

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L.C. 578 of 1995

BETWEEN DENNIS P. CHONG CLAIMANT
AND THE JAMAICA OBSERVER LIMITED DEFENDANT

Mr. Crafton S. Miller and Ms. Suzette Wolf instructed by Crafton S. Miller and Co. for the Claimant.

Mr. Winston Spaulding Q.C. instructed by Mr. Charles Piper for the Defendant.

Heard: 12, 13 and 14 February 2007.

Mangatal J:

1. This matter was set down for trial for five days commencing 12th February 2007. By Notice dated 9th February 2007 the Defendant's Attorneys indicated their intention to raise a preliminary point of law in relation to the Claimants' pleadings and that matter has occupied the Court for the past two days.
2. The application is to strike out paragraph 6 of the Statement of Claim and particulars thereto and also seeks an order striking out the Claim on the basis that the Claimant has failed to comply with the law requiring him to set out his claim in full and to provide proper particulars of malice.
3. The Claimant has pleaded in paragraph 6 of the Statement of Claim, which is repeated in paragraph 10 of the Reply, that the Defendant published an article in its newspaper of November 1 1995 which was defamatory of him. He says that the Defendant published the

words out of malevolence or spite towards the Plaintiff and carelessly recklessly and maliciously knowing the said statement to be false and without believing in its truth and knowing that same would be to the detriment of the Plaintiff in his professional duties with the Government of Jamaica in particular, and the public in general.

4. The Particulars provided are as follows:
 - (a) The Defendant published the words with no belief in the accuracy or truth of the words;
 - (b) The Defendant acted out of ill-will and spite in publishing the said words;
 - (c) The Defendant acted with the wrong motive in publishing the said words.

5. In paragraph 7 of the Statement of Claim the Claimant also says that the Defendant published the said words on the front page of the said newspaper calculating thereby to increase the circulation of the said newspaper and with a view to making a profit from the sale of the said newspaper and of advertising space therein.

6. In paragraph 9 of the Statement of Claim the Claimant states that at the date of the publication the Plaintiff had not been suspended from his job and such suspension was not done until the 25th day of March 1996. Hence the publication was false and mischievous and calculated to injure the Plaintiff and did so injure him.

7. The Defendant argues that as a matter of law and pleading generally a Defendant is entitled to know the case which he has to meet and reference was made to the C.P.R.2002, Part 8, which deals with Claims generally, and Part 69 which specifically relates to Defamation Claims. The Defendant argues that these allegations set out in the particulars themselves beg for particulars in order to be understood. They pose the question: What are the facts in support of the "so called"

particulars to indicate what is in issue in respect of each allegation of malice?

8. The Claimant on the other hand submits that the pleadings with respect to malice are sufficient to alert the Defendant in this case to the nature of the Claimant's case and that the pleadings have made clear the general nature of the case of the pleader.
9. The Claimant has also said that here the Claimant is not saying that either the Journalist or the editor was pursuing a personal vendetta against Mr. Chong. There is nothing in Mr. Chong's witness statement which attempts to make such an allegation. I will refer to the Claimant's witness statement in greater detail later in my ruling.
10. The Rules of the C.P.R. 2002, which are the governing Rules, make it clear that all the relevant facts upon which the Claimant relies must be pleaded and particulars in support of an allegation that the Defendant maliciously published the words or matters must be given. The Rules also state that such statements of fact must be as short as practicable. In my judgment that means that the facts must be stated concisely.
11. In **Mc Phileney v. The Times Newspaper Ltd.** [1999] 3 All E.R.775 the English Court of Appeal was there considering Rules in relation to libel cases, and new civil procedure rules that were not in my view substantially dissimilar from our own rules.
12. Although in that case the Court was dealing with an application for particulars in relation to justification, as opposed to particulars of malice which the Rules(both English and Jamaican) specifically required, it nevertheless seems to me that the reasoning of Lord Woolf at page 792j to page 793d is sound and apposite. Lord Woolf stated:
The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This

reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to rule 16, para 9.3... requires in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required....

In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historical interest.....Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged.

13. In **Three Rivers District Council v. Bank of England**[2001] 2 All.

E.R. 513, Lord Hope at page 528 E-F stated:

In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other....

14. When one looks at the pleadings, agreed documents and witness statements, it is clear that the thrust of the Claimant's allegation in relation to malice is that the Defendant had no belief in, or was reckless as to the truth or accuracy of the words and that the Defendant acted with improper motives for its own advantage in publishing the offending words.

15. The Defendant's Attorneys cited to me the authority of Carter-Ruck on Libel and Slander, a 1997 edition, which from my reading seems to be a work which preceded the new English Procedure Rules and the advent of witness statements. The authors state:

In order to be entitled to give evidence tending to establish malice the plaintiff must in every case deliver a reply setting out all the matters and

facts from which he says that malice is to be inferred. This pleading is required so that the Defendant shall know in advance what is going to be alleged against him as tending to prove spite, ill-will or improper motive and so that he shall not be taken by surprise at the trial by evidence which he is unprepared to meet (my emphasis).

16. Under the C.P.R.2002, having pleaded the case and exchanged witness statements, and documents having been agreed, the Claimant is not at liberty without more, to range at large in relation to his case on malice. Ordinarily the Court will order the witness statements to stand as examination-in-chief and there are firm rules dealing with the scope of any amplification or latitude outside of what is in the witness statement. Within the framework set up by the C.P.R.2002, the detail of the case parties have to meet becomes clear well before trial, and the risk of surprise is greatly reduced, if not eliminated. It has to be remembered that the trial judge retains case management functions and has a wide range of powers to control evidence and streamline the presentation of cases.

17. In **Horrocks v. Lowe** [1974] 1 All E.R. 662, a House of Lords decision which is an oft-cited leading authority on malice and qualified privilege, at page 671e-f Lord Diplock referred to the fact that in the case before the court the judge was left with no other material on which to found an inference of malice except the contents of the offending speech itself, the circumstances in which it was made and, the Defendant's own evidence in the witness box. Said Lord Diplock:

Where such is the case the test of malice is very simple.....It is: has it been proved that the defendant did not honestly believe that what he said was true, i.e. was he either aware that it was not true or indifferent to its truth or falsity?

18. When one looks at the Claimant's witness statement it is clear that his case in relation to malice is substantially that the publication was untrue and false and that the Defendant had no belief in the accuracy or

truth of the words or was reckless as to the truth or falsity. At paragraph 57 of his witness statement, the Claimant has fleshed out what the claim is in relation to spite and ill-will where he says that the publication was done out of malevolence, maliciousness or spite, "particularly since the statements are false". In paragraph 58 it is made clear that the improper motive alleged is that the publication on the front page was not intended to advise the public on matters of public interest, but were intended to increase sales of the Defendant's newspaper.

19. In my view ideally the particulars may well have been more fulsome, and the terms "spite and ill-will" may arguably have been used somewhat loosely in the particulars and witness statement. However in my judgment intelligent and informed persons may well disagree about the degree of detail required for particulars in relation to this Claimant's case of malice. The truly important consideration is that it can not properly be said that the Defendant is taken by surprise in this case. I also do not think, particularly having regard to the exchange of documents, witness statements, and the matters pleaded, that the Defendant can properly maintain that they do not have sufficient notice of the nature of the claim made against them for malice. I find that the particulars and pleading of the Claimant are sufficient to mark out the parameters of the Claimant's case with regard to malice.

20. I am of the view that the overriding objective of dealing with cases justly calls for the interpretation of the rules and their interplay in the manner which I have adopted. In any event, in keeping with the court's powers to manage cases, it is eminently preferable in my view for the court not to take the draconian course of striking out parts of a pleading, or the even more extreme measure of striking out a case at this late stage. This is particularly so where as here the area of demarcation of the degree of detail required in the particulars of malice is shrouded in shades of grey. Rather, the court should exercise its powers to ensure that the Claimant sticks to a presentation of its case well within the

material already provided to the Defendant in the form of pleadings, documents and witness statements.

21. The point in limine therefore fails. I will now hear the parties as to where we go from here in terms of the trial of the matter and in relation to any cost issues.