoinder of issue. I therefore find that the allegation of malice is not defeated by the failure of the Claimant to counter the reference to fair comment in the defence with a reference to malice in the Reply.

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[22] The more pertinent question for my consideration is whether the Claimant has relevantly particularized facts with regard to the issue of malice so as to survive a challenge of summary dismissal of the issue.

[23] The Claimant specifically averred that the Defendant made statements about the Claimant which he knew to be is false; or which was done with reckless disregard for whether it is false or true. Lord Justice Clark in **Hayford v Forrester-Patton** 1927 SC 740, a case referred to me by the Defendant stated that an averment that the Defendant made the statement with knowledge that it was untrue, is always a good averment of malice**.** The occasion when the statements were made was on a talk radio programme which the Claimant was not part of and was not the subject of. The programme was a sports show but the reference by the caller was to his fitness to serve as a diplomat for St. Lucia. The caller also made reference to an acrimonious interaction between him and the Claimant which he said resulted in him being assaulted. Although there is no particular pleading of spite or ill will, I do not find the pleadings of malice objectionable in the circumstances of this case. I find that in addition to the pleadings and particulars of the Claimant, evidence of malice can be inferred by the court, given the nature of the statement made, the circumstances under which it was made, and an assessment by the court of whether the statements made were in fact commentary and were in fact fair. This would rebut any presumption of the Defendant acting in good faith.

[24] I therefore find the application to dismiss the pleadings of the Claimant on the basis that its failure to properly particularize malice has made the claim unsustainable has not found fertile ground with and is dismissed.

The Claimant's Application

[25] The Claimant's alleged that in so far as the Defendant pleads that the statements made were true does not amount to a defence of the claim, further that the defence is misleading and based purely on matters of hearsay. In so far as the defence alleges fair comment, it is inapplicable and the words complained of went

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beyond the threshold and delved into the realm of slander actuated by the malice of the Defendant. The Claimant avers that the defence is flawed, inaccurate and ripe with hearsay and unsubstantiated claims or remarks. The Claimant submits that paragraphs 8, 9, 10(ii), 10(iii), 10(iv), and 10 (v) all constitute hearsay and in the absence of corroborative evidence by the parties claimed to have actually made the statements.

A Prolix Defence?

[26] The offending paragraphs referred to, although verbose, refer to the defence of fair comment and on one hand purport to provide a basis of fact for the comments made, to show that they were consonant with the facts relied on and on the other to assert that the comments were on a matter of public interest.

[27] I have considered the particular paragraphs referenced. In particular, as regards paragraph 8, I am of the view that paragraph 8(i) should be struck out in its entirety as it does not represent a statement of provable fact, but is an expression of the Claimants opinion. This in my view compounds any finding of defamation. Where I can ascertain at this stage that offending paragraphs are expressed as comments on facts or inferences of fact, I have ordered them struck, or otherwise amended. At paragraph 8(iv) the Defendant has clearly failed to distinguish between fact and his own commentary. The offending paragraph must be amended to remove the misstatements of fact and the Defendant's comments of what transpired.

[28] As regards paragraph 9,(i) and (ii) I am of the opinion that the statements are reflected as mixed statements of fact and of comment on fact. However this is a matter ordinarily dealt with by the trial judge following the proof by the Defendant of the factual basis of the statements. Paragraphs 9(iii) and 9(iv) can only be classed as commentary and falls foul of the principle that the libel must be based on provable fact. These paragraphs are to be struck out in their entirety.

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[29] As regards paragraph 10 these statements are all reflected as fact, which statements are usually subject to proof at trial.

The Defence of fair comment

[30] In order to succeed on a defence of fair comment, a Defendant is required to show that: –

(i) the comment is on a matter of public interest;

(ii) the comment, though it can consist of or include the inferences of fact, must be recognized as comment, distinct from an imputation of fact, to this end, it is generally necessary that the words complained of should explicitly indicate, at least in general terms, the factual basis for the comment;

(iii) the comment must be based on facts which are true or protected by privilege; and

(iv) the comment must be one which an honest person could have made on the proved facts.

See **Spiller and Another v Joseph and Others** UKSC [2010] 53

[31] The allegation of truth is confined to the facts averred. The averments in the defence detail numerous news and other statements made in the realm of the cricketing world over a period of time when the Claimant was the CEO of the WICB on which he alleges his comments were based. Whether what has been supplied as fact by the Defendant, is a true representation of what was stated will be a matter of proof by the Defendant, at the trial of the issues.

[32] The question is whether the issue of fair comment has passed the litmus test of Part 26.3 so as to enable it to proceed to trial. Has it disclosed a defence of fair comment? It is to be noted that nowhere in the comments allegedly made by the Defendant was there any reference to the facts now relied on by the Defendant. His reference to the facts supporting his statement in his defence appears to be no more than a hodgepodge of events recalled from his memory databank of events

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that support the view he holds of the Claimant. Not one of these factual events was referred to at the time the statements were made. Of importance to this analysis of the defence's case is the very useful dicta of Lord Porter in **Kemsley v Ford Lord** referred to and set out in detail by her ladyship Justice Louise Blenman in **Abraham Mansoor v Glenville Radio et al** ANUHCV2004/0408. Lord Porter clarified the limitations of the defence of fair comment as operating in two circumstances (1) in cases where the facts are fully set out in the alleged defamatory publication with comments and (2) in cases where there is a sufficient substratum of facts stated or indicated. I too feel it necessary to set out the reference in full:—

> " The question therefore in all cases is whether there is sufficient substratum of fact stated or indicated in the words which are the subject matter of the action, and I find my view well expressed in the remarks contained in **ODGERS ON LIBEL AND SLANDER** (5th ed 1911) at p203: "Sometimes, however, it is difficult to distinguish an allegation of fact, from an expression of an opinion. It often depends on what is stated in the rest of the article. If the Defendant accurately states what some public man has really done, and then asserts that "such conduct is disgraceful" this is merely the expression of his opinion, his comments on the plaintiff's conduct. So if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case the Defendant enables his readers to judge for themselves, how far his opinion is well founded. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what the conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a Defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states that bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as an inference from those facts, such inference will as a rule, be deemed a comment. But even in this case the writer [speaker] must be careful to state the inference as an inference and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment and he may be driven to justify it as an allegation of fact."

[33] I am satisfied that the Dicta of Lord Porter continues to be an accurate exposition of the law. In this case, and in so far as the Defendant seeks to rely on the defence of fair comments, I am satisfied that by his failure at the time of the comments to have correctly set out the facts on which his comments were based

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has left him today without a defence of fair comment. Such was the conclusion of her ladyship Louise Blenman in **Abraham Mansoor** she said thus, referring to the facts on which comments were purportedly made:—

> "but where, as here, they are contained only in particulars and are not published to the world at large, they are not the subject matter of the comment but facts *alleged to justify that comment"*

Her reasoning is flawless. I can add nothing further. Reference to the defence of fair comment is to be struck from the defence, as based on the pleadings of the parties, the defence of fair comment is unavailable to the Defendant, he having made no reference at the time of publication, to the facts which he has now particularised and seeks to rely on. I therefore order struck from the defence, paragraphs 9-13. An alternate order of amendment is incapable of assisting the Defendant in these circumstances.

Conclusion

[34] As regards the claim, I order

(i) Paragraphs 7 and 8 to be struck out for reason provided earlier.

(ii) Paragraphs 11.4 and paragraph 12 to be amended for reasons earlier provided.

[35] As regards the defence, I order

(i) Paragraph 8(i) should be struck out in its entirety for reasons provided in this judgment.

(ii) Paragraph 8(iv) is to be amended to remove the misstatements of fact and the Defendant's comments of what transpired.

[36] In the circumstances of my decision it is imperative that I issue directions for the continuation of the proceedings. Where references in the reply are to parts of the defence struck out, those parts are to be disregard in their entirety.

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[37] I further order consequential amendments if any to both the claim and the defence, to be filed and served within 14 days hereof.

[38] Further case management is now scheduled for the 3rd day of March, 2015.

[39] As regards costs I order the sum of $1000, to be paid in the proportion of 70% to the Claimant and 30% to the Defendant. All to be settled ahead of the next case management conference.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER

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