

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2023/0336

BETWEEN:

G.A. DWYER ASTAPHAN

Claimant

and

GASTON BROWNE

Defendant

Appearances:

Mr. Kendrickson Kentish, Counsel for the Claimant
Mr. Jarid Hewlett, Counsel for the Defendant

2024: May 13th, 21st.

DECISION

- [1] **MICHEL, M.:** The Claimant filed this action against the Defendant seeking damages for defamation including exemplary damages, and an injunction restraining the Defendant whether by himself, his servants, agents or otherwise from publishing or causing to be published certain or similar words of the Claimant as set out in his statement of claim. The Defendant filed a defence to the Claimant's claim. The Claimant now seeks an order pursuant to rule 26.3(1)(b) of the **Civil Procedure Rules (Revised Edition) 2023** ("CPR") striking out paragraphs 3(b), 3(c) and 4 of the Defendant's defence.
- [2] For the reasons set out below, the Claimant's application to strike is refused.

Strike Out Principles

- [3] The principles guiding the exercise of the Court's discretion to strike out are well settled and have been stated and re-stated in several decisions of the Court of Appeal and need not be discussed in any detail. It is sufficient to state that striking out is a drastic step reserved for the clearest and most obvious cases. On hearing an application to strike pursuant to CPR 26.3(1)(b), the court should consider the pleadings alone and assume that the facts alleged are true, unless

manifestly incapable of proof. As stated by Farara JA [Ag.] in **Ian Hope-Ross v Martin Dinning et al**,¹ in deciding whether to strike: 'the court must be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the case in the sense that it has no real prospect of succeeding at trial.'

- [4] In **Baldwin Spencer v The Attorney-General of Antigua and Barbuda et al**,² Byron CJ [Ag.] explained that in considering an application to strike, the operative issue is whether there is 'even a scintilla of a cause of action' and that if the pleadings disclose any viable issue for trial then the matter should proceed to trial.

Background and Pleadings

- [5] The Claimant is an attorney-at-law. He previously held public office in St. Kitts and Nevis for several years. The Defendant is and was at the material time the Prime Minister of Antigua and Barbuda. The Claimant's claim arises from words spoken about the Claimant by the Defendant whilst hosting a radio station programme which was broadcast via the radio and the internet. In his defence to the Claimant's claim, the Defendant admitted that he spoke the words complained of by the Defendant and that he called the Claimant by name.
- [6] At paragraph 3(b) of his Defence, in response to the Claimant's particulars of defamation, the Defendant denied that the words complained of were capable of the meaning attributed to them by the Claimant and pleaded certain matters he intended to rely on in support of his defence. He further pleaded that he was entitled to 'express his opinion on the root cause of the Claimant's hostility and malicious attacks towards him'.
- [7] In response to the Claimant's assertion that the statements made by the Defendant were false, actuated by malice and without reasonable justification, the Defendant at paragraph 3(c) of his defence denied these assertions and pleaded that the Claimant on more than one occasion attacked him, as well as members of his family on regional media. He pleaded further that his statements were clearly intended as statements of opinion and fair comment on a matter of public interest.

¹ AXAHCVP2020/0005 consolidated with Christopher Liss et al v Martin Dinning et al AXAHCVP2020/0006 and Satay Limited et al v Martin Dinning et al AXAHCVP2020/0007 (delivered 30th April 2021, unreported).

² Antigua and Barbuda Civil Appeal No. 20A of 1997 (delivered 8th April 1998, unreported) at p. 8.

- [8] At paragraph 6 of his statement of Claim, the Claimant averred that in consequence of the alleged defamatory words spoken by the Defendant, he had been gravely injured in his character, credit and reputation and has been brought into public scandal, odium and contempt and has suffered distress and embarrassment. At paragraph 4 of his defence, the Defendant denied these assertions and averred that on more than one occasion, the Claimant has made statements and insinuations that are defamatory of him and in response, he simply stated his opinion as to why 'the Claimant, who does not reside in Antigua and Barbuda, has frequently berated him and his family.'

The Claimant's Strike Out Application

- [9] The crux of the Claimant's application to strike out parts of the Defendant's defence is his contention that the matters pleaded by the Defendant at paragraphs 3(b), 3(c) and 4 of his defence raise the privilege of right to reply; however, the Claimant contends, the Defendant has failed to identify and/or satisfy the conditions for invoking the privilege of the right to reply in defamation cases. Thus, the Claimant contends that the Defendant has disclosed no reasonable grounds for defending the claim on this basis.

The Claimant's Submissions

- [10] In his written and oral submissions, learned counsel for the Claimant outlined the law on qualified privilege as it relates to the privilege of the right to reply to an attack. He submitted that in order to invoke privilege, the Defendant must establish the following:-

- (1) there was an attack;
- (2) the reply was objectively commensurate with, relevant to, and sufficiently connected with the attack and was genuine for the purposes of vindication; and;
- (3) significant time had not elapsed between the attack and the reply.

- [11] Learned Counsel for the Defendant also canvassed the case law on the defence. In conclusion, learned Counsel for the Claimant submitted that in the case at bar, the Defendant has not condescended to plead any particulars of the attack which prompted him or gave him a legitimate or commensurate interest in replying in the manner in which he did. He submitted that, put simply, there is no indication of a previous attack and no basis upon which a Court could determine the relationship between the alleged attack and the impugned reply. He submits therefore that this defence is incurably bad and should be struck out.

The Defendant's Submissions

- [12] Learned Counsel for the Defendant does not challenge the Claimant's interpretation of the ingredients of the defence of qualified privilege relating to right of reply to attack and the case law on the defence. Rather, learned Counsel for the Defendant argues that the Defendant is not relying on such a defence. He submits that at no point in the paragraphs of the defence which are the subject of the Claimant's strike out application, does the Defendant raise privilege of the right to reply. He submits that instead, the Defendant has repeatedly stated that his comments were opinion, and has gone on to provide the factual basis and context for the expression of that opinion, as he is required to do by CPR in order to not run afoul of the rule against bare denials.
- [13] Learned Counsel for the Defendant submitted that it is inconceivable now, after using the specific word 'opinion' and 'fair comment' several times in his defence, that the Claimant can submit to the Court that the Defendant is raising the privilege of the right to reply, which, learned Counsel for the Defendant contends are not found anywhere in the Defendant's defence.

Discussion

- [14] There is no dispute between the Parties on the law of qualified privilege as it relates to the right to reply to attack and the submissions of learned Counsel for the Claimant are accepted in this regard. Where the Parties differ is that whilst the Claimant is asserting that the facts pleaded by the Defendant at paragraphs 3(b), 3(c) and 4 of his defence raise the defence of reply to attack, but the pleading is incurably bad, the Defendant contends that he is not relying on the defence of reply to attack but has pleaded the facts to support his defence of fair comment.
- [15] It would be useful to set out some of the provisions of CPR as it relates to a defendant's duty to set out his case generally and specifically to a defamation claim and then consider the defence of fair comment, which is a complete defence to a defamation claim where it is found to apply.
- [16] CPR 10.5 provides:
- “(1) The defence must set out all the facts on which the defendant relies to dispute the claim.
- (2) Such statement must be as short as practicable.

(3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –

- (a) are admitted;
- (b) are denied;
- (c) are neither admitted nor denied, because the defendant does not know whether they are true; and
- (d) the defendant wishes the claimant to prove.

(4) If the defendant denies any of the allegations in the claim form or statement of claim –

- (a) the defendant must state the reasons for doing so; and
- (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(5) If, in relation to any allegation in the claim form or statement of claim, the defendant does –

- (a) admit it; or
- (b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.

[17] CPR 58.3 provides:

“58.3 A defendant (or in the case of a counterclaim, the claimant) who alleges that –

- (a) in so far as the words complained of consist of statements of facts, they are true in substance and in fact; and
- (b) in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest; or
- (c) pleads to like effect; must give particulars stating –

- (i) which of the words complained of are alleged to be statements of fact; and
- (ii) the facts and matters relied on in support of the allegation that the words are true.”

Fair Comment

- [18] The defence of fair comment, or what is now referred to in the United Kingdom as ‘honest comment’, has been codified in the **Defamation Act, 2015**³ (“the **Defamation Act**”). Section 21 and 22 of the **Defamation Act** provide:

“21. Defence of fair comment; truth of assertions

(1) In an action for defamation in respect of words, including or consisting of expression of opinion, a defence of fair comment shall not fail only because the defendant has failed to prove the truth of every relevant assertion of fact relied on by him as a foundation for the opinion, provided that such of the assertions as are proved to be true are relevant and afford a foundation for the opinion.

(2) Nothing in this section affects the liability of the defendant in an action for defamation for the acts of his employees.

22. Publication on a matter of interest

(1) It is a defence to an action for defamation for the defendant to show that—

(a) The statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) The defendant reasonably believed that publishing the statement complained of was in the public interest.”

- [19] In **Vere Bird III v Gaston Browne**,⁴ a post **Defamation Act** decision, Byer J explained the defence of fair comment as follows:

“For the Defendant to avail himself of this defence he must however show that the words are comments and not statements of facts. They must also show that there is a basis, which is some allusion, to the facts underpinning the comment, that it is based on facts that are true or protected by privilege and the comment is one that is objectively fair in that an honest and fair-minded person could hold that view. “The defence is not in- applicable because the comment was prejudiced or exaggerated or “unfair” in the ordinary sense of the word”²⁹ (Abraham Mansoor and Ors v Grenville Radio Ltd ANUHCv 2004/0408 per Blenman J (as she then was) at paragraph 102) and finally the comment must be on something that is of public interest. That is, “one which has been expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern.”³⁰ (Abraham Mansoor Ibid paragraph 102).” (My emphasis).

³ No. 7 of 2015.

⁴ ANUHCv2019/0683 (delivered 27th April 2023, re-issued 4th May 2023) at para. 63.

[20] Additionally, in **Abraham Mansoor et al v Grenville Radio Ltd**,⁵ Blenman J noted that if a claimant can show that the comment was actuated by malice, this will defeat the plea of fair comment.

[21] As it relates to the matter of facts underpinning the comment, the UK Supreme Court decision in **Joseph v Spiller**⁶ is instructive. This judgment was referred to in the above-mentioned judgment in **Vere Bird III v Gaston Browne** and in **Sigmund Wiggins v Luke Boyea et al**.⁷ At paragraph 96 of **Joseph v Spiller**, Lord Phillips explains:

“[96] I can summarise the position as follows. Where, expressly or by implication, general criticism is made of a play, a book, an organ of the press or a notorious course of conduct in the public domain, the defendant is likely to wish in his defence to identify particular aspects of the matter in question by way of explanation of precisely what it was that led him to make his comment. These particular aspects will be relevant to establishing the pertinence of his comment and to rebutting any question of malice, should this be in issue. Lord Porter’s speech indicates that the comment does not have to refer to these particular aspects specifically and that it is not necessary that all that are pleaded should be accurate, provided that the comment is supported by at least one that is.”

[22] Lord Phillips then went on to discuss the position where the subject matter of the comment is not within the public domain but is known only to the commentator or to a small circle of which he is one, for example comments on the internet. What Lord Phillips recognized⁸ is that cases have none the less emphasized the requirement that the comment should identify the subject matter on which it is based, at least in general terms. He concluded his discussion by stating:⁹

“[104] Such considerations are, I believe, what Mr Caldecott had in mind when submitting that a defendant’s comments must have identified the subject matter of his criticism if he is to be able to advance a defence of fair comment. If so, it is a submission that I would endorse. I do not consider that Lord Nicholls was correct to require that the comment must identify the matters on which it is based with sufficient particularity to enable the reader to judge for himself whether it was well founded. The comment must, however, identify at least in general terms what it

⁵ ANUHCv 2004/0408 (delivered 12th October 2007, unreported).

⁶ [2010] UKSC 53.

⁷ SVGHCv2018/0183 (delivered 28th April 2022, unreported).

⁸ At para. 100.

⁹ At para. 104.

is that has led the commentator to make the comment, so that the reader can understand what the comment is about and the commentator can, if challenged, explain by giving particulars of the subject matter of his comment why he expressed the views that he did. A fair balance must be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making the criticism.”

- [23] In a defence, CPR places a defendant under a duty to set out their case. The defence must set out all the facts on which the defendant relies to dispute the claim. Applying the above principles and authorities to the present case, I am of the view that there is much force in the Defendant’s argument that the matters pleaded at paragraphs 3(b), 3(c) and 4 of the Defendant’s defence are facts pleaded to support his defence of fair comment pursuant to the **Defamation Act**.
- [24] In **Sigmund Wiggins v Luke Boyea et al**, a case originating from St. Vincent and the Grenadines, the defendants had pleaded justification (now known as the defence of “truth” under the **Defamation Act** of Antigua and Barbuda), fair comment and qualified privilege in the defence to the claimant’s defamation claim. In the Court’s judgment, it was noted that at the pre-trial review of the matter, the defendants had accepted that justification as a defence relying on the truth of the matter, could not be relied on and as such they could not advance that defence. The Court recognised however that what the defendants did plead was the justification or reasons for having spoken the words of the claimant upon which they relied on for the entirety of their case and submissions. The Court then went on to determine whether based on the reasons given, the defendants could avail themselves of the defence of fair comment. On the facts of that case, the Court found that the defendants were entitled to rely on the defence of fair comment.
- [25] In the present case, I understand the pleadings that the Claimant seeks to strike out to be providing facts to support the Defendant’s defence that he was expressing an opinion or comment on a matter of public interest and his reasons for doing so and also to rebut any question of malice that arises on the Claimant’s case. In my view, in light of this, it would be inappropriate to strike out these parts of the Defendant’s defence based on the Claimant’s application.
- [26] In his oral submissions, learned Counsel for the Claimant sought to attack the Defendant’s pleadings as it relates to the defence of fair comment. However, the basis of the Claimant’s application to strike out the paragraphs of the Defendant’s defence must be kept in mind. The Claimant contended that the facts pleaded by the Defendant in those paragraphs of the defence raised the privilege of right to reply but the pleading is incurably bad. The Defendant’s

application did not seek to impugn the Defendant's reliance on the defence of fair comment. Therefore, this is not the matter before the Court for consideration on the present application.

[27] For the above reasons, bearing in mind the principles guiding the Court's discretion to strike, it would be inappropriate to deploy the nuclear strike out option when the court has arrived at the view that there is a sufficient basis for the Defendant's pleadings.

[28] I believe it is also important to note that if the Claimant's argument were accepted that the Defendant has raised the issue of reply to an attack as a defence but his pleadings to support the basis of the defence were deficient, it would not automatically follow that the court would exercise its discretion to strike out those portions of the defence. Once the Court is satisfied that there is even a 'scintilla of a cause of action' or in this case, a scintilla of a defence, or a pleaded basis for a defence, then it is not at all suitable for striking out. This is especially so when the Claimant's complaint is that the Defendant failed to plead any particulars of the attack which prompted him or gave him a legitimate or commensurate interest in replying in the way he did. In such circumstances, the Court instead would have to consider whether there are other more proportionate case management powers that can be used instead of the nuclear strike out option, even after the date of the first case management conference.

[29] The Court of Appeal's judgment in **Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina**¹⁰ which cited the judgment of the Judicial Committee of the Privy Council in **Real Time Systems Limited v Renraw Investments Limited and others**¹¹ is instructive in this regard. In the lower court, the learned Master struck out the claim against the defendants on the basis that there was need to plead additional facts to support the claim even though the Master had earlier found that the claimant had pleaded a sufficient cause of action. The claimant appealed the learned master's decision. At paragraph 14 of the Court of Appeal's judgment, Pereira CJ stated:

"This failure to plead all the facts or, put another way, the need to plead additional facts could have been adequately and proportionately addressed by the learned master by alternative means, having been faced with the application to strikeout at a time when case management had not yet occurred, by invoking his case management powers and fashioning an order under CPR 26.1(2)(w) which could no doubt have directed the appellant to amend its case to address this failure within a specified period. If considered necessary, the learned master could

¹⁰ ANUHCVP2016/0009 heard together with Cedar Valley Springs Homeowners Association Incorporated v Kenneth Meade et al ANUHCVP2016/0010 (delivered 18th January 2017, unreported).

¹¹ [2014] UKPC 6.

have gone further, when ordering an amendment, by directing the imposition of a sanction for failure to amend. This was an approach open to the master to adopt even in the absence of the respondents themselves utilising this less draconian approach available under CPR 26.4 in seeking to address this perceived omission to fully plead the facts of the claim, rather than having immediate resort to this measure which should only be engaged as a weapon of last resort.”

[30] It would not be necessary however for me to make any such orders at this time in the present case considering my above findings on the application before the Court and that the matter is presently on the case management track.

[31] In light of the foregoing, I make the following orders:-

1. The Claimant’s application to strike out paragraphs 3(b), 3(c) and 4 of the Defendant’s defence is refused.
2. The Claimant shall pay the Defendant’s costs of this application to be summarily assessed at the next case management conference, unless sooner agreed.
3. The matter shall be set down for further case management on a date to be fixed by the Registrar of the High Court on notice to the Parties.

[32] I wish to thank learned Counsel on both sides for their helpful oral and written submissions.

Carlos Cameron Michel
High Court Master



By the Court

Registrar