JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 43/2008

APPLICATION NO. 84/09

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE MORRISON, J.A.

BETWEEN	ENOCH KARL BLYTHE	APPLICANT
A N D	PAGET DeFREITAS	FIRST RESPONDENT
A N D	CLOVIS BROWN	SECOND RESPONDENT
A N D	THE JAMAICA OBSERVER LTD	THIRD RESPONDENT

Canute Brown and L. Jack Hines for the applicant

Winston Spaulding, Q.C., Charles Piper and Miss Yualande Christopher for the respondents

27, 30 July and 18 December 2009

PANTON, P.

I have read the judgment of my brother Morrison, J.A. I agree with his reasoning and conclusion and have nothing further to add.

COOKE, J.A.

I too agree with the judgment of my brother Morrison J.A.

MORRISON, J.A.

Introduction

1. This is an application, pursuant to rule 2.11(2) of the Court of Appeal Rules ("the CAR"), to discharge the order of Harrison JA made on 11 March 2009 setting aside an order made in the Supreme Court by Hibbert J. The latter had granted permission to the applicant to file a reply out of time in defamation proceedings and Harrison JA considered the respondents' procedural appeal on paper, pursuant to rule 2.4(3) of the CAR, and allowed the appeal.

2. The application was heard on 27 July 2009, and on 30 July 2009 this court made the following order:

> "Application to discharge order of single judge granted. Order of the court below is reinstated. Costs of this application to the applicant to be agreed or taxed. Matter to proceed in the Supreme Court in the usual way."

These are my reasons for concurring with that order.

The background

3. The facts relevant to a determination of this application can be shortly stated as follows. On 31 July 2000 the applicant issued a writ of summons and filed a statement of claim against the respondents claiming damages for libel allegedly published in an article and a cartoon in the

edition of the third respondent's newspaper published on 14 November 1999. There was no allegation of malice in the statement of claim. In separate defences filed on behalf of the third respondent on 3 November 2000 and on behalf of the first and second respondents on 21 May 2001, the respondents denied the defamatory meanings pleaded by the applicant and averred that the publication complained of was fair comment on a matter of public interest.

4. On 12 January 2007, the respondents were given permission to amend their defences and to file a consolidated defence, which they did on 26 January 2007. The amended defence raised for the first time a plea of qualified privilege and averred (also for the first time) that the article and the cartoon complained of were not published maliciously. The amended defence also substantially expanded and restated the plea of fair comment.

5. The trial of the action was fixed for 5 November 2007, and in preparation the applicant delivered witness statements setting out material from which it is claimed that evidence of malice could be inferred, together with a list and bundle of documents in which were included several articles that appeared on the list. On 1 November 2007, the respondents gave notice to the applicant of their intention to take a preliminary point of law as to the failure of the applicant to plead malice

"in the context of the claim and the defence". The trial did not commence on 5 November 2007 as scheduled, the judge assigned to hear the matter having recused himself, and on 6 November 2007 the applicant filed an application seeking permission to file a reply out of time.

6. Both the respondents' notice of preliminary point and the applicant's application for permission to file a reply out of time were in due course listed for hearing before Hibbert J on 30 April 2008, when the learned judge sensibly determined to hear the latter application first. In the result, he made the order granting permission to the applicant to file his reply out of time and adjourned the respondents' notice of preliminary point to a date to be fixed by the Registrar, the respondents having reserved their position on it. In the reply filed on 8 May 2008, pursuant to the judge's order, the applicant pleaded (for the first time) that "the words and cartoon complained of were published maliciously", giving particulars from which it was said that malice might be inferred.

The procedural appeal and Harrison JA's order

7. The respondents filed a procedural appeal against Hibbert J's order, pursuant to permission granted by the judge himself. Harrison JA considered that the issue for his determination on the appeal was whether the procedure adopted by the applicant was permissible under the Civil Procedure Rules ("the CPR"). He pointed out that Rule 69.2 of the CPR

"indisputably makes no provision for the filing of a Reply" and "only deals with the mandatory requirement that an allegation of malice and the particulars in support of that allegation must be set out in the particulars of claim at the same time as the averment of malice is made". Against this background, the learned judge concluded as follows:

> "It has always been a cardinal principle of pleading (which has certainly not been altered by the CPR) that a claim should not anticipate a potential defence (popularly known as jumping the stile'). Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a defence to the defence'. See Blackstone's Civil Practice 2004.
>
> Conventionally, a reply may respond to any matters raised in the defence but where the defence takes issue with the absence of facts which must be pleaded in the particulars of claim, the proper course should be for the claimant to seek to amend his statement of case accordingly."

8. Harrison JA therefore concluded that Hibbert J's decision to grant permission to the applicant to file a reply "pursuant to the application based on rule 69.2(c) of the CPR in order to introduce not only an allegation of malice but also particulars of malice, was clearly wrong". The respondents' appeal was accordingly allowed and Hibbert J's order set aside, with the usual consequences.

The application to discharge Harrison JA's order

9. The applicant has sought to discharge Harrison JA's order, primarily on the ground that the learned judge "erred in law in holding that the Civil Procedure Rules 2002 do not admit of the filing of a Reply to a Defence to a Claim for Defamation, where that Defence raised is one of privilege and or fair comment". In the notice of application dated 6 May 2009 the details of the applicant's challenge to Harrison JA's conclusions are set out as follows:

> "The finding of fact or in law that malice was introduced for the first time by the Claimant in his Reply made by the Learned Judge of Appeal cannot be supported by the pleadings filed by the parties in that:-
>
> a. That the Claimant is not required to plead malice in his Particulars of Claim, it not being an essential ingredient in a Claim for libel.
>
> b. The Defence, at first, pleaded to the Claim in 2000 was justification to which the issue of malice would only be relevant to the question of quantum of damages.
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> c. The amended Defence filed in 2006 raised the issue of malice by way of a negative averment in relation to the plea of fair comment, statutory qualified privilege and/or a "Reynolds" privilege.
>
> d. At common law, malice has always been the Claimant's answer to a defence of fair comment or qualified privilege.

e. At the commencement of the proceedings for libel, the rule of pleading enshrined in the Judicature Civil Procedure Code Law (Repealed 26th of March, 2003) was that when the Defence is one of fair comment or qualified privilege and the Claimant intends to adduce evidence of malice he must file a Reply giving particulars.

f. That when the Civil Procedure Rules 2002 came into force on the 1st day of January, 2003, the Rules omitted the latter provision for a Reply and in fact barred the filing of a Reply generally, without the permission of the Court. Upon the correction of such a major error by way of amendment in September, 2006, that provision was not restored.

g. The particulars supplied in the Reply are contained in the list of documents filed on Disclosure by the parties, some of which are common to both lists.

The findings formed the basis for the wrong conclusion in law that if malice is not pleaded in the Particulars of Claim it cannot be pleaded by way of a response to a Defence in a Reply."

10. The applicant therefore contends that, it being no part of the particulars of claim to anticipate a defence, the judge erred in holding that the applicant ought to have sought permission to amend in order to plead malice. It should also be noted that a further contention on behalf of the applicant, that the provisions in the CAR which permit the determination of procedural appeals on paper by a single judge of

appeal without a hearing were ultra vires the Judicature (Rules of Court) Act and the Judicature (Appellate Jurisdiction) Act, as well as the Constitution of Jamaica, was not pursued when the matter came on for hearing.

11. Mr Canute Brown and Mr L. Jack Hines appeared for the applicant and provided us with a full skeleton argument, supplementing in admirable detail the grounds of challenge foreshadowed by the notice of application. This is how the argument, as I understood it, ran. A claimant is not required to anticipate the defence by stating in his particulars of claim his answers to it (***Hall v Eve*** (1877) 4 Ch.D. 345); neither is a claimant obliged to plead malice as an essential ingredient of a claim for defamation (Clerk & Lindsell on Torts, 19th edn, page 1443, Civil Procedure, 2007, volume 1, page 1632). The respondents having pleaded qualified privilege and the absence of malice, it was incumbent on the applicant to respond by way of a reply and, inasmuch as rule 69.2 of the CPR does not admit of a reply, the general rules of pleading allow for it, rule 10.9(3), which originally abolished the right of reply without permission, having been amended to restore it in 2006. Malice need only be pleaded in the particulars of claim where it is relied on to support a claim for aggravated damages and, save for that, is no longer relevant to a defamation claim other than in the context of defeating a defence of fair comment or qualified privilege (***Reynolds v Times Newspapers*** [1999] 4 All ER 609,

Jameel v Wall Street Journal [2007] 1 AC 359 and ***Bonnick v Morris*** [2003] 1 AC 300.)

12. Mr Winston Spaulding QC for the respondents pointed out that under section 185 of the now repealed Judicature (Civil Procedure Code) Act ("the CPC"), the predecessor to the CPR, a plaintiff who intended to allege that a defendant who pleaded fair comment or qualified privilege was actuated by malice was obliged to deliver a reply to the defence pleading malice and giving particulars of the facts and matters from which such malice was to be inferred. Despite the fact that the respondents' defences, even before the 2007 amendments, had raised the defence of fair comment, the applicant had taken no steps, even under the CPC, to plead malice in reply. In these circumstances, that omission was best corrected, as Harrison JA held, by seeking an amendment of the particulars of claim, since rule 69.2 "requires the plea of malice and the particulars to be asserted at one and the same time in the Claim, not in the Reply". By so doing, the respondents' right to respond to the allegation of malice would have been preserved. In this regard, the applicant could not rely on section 185 of the CPC, it having been displaced by the CPR.

Pleading malice

13. These submissions raise squarely the question of whether it is permissible in law, in the light of the regime established by the CPR, for a

claimant to allege malice for the first time in a reply as a response to a defence setting up fair comment and qualified privilege and averring the absence of malice. In order to answer this question, it is first necessary, I think, to consider the role of malice in the modern law of defamation generally.

14. Clerk & Lindsell (supra, at para. 23-204) states that in order to commence an action for defamation "there is no need to plead that the words were spoken or written maliciously". The judgment of Lord Bramwell in ***Abrath v North Eastern Railway Co.*** (1886) 11 App. Cas. 247, 253-4, is cited as having "effectively disposed" of this idea. That was a case of an action for malicious prosecution against a corporation in which the trial judge directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause for the prosecution, as well as malice, and that the defendant had not taken reasonable care to inform itself of the true facts of the case. It was held by the House of Lords that this direction was correct and that judgment had been rightly entered in the defendant's favour. In the course of his concurring judgment, Lord Bramwell said this:

> "That unfortunate word "malice" has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged account

> of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper, or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation in order to see whether it should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill will or motive."

15. As a result, the old allegation much favoured by pleaders in defamation cases that a statement was published "falsely and maliciously" of the claimant has been "emptied of all meaning" (English Private Law, 2nd edn, para. 17-298). This is because, as is pointed out by the editors of Civil Procedure (2007, in a note to CPR 53 PD.22), "falsity is presumed in the claimant's favour, and malice is not a necessary element in his cause of action". It is therefore clear that, as a matter of law, malice is not an ingredient of the cause of action for libel and there is accordingly no necessity to plead it, save where it is relied on as aggravating damage (***Egger v Chelmsford*** [1965] 1 QB 248, per Lord Denning MR at page 265).

16. Equally uncontroversial is the proposition that, again as a matter of law, the defences of fair comment and qualified privilege are destroyed by proof of malice (Gatley on Libel and Slander, 9th edn, paras. 12.1 and 14.1), hence the specific rule of pleading in section 185 of the CPC that a

plaintiff intending to allege malice in answer to one of those defences was obliged to do so in a reply (see also the former RSC, Ord. 82, r. 3(3)).

The CPR

17. Rule 10.9(1) of the CPR, as originally drafted, provided that a claimant could not file or serve a reply "without the permission of the court". That rule was however amended in 2006 (by LN 159/2006, 18 August 2006) and the rule now provides that "A claimant may file a reply within 14 days of the date of the defence". The right to file a reply, without the need for any prior permission, is therefore expressly preserved by rule 10.9(1), as amended. There is however no provision in the CPR which is equivalent to either section 185 of the now repealed CPC or the current English CPR PD.21, para. 2.9, which provides as follows:

> "If the defendant contends that any of the words or matters are fair comment on a matter of public interest, or were published on a privileged occasion, and the claimant intends to allege that the defendant acted with malice, the claimant must serve a reply giving details of the facts or the matters relied on".

18. Part 69 of the CPR deals specifically with defamation claims and rule 69.2, under the rubric "Claimant's particulars of claim", provides as follows:

> "The particulars of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 -
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> (a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; and
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> (b) where 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
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> (c) where the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation."

19. Part 8 of the CPR sets out what is to be included in a claim form and rule 69.2(c) supplements that part of the rules by requiring that the claimant alleging malicious publication of defamatory material must give particulars in support of that allegation in his particulars of claim. But this rule is plainly only applicable to particulars of claim and, it seems to me, has no real significance outside of those cases in which it is still necessary to plead malice in the particulars of claim, that is, as a factor aggravating damage (see para. 15 above). It certainly has nothing to do with a reply, which, as rule 2.4 (definitions) makes plain, is a separate statement of case from either a claim form or particulars of claim.

The function of the reply

20. This leads me, then, to the function of a reply in civil proceedings. This is how the learned editors of Blackstone's Civil Practice (2005) describe it (at para. 27.2, in a passage that Harrison JA obviously had in mind in his conclusion at para. 7 above):

> "Conventionally, a reply may respond to any matters raised in the defence which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not have been properly dealt with in the particulars of claim, but which require a response once they have been raised in the defence. It has always been a cardinal rule of pleading (which has certainly not been altered by the CPR) that a claim should not anticipate a potential defence (popularly known as 'jumping the stile'). Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on the point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a 'defence to a defence'."

21. This view of the function of a reply finds specific support in ***Hall v Eve*** (supra), an illuminating older authority to which we were referred by Mr Brown. The plaintiff's claim in that case was for specific performance of an agreement. The defence was that the plaintiff was not entitled to specific performance because he had committed breaches of the agreement which entitled the defendant to put an end to it, which he had done. The plaintiff in reply denied the things alleged against him by

the defendant, but also pleaded that, if they were true, they had been induced by the defendant's behaviour. The defendant moved to set aside the reply as irregular, in that, he contended, what was contained in the reply ought properly to have been dealt with in the statement of claim. The Court of Appeal was unanimously of the view that a plaintiff was entitled to reply to a defence by traverse, confession and avoidance, or a combination of both. James LJ stated (at page 345) that it was no part of the statement of claim "to anticipate the defence, and to state what the Plaintiff would have to say in answer to it". Bramwell JA's comment (at page 348), in specific reference to a submission that the proper course for the plaintiff to have taken was to amend the statement of claim, was that the new matter "would be out of place and illogical in the statement of claim" and that the allegation that the defendant had waived his rights was "much more cheaply, conveniently, and compendiously made in the reply than by amendment to the statement of claim".

22. Blackstone (supra, loc. cit.) goes on to distinguish cases in which a reply is the appropriate medium of response to matters raised in a defence from cases in which an application to amend the particulars of claim might be more apt:

> "Where the defence takes issue with a fact set out in the particulars of claim, and the claimant

> accepts that the fact is incorrect, the proper course should be for the claimant to seek to amend his statement of case accordingly...and not to deal with the matter in a reply."

Conclusion

23. It seems to me, with the greatest of respect, that the instant case falls squarely within the first category of case identified by Blackstone: the respondents' amended defence did not take issue, as Harrison JA put it, "with the absence of facts which must be pleaded in the particulars of claim", but rather, it asserted the absence of malice in support of the defences of fair comment and qualified privilege. Given that the applicant was not obliged to allege malice as a necessary ingredient of the claim, and also that it was no part of his duty to anticipate the defence, I am of the view that it was entirely appropriate for him to respond by alleging malice in the reply, rather than by way of amendment to the particulars of claim.

24. The further question which arises is whether the applicant was precluded from adopting that course because of the absence from the CPR of a rule comparable to section 185 of the CPC (or the UK Practice Direction, CPR 53 PD.21, para. 2.9). It is not entirely clear why such a rule should have been omitted from the CPR, given that there has been no change in the underlying substantive law. It could well be, as Mr Brown

submitted, that the Rules Committee of the Supreme Court inadvertently omitted to revisit Part 69, having amended rule 10.9(1) by restoring an unqualified right of reply. But curiously, save for the case of rule 69.8 of the Barbados CPR, which is in virtually identical form to the UK Practice Direction, that rule is also absent from all the other CPRs in the region (Belize, Part 68, Eastern Caribbean, Part 69, Trinidad & Tobago, Part 73). If Mr Brown is correct, then this is obviously a matter that could benefit from further attention by the Rules Committee.

25. Be that as it may, I am clearly of the view that rule 10.9(1), which permits a reply by the claimant within 14 days of the date of the defence, is sufficiently general in its terms to embrace a reply to allege malice in defamation proceedings. I am further of the view that this right of reply is unaffected by rule 69.2(c), which deals solely with the giving of particulars in support of an allegation of malice in particulars of claim or in a counterclaim.

26. The only remaining question, therefore, is whether Hibbert J exercised his discretion properly by granting permission to the applicant to file a reply out of time in the circumstances of this case. Mr Spaulding pointed out, correctly, that even though the respondents in their original defences filed in 2000 and 2001 had pleaded fair comment, the applicant "took no step in alleging malice" until prompted by the 2007 amendment to the

defences to add qualified privilege. While I fully accept the force of this point as it relates to the delay, absolutely nothing has been placed before us to suggest that the judge, in whose discretion it lay to determine whether permission to file the reply out of time ought to be granted despite the delay, acted in accordance with any incorrect principle or had regard to any irrelevant considerations in deciding to grant permission to the applicant. I do not therefore think that there is any basis to disturb his decision.

27. These are my reasons for agreeing with the order made on 30 July 2009 (see para. 2 above) discharging the order of Harrison JA, with costs to the applicant to be taxed if not sooner agreed.