THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2015/0003

BETWEEN:

DELDRIDGE FLAVIUS

Appellant

and

DR. ERNEST HILAIRE

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On the written submissions:

Mr. Horace Fraser for the Appellant
Mr. Thaddeus M. Antoine for the Respondent

2015: July 22.

Interlocutory appeal – Application to strike out claim or statement of case pursuant to rule 26.3 of Civil Procedure Rules 2000 – Defamation claim – Parts of appellant's defence in court below setting out defence of fair comment struck out by learned master – Whether learned master erred in so doing – Whether learned master ought to have struck out respondent's claim because of failure to plead and particularise express malice after appellant had raised it as defence

The respondent brought a defamation claim against the appellant in the court below. Two strike out applications were subsequently filed by the parties in the proceedings – one by the appellant to strike out the respondent's claim, and the other by the respondent to strike out the appellant's defence. Both strike out applications had been filed pursuant to rule 26.3 of the Civil Procedure Rules 2000. The learned master did not strike out either of the parties' statements of case in their entirety but rather, dealt with the applications in the following way: in respect of the respondent's claim, certain paragraphs were struck out and others amended; and in respect of the appellant's defence, a few paragraphs were struck out, including those which set out his defence of fair comment. Further case management

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directions were then given by the master for the trial of the claim. The appellant, dissatisfied with the learned master's decision, appealed to this Court.

On appeal, the appellant argued that the learned master ought to have struck out the respondent's claim on the basis of his failure to plead and particularise express malice 'in the face of' the appellant's fair comment defence. Additionally, the appellant argued that the learned master erred in principle in not permitting him to rely on the defence of fair comment at trial.

Held: dismissing the appeal and awarding costs to the respondent fixed in the sum of $2,000.00, that:

1. 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 inferences of fact, must be recognised 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. In the present case, the averments in the appellant's defence, which grounded his defence of fair comment, made no reference to the facts on which the comments were said to be based. The appellant's defence fell short of satisfying the criteria set out above. The learned master rightly struck out the appellant's defence of fair comment and the offending paragraphs in respect of it. The defence, quite clearly, was simply not made out.

   Spiller and Another v Joseph and Others [2010] UKSC 53 applied.

2. The statement of claim in a defamation claim must, if the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation. The Civil Procedure Rules 2000 does not require that the claimant wait until a defence of fair comment is made to then plead malice by way of reply, although if a claimant does aver malice in the statement of claim, once the defence of fair comment is raised in the defence, it would be proper for a claimant who wishes to defeat the defence to aver malice by way of reply. With regard to the sufficiency of the particulars of malice pleaded by the respondent in the present case, it is not the function of the court at the stage of a strike out application to determine the strength of the averment of malice contained in the statement of case. In any event, in the circumstances, it does not matter that the claimant may not have sufficiently particularised his averment of malice, as the appellant's defence of fair comment is no longer standing.

   Rule 69.2(c) of the **Civil Procedure Rules 2000** applied.

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JUDGMENT

[1] **PEREIRA, CJ:** This interlocutory appeal arises from the decision of the master made on 19th January 2015 in respect of two strike out applications – one filed by the respondent herein ("Dr. Hilaire") to strike out the defence of the appellant ("Mr. Flavius"), and the other filed by the appellant herein to strike out the respondent's defamation claim. Both applications sought to invoke the court's powers to strike out a claim or statement of case under rule 26.3 of the **Civil Procedure Rules 2000** for disclosing no reasonable ground for either defending the claim or for bringing it and with each asserting prolixity against the other. The learned master did not strike out in their entirety either of the statements of case. Instead, she ordered in respect of Dr. Hilaire's claim, that paragraphs 7 and 8 of his statement of case be struck out and that paragraphs 11.4 and 12 be amended. In respect of Mr. Flavius' defence, she ordered that paragraphs 8(i), 9(iii) and 9(iv) be struck out in their entirety, and that paragraph 8(iv) be amended 'to remove the misstatements of fact and the Defendant's comments of what transpired'. She also struck out Mr. Flavius' defence of fair comment, specifically, paragraphs 9-13 of Mr. Flavius' statement of case. She then gave further case management directions for the trial of the claim. Mr. Flavius, being dissatisfied with the master's decision, has, with leave of the court, appealed.

The appeal

[2] Mr. Flavius, in essence, complains to this court on two grounds which, shortly put, are that the learned master:

(a) ought to have struck out Dr. Hilaire's claim because of the failure to plead and particularise express malice 'in the face of the fair comment defence' of Mr. Flavius; and

(b) erred in principle in not permitting Mr. Flavius to rely on the defence of fair comment at trial.

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Approach to the issues

[3] I propose to deal firstly with the master's withdrawal of the defence of fair comment as this will impact on the treatment of the first issue relating to a pleading of express malice. A useful starting point however is with a consideration of the master's discretion under the case management powers contained in CPR Part 26. Rule 26.3 permits the striking out of a statement of case (or part thereof) where it appears it discloses no reasonable ground for bringing or defending a claim. It may now be taken as trite law that the power to strike out in the context of the plenitude of case management powers contained under Part 26 may only be ordinarily utilised as a last resort given its draconian nature.[1] It is normally reserved for the plainest of cases.

The defence of fair comment as pleaded

[4] Reference must be made to Mr. Flavius' averments in his defence. At paragraph 7 he denies that he spoke the words complained of or that he was the caller to the live call-in radio programme called "The Morning Rumble" and puts Dr. Hilaire to strict proof of those assertions. At paragraph 8 he again denies that he spoke the words complained of but then, strangely, contends that the words are true or substantially true and not actuated by express malice for the various reasons set out in the sub-paragraphs thereunder. Then at paragraph 9 he contends that the statements complained of are fair comment on a matter of public interest based on the reasons set out in the sub-paragraphs in paragraph 8 as well as a list of other reasons set out as sub-paragraphs in paragraph 9. At paragraph 10, and referring to paragraph 9(2) of the statement of claim he again asserts that the words therein complained of are also fair comment by reason of the matters set out in a further five sub-paragraphs in paragraph 10. In my view, the averments are plainly inconsistent having regard to the nature of the claim as, on the one hand, Mr. Flavius is saying categorically that he did not utter the words, but on the other

[1] See: Real Time Systems Limited v Renraw Investments Limited [2014] UKPC 6.

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hand, asserts that the words are either true or are fair comment. This to my mind begs the question: if the words were not uttered by him, then on what basis would he be asserting a defence of truth or fair comment?

The master's reasoning

[5] The learned master, in her carefully written decision, addressed the defence of fair comment commencing at paragraph 30 of her decision. After setting out the elements required for a defence of fair comment, at paragraph 31, she opined:

> "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."

[6] She continued at paragraph 32 as follows:

> "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 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 [Foot and Others]** referred to and set out in detail by her [L]adyship Justice Louise Blenman in **Abraham Mansoor [et al] v Glenville Radio et al** ANUHCV2004/0408."

[7] After setting out the relevant passage by Lord Porter in **Kemsley**,[2] she concluded at paragraph 33 in this way:

> "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 [sic], 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 has left him today without a defence of fair

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[2] Kemsley v Foot and Others [1952] AC 345.

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comment. Such was the conclusion of her [L]adyship 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*'"

Review of the defence

[8] Counsel for Dr. Hilaire submits that the alleged defamatory published words merely had imputations of fact and no commentary and that the appellant's pleadings did not identify with sufficient precision the statements, facts and the associated fair comment. Counsel states that as a result of this the pleadings are incurably bad. I agree. Having reviewed the averments made in the defence on which Mr. Flavius relies as grounding his defence of fair comment, I have concluded that the learned master's assessment is entirely correct. There is nowhere in the averments in the defence any reference to the facts on which the comments are said to be based. I can do no better than recite the elements for establishing fair comment as set out in paragraph 30 of her decision, which elements are culled from a number of judicial authorities on the subject:

> "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"

[9] Mr. Flavius' pleaded case has, in my view, fallen woefully short of satisfying these necessary elements. The criticisms made by the learned master at paragraphs 32 and 33 of her decision are well justified. She was right to strike out the defence of

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fair comment (and the offending paragraphs in respect of it) which quite clearly was simply not made out. There is in my view no merit in this ground of appeal.

A plea of express malice

[10] A plea of express malice, as recognised by counsel for Mr. Flavius, would be relevant to a defence of fair comment. As the learned master rightly states at paragraph 18 of her decision, a defence of fair comment will be unsuccessful where it is proven to be done dishonestly and actuated by malice. In as much as the defence of fair comment is not at all viable for the reasons given, then it matters not that the claimant may not have sufficiently particularised his averment of malice as the defence of fair comment is no longer standing. In any event, counsel for Mr. Flavius appears to misconceive CPR 69.2 and 69.3 and, as submitted by counsel for Dr. Hilaire, seeks to pray in aid the English CPR, the corresponding provision of which is different to our CPR. CPR 69.2(c) states, in effect, that the statement of claim in a defamation claim must, if the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation. In short, the claimant does not wait until a defence of fair comment is made to then plead malice by way of reply. Our CPR does not so require. However, it would no doubt behoove a claimant who did aver malice in the statement of claim, to aver malice by way of reply if the defendant raises the defence of fair comment in the defence, if the claimant wishes to defeat the defence. As to the sufficiency of the particulars of malice pleaded by the respondent, it is not the function of the court at the stage of a strike application to determine the strength of the averment of malice contained in the statement of case. As the learned master opined at paragraph 21, 'A trial judge is able to consider the pleadings in the round to determine the case of each party.' Further, the learned master, in reliance on the dictum of Lord Justice-Clerk (Alness) in **Hayford v Forrester-Paton**,[3] concluded as follows at paragraph 23:

> "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

[3] 1927 SC 740.

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> 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."

[11] I can find no fault with this reasoning. It was perfectly open to her to so conclude in the peculiar circumstances of this case. Quite apart from what I have set out above in relation to the necessity or insufficiency of such a plea, I agree with the learned master and would dismiss this ground of appeal. If the averment is not sufficiently made out then in the face of a defence of fair comment where such a defence exists, it may very well be that at trial the claimant may be unable to defeat the defence. But that would not afford a good reason for striking out the claim at this stage.

Conclusion

[12] For the reasons given, I would dismiss this appeal with costs to the respondent fixed in the sum of $2,000.00.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal

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