The Court of Appeal for Bermuda

CIVIL APPEAL No. 3 of 2015

Between:

HON. MARC BEAN JP MP

Appellant

-v-

HON. MICHAEL DUNKLEY JP MP

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Eugene Johnston, J2 Chambers, for the Appellant
Mr. Timothy Frith, MJM Limited, for the Respondent

Date of Hearing: **17 June 2015**

Date of Judgment: **28 August 2015**

JUDGMENT

Baker, P

Introduction

1. The Court has to determine an interlocutory appeal from a decision of Kawaley CJ who struck out paragraph 7 of the amended defence in a libel action between Michael Dunkley, the Premier, and Marc Bean, the Leader of the Opposition. At the time he commenced the proceedings, Michael Dunkley was Deputy Premier and Minister of Public Safety. His claim is for damages for defamation in relation to a "thread" written or published by Marc Bean on 20 September 2013 on the Facebook page "Bermuda Elections 2012". I shall refer hereafter to Michael Dunkley as "the respondent" and Marc Bean as "the appellant".
2. The "thread" is set out in paragraph 3 of the statement of claim as follows:

"3.1 At 8.59am: *'Morning Ms Furbert, this motion is solely the doings of Minister Dunkley (the irony). Only Walton Brown spoke on our side, and three members from their side (reluctantly). In other words, there is very little support for it but the OBA members are silent. Dunkley has motivations that only he can explain. If the motion is about standards, then it should be based on being honourable (being honest). That said, we should have lie detector test as a start. Lord knows we would not have a sitting Parliament. In terms of how it will work, none of us has any idea. When I look across the isle, all I can do is shake my head, especially when we all know what the former head of Narcotics had to say about Minister Dunkley, and we all know two men have served time in prison for it. Imagine a PLP MP, as a leading importer of goods, also being the head of National security and border control? Irony and hypocrisy at its finest, delivered by a man whose sole purpose is power and control."*

3.2 At 9.14am, in answer to the post by Nash Shak at 9.05am: "*DID ANY OF YOU JUST READ WHAT MARC BEAN JUST POSTED?*", the Defendant replied: "*That's it Nash Shak. A lie detector test will certainly reveal a lot.*"

3.3 At 9.34am, in answer to the post by Charles Doyle at 9.15am, which stated among other things *"Marc Bean, what's with all the bizarre hyperbole? Please, enough with the veiled accusations…if you think Michael Dunkley is using his position to facilitate drug smuggling, just say so…"'* the Defendant replied: "*Charles, what I said is what I meant. No accusations on my part, I'm just removing some people's selective amnesia."*

3.4 At 9.50am, in answer to the posts by Charles Doyle (i) at 9.40am, which stated "*Is there any empirical evidence against him or are the accusations just hearsay?' (ii) at 9.41am, which stated "NASH SHAK answer…what would you say if a OBA MP, as a leading importer of goods, also being the head of National security and border control? Irony and hypocrisy at its finest, delivered by a man whose sole purpose is power and control."* and (iii) at 9.44am *"…To be honest, this was (surprisingly) the first time I'd ever heard of this controversy, and I was unaware of the video posted above,*" as well as the post by Rhonda Neil at 9.47am *"INV we didn't need the video…to see*

this is wrong… …and the point I am making is had this been the PLP…Scotland Yard, MI would be here…screaming appearance of corruption" the Defendant replied: "*Rhonda, Larry Smith claims that the police have sufficient evidence of conspiracy. Lesson to be learned. MPs, as Brother Lamach would note, are not angels, far from it. As such, I can lead off by saying "what if, I, Marc Bean, was in rehab as we speak, or, was once convicted of stealing and distributing drugs, or, was well known to love cocaine etc"? That's just 3 examples, and I can go on and on. It will cut across the isle. Why wouldn't I, because it would bring the HOA into disrepute. We are not talking about bones in a closet, we are talking about the graveyard here. This is also the reason why neither side make personal issues political. 99 percent of the legislators understand this, save for the thrower of stones in Glass houses…Mike Dunkley…In a nut shell, watch the video again, and you will get a snap shot into the mind of our Deputy Premier"*

3. The statement of claim goes on to plead that in their natural and ordinary meaning, and/or by way of innuendo, the words complained of meant and were understood to mean that the respondent:

   (a) is a dishonest hypocrite who has dubious motives for introducing a motion in Parliament for random drug testing for sitting MPs ; and/or

   (b) has been and continues to be a leading importer of narcotics, a crime for which two men have already been imprisoned and/or

   (c) abuses his public office in order to facilitate and further his involvement in the illicit importation of drugs for his own personal gain.

4. The particulars of innuendo are pleaded in paragraph 5 of the statement of claim as follows:

   "5.1 On 8 December 2007, a video of the former Head of Narcotics in Bermuda, Larry Smith, was posted on You Tube ("the Video").

   5.2 In this Video, Mr Smith alleged (among other things) that:

5.2.1 In 2003 there was an importation of drugs at the Claimant's business address, Dunkley's Dairy, with an estimated street value of $3.37 million.

5.2.2 One of the suspects arrested in connection with this was employed at Dunkley's Dairy and two of the accused lived on Dunkley's Dairy property;

5.2.3 The Claimant appeared to greet a renowned drug dealer in his office as if he knew him;

5.2.4 In the circumstances, the Claimant ought to have been arrested on suspicion of conspiracy to import drugs;

5.2.5 Two of the accused were subsequently convicted of conspiracy to import drugs and sentenced to ten years in prison.

5.3 The video was widely, available, posted as it was on a popular and well-known website. Moreover, the Video became part of the thread pleaded in paragraph 4 above having been inserted into it by Christopher Thomas Famous(s) in a post at 11:07am following upon the posts of the words complained of that were published by the Defendant.

5.4 The words complained of that were published by the Defendant make specific reference to the Video both by reference to Mr Smith's former position as the 'former Head of Narcotics' (at 3.1 above), by name, 'Larry Smith' (3.4 above), by reference to his claim that "*the police have sufficient evidence of conspiracy"* (also at 3.4 above) and by reference to his direction to "*watch the video again"*"(also at 3.4 above).

5.5 In the premises, the said facts and matters would have been and become known to a substantial but unquantifiable number of unidentifiable readers of the Facebook thread complained of, and those readers would have understood the words complained of to bear the meanings set out in Paragraph 5 above."

5. We were shown the video during the appeal. It is part of the thread and was posted on Facebook at 11:07 on 30 September 2013, although it had been in circulation on YouTube for some time.
6. The appellant's amended defence admits that the comments set out in paragraph 3.1 and 3.4 form part of the statements made on the "thread" but do not admit the extent to which they are defamatory. In paragraph 5 the meaning contended for in paragraph 5(a) of the Statement of Claim is admitted but that in 5(b) and 5(c) is denied.
7. The critical paragraph in the amended defence for the purpose of this appeal is paragraph 7 which reads as follows:

> "7. Further or alternatively, insofar as the words set out at paragraph 3 contained the following comment or expression of opinion, namely that the Plaintiff's continuing connection to a leading Bermudian goods importation company which was formerly caught up in a drug importation investigation, should raise some concerns with the Bermudian electorate, and that, in light of this, the Plaintiff's fascination with promoting a motion in the House of Assembly on the random drug-testing of sitting Members of Parliament is hypocritical; the Defendant contends that the said words constituted honest comment on a matter of public interest.
>
> Particulars of Honest Comment
>
> (1) It is a matter of public record that the Defendant remains a respecter of Rastafarian beliefs; and openly practiced Rastafarianism. This open practice included the liberal use of cannabis (prohibited by the Misuse of Drugs Act 1972) for medicinal and spiritual purposes. There is a further widespread view amongst various parts of the Bermudian populace that the Defendant still makes continual use of cannabis. As such, the Plaintiff appears to be of the view that if the House of Parliament instituted random drug-testing, and promoted the idea that the use of cannabis is morally reprehensible, the One Bermuda Alliance, and the Plaintiff, may be able to score points with the electorate, and at the same time, do political damage to the Defendant's political reputation.
>
> (2) The motion for the random drug-testing of sitting Members of Parliament, when introduced, did not

> appear to have wide-spread interest on both sides of the House of Parliament. The said motion was *"solely the doings"* of the Plaintiff.
>
> (3) Paragraph 6 of this Defence is repeated (along with all the admitted particulars of innuendo pleaded in the Statement of Claim)."

8. It was this paragraph that the Chief Justice struck out on the grounds that "the averments are wholly irrelevant to the defamatory matters complained of in the present action." I mention for completeness that before the Chief Justice Mr. Johnston, for the appellant, conceded that the paragraph was inelegantly expressed and would have been better expressed as follows:

> "Further or alternatively, insofar as the words set out at paragraph 3 contained the following comment or expression of opinion, namely that the Plaintiff's fascination with promoting a motion in the House of Assembly on the random drug-testing of sitting Members of Parliament is hypocritical because of his connection with a leading Bermudian goods importation company that was implicated in a well-known drug investigation in which two men with some connection to the Plaintiff served prison sentences; The Defendant contends that the said words constituted honest comment on a matter of public interest, namely the standard by which the Bermudian electorate should judge parliamentarians, the Plaintiff's motivation for bringing forward such a motion, and whether such a motion is misguided in the circumstances."

9. The thrust of Mr. Johnston's appeal is that the Chief Justice was wrong to strike out paragraph 7 of the amended defence; the matter should have been left to the jury, it being assumed that there would be a trial by jury. The position is aptly described in the 12th Edition of *Gatley on Libel and Slander* at 1.10:

> "Where there is a trial by jury, the issues of the meaning of the words, whether they were defamatory, whether they were true and whether, if the defences of qualified privilege or honest comment are raised, the defendant was actuated by malice are for the jury. It is for the judge to rule, first, whether the words are capable of bearing the meanings contended for and of being defamatory, and whether the occasion or matter

were such as to be capable of attracting privilege or honest comment."

10. Freedom of speech is one of the cornerstones in any democratic society. As Lord Denning said in a slightly different context in *Rothermere and ors v Times Newspapers* [1973] 1 WLR 449, 452: "It is one of the essential freedoms that the newspapers should be able to make fair comment on matters of public interest. So long as they get their facts correct, they are entitled to speak out." This is just as true for politicians as it is for newspapers. But the law does not permit the publication of unwarranted and damaging allegations, and a person is entitled to protect his reputation against these by the law of defamation (see *Gatley on Libel and Slander* 12th Edition Chapter 1). The present case raises quite a narrow point, namely whether the defence of fair comment or honest comment as it is now known in England as set out in paragraph 7 of the amended defence is open to the appellant.

11. In order to establish this defence the following principles apply (see *Gatley* 12th Edition 12.2):

- The comment must be on a matter of public interest.
- The comment must be recognisable as comment, as distinct from fact;
- The comment must be based on facts which are true or protected by privilege.
- The comment must explicitly or implicitly indicate at least in general terms the facts on which it is based.
- The comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views. It must also be relevant to the facts relied upon (see *Gatley* 12.28).

12. As the Chief Justice pointed out, defamation actions are rare in Bermuda, the last fully fledged one occurring over 30 years ago. The relevant law in Bermuda is different from that in England. Section 6 of the Defamation Act 1952 which underpins the common law defence of fair comment does not apply to Bermuda and nor does the Defamation Act 2013 which repealed section 6 of the 1952

Act and replaced the old defence of fair comment with one of honest opinion. . Accordingly, submits Mr Frith for the respondent, the law in Bermuda is that of the common law prior to 1952 as set out by Fletcher Moulton LJ in *Hunt v The Star Newspaper Company Limited* [1908] 2 KB 309,320:

> "Finally, comment must not convey imputation of an evil sort except so far as the facts truly stated warrant the imputation."

Thus, it is submitted that what is said in post 1952 cases should be viewed with caution. However, it seems to me that the five principles above-stated apply today in Bermuda just as they do in England.

13. The grounds for the respondent's strike out application are as follows:

> (1) "The substance of the comment which the (appellant) seeks to defend namely that the (respondent's) continuing connection to a leading Bermudian goods importation company which was formerly caught up in a drug importation investigation should raise some concerns with the Bermudian electorate is an allegation of fact not comment.
>
> (2) The facts on which the comment is alleged to be based are not properly pleaded and/or are based on hearsay and/or cannot support the comments set out in paragraph 7 of the (amended defence).
>
> (3) The amended defence does not set out what is the matter of public interest upon which he is purporting to comment."

The Judgment of the Chief Justice

14. In the course of his judgment the Chief Justice dealt with the elements of the defence of fair comment. He observed that there was no issue on whether the subject matter of any comment met the public interest. He found that paragraph 7 of the amended defence (at least as re-amended as proposed by Mr. Johnston) did plead facts coupled with a comment. I shall return to this

later. On the question whether there was a true factual foundation for the comment he said at paragraph 22:

> "It is an essential requirement for a valid defence of fair comment that any defamatory facts upon which the comment is based must be proved by the (appellant) to be true. Accordingly, I find that the defence of fair comment is only available if the (appellant) is able to prove at trial that the (respondent) was criminally guilty of participating in the drug importation offence for which it is alleged two employees of a company the (respondent) was connected with were convicted."

15. The Chief Justice continued:

> "23. It is accordingly difficult to imagine at this juncture what evidence the Defendant will be able to adduce at trial which could justify leaving the fair comment defence to the jury. The position might be otherwise if the sting of the libel was merely that grounds existed for suspecting the Plaintiff had been involved in the relevant offences. The main complaint made in the present action, which has been partially admitted and is plainly arguable, is that the Defendant has asserted that the Plaintiff is actually guilty of participating in serious criminal offences.
>
> 24. The Defendant can only make such egregious allegations and escape liability for damages through his fair comment defence if, amongst other things, he proves the factual foundation for what he contends was a fair comment to be true. The sting of the libel in the present case appears on the face of it to be particularly acute, because the drug importation investigation upon which the Defendant's remarks are based occurred over 10 years ago, at a time when the Plaintiff was a 'lowly' Opposition MP with no obvious political influence to bring to bear.
>
> 25. However, the Court cannot properly conclude at this juncture, before the Defendant has served and filed his evidence, that he will be unable to adduce sufficient evidence to prove the truth of the facts upon which the comment are based. For the avoidance of doubt I am only assuming for the purposes of the present interlocutory application that the Plaintiff will succeed in proving that the Defendant's words bear the disputed defamatory meaning complained of. It will

> of course be for the jury to determine whether or not the words complained bear the disputed defamatory meaning contended for by the Plaintiff, it being common ground that the words used are defamatory to some extent."

16. He then went on to consider whether the facts on which the comments were based were sufficiently identified. He answered this question in the affirmation. He said:

> "26. Paragraph 7 of the Defence (including paragraph (3) of the Particulars) does in my judgment sufficiently identify a factual foundation for the hypocrisy comment. Mr. Johnston referred the Court to Lord Phillips' observation that a defence of fair comment could not be defeated solely because it failed to sufficiently identify supporting facts in such a manner as to allow the reader to form his own opinion: *Joseph-v-Spiller* [2011] 1 AC 852 at 885A.
>
> 27. However, reading paragraph 7 in a purposive way in light of the defamatory remarks complained upon as a whole, I would find that the reference to the You Tube video is sufficient to signify that the Defendant is by necessary implication contending that the Plaintiff ought to have been arrested and charged in connection with the relevant Police investigation.
>
> 28. The hypocrisy comment is only a comment at all if it is linked to the implicit factual assertion that the Plaintiff's involvement with the drug importation investigation was <u>not</u> an innocent involvement. It would be different if the legislative initiative which was alleged to be hypocritical involved changing the law to create strict liability for the proprietors of businesses whose employees were (convicted) of drugs offences. The natural and ordinary meaning of "hypocrisy" is: "*The claim or pretense of having beliefs, standards, qualities, behaviours, virtues, motivations, or other characteristics that one does not in actual fact hold*"[1]. There is a logical inconsistency between the Defendant's admission that his words meant that the Plaintiff was a dishonest hypocrite but did not mean that he was an importer of drugs likely to use his Ministerial position for personal gain.

[1] http://en.wikipedia.org/wiki/hypocrisy .

> 29. Because the exceptional nature of the strike-out remedy and its availability only in plain and obvious cases, I find that I should err in favour of the Defendant in construing the Amended Defence and not adopt an interpretation which resolves ambiguities of drafting in favour of the Plaintiff, the strike-out applicant."

17. He finally asked himself this question: "Is the comment germane to the conduct or matter criticised?"

18. He said that Mr. Dunch, who appeared in the Court below for the respondent, was clearly right that paragraph (1) and (2) of the particulars provide no factual foundation for the pleaded comment. The Chief Justice went on that the comment had to have some connection with an identifiable factual matrix but that paragraphs 7(1) and 7(2) did not. This was, he said, because it was plain and obvious that the supposed comment about the (respondent) being motivated by a desire to embarrass the (appellant) and/or score political points because of the (appellant's) pro-cannabis sympathies:

> (a) could not be found in the pleaded extracts of the statements of which complaint is made in the Statement of Claim at all;
>
> (b) could not be found in any pleaded extracts of the impugned statements reproduced in the amended defence and/or;
>
> (c) was so completely divorced from the defamatory statements complained of that the relevant comment could not be relied upon as a defence to the (respondent's) claim on the grounds of irrelevance.

19. The Chief Justice cited a passage from the speech of Lord Phillips of Worth Matravers in *Joseph and others v Spiller and another* [2011] 1 AC 852, 859 in which he referred to what he described as the pertinence element, a requirement that as far as he was aware had never been an issue in any reported case:

> "6 The fifth proposition. The requirement to show that the comment is germane to the subject matter criticised and is one that an honest person could have

> made, albeit that that person may have been prejudiced, or have had exaggerated or obstinate views, is one that is bizarre and elusive. I am not aware of any action in which this has actually been an issue. I shall describe this element as 'pertinence'."

20. He concluded that paragraphs 7(1) and (2) were not germane to the subject matter criticised and that they should therefore be struck out. He did however give the appellant leave to re-amend paragraph 7 of his amended defence saying that if the appellant wished to pursue this limb of his defence he must make it clear in paragraph 7 that it is his case that the respondent was criminally implicated in the drug import in question. In the event of a re-amended defence being filed the balance of the respondent's strike out summons would be relisted for hearing after witness statements had been served and filed to see if the appellant was capable of proving the factual allegations upon which the defence of fair comment is based. This appeal is, however, concerned only with the amended defence and not with any re-amended defence.
21. So the appellant lost in the lower court because the comment was not underscored by a relevant allegation of fact.

The Appellant's Submissions

22. Mr. Johnston argues that there are three principal determinations in the Chief Justice's judgment, each of which is wrong. These are:

    1. That the comment in the posting only makes sense if the appellant is calling the respondent a criminal. (Determination1).
    2. That the appellant would have to prove the respondent is a criminal for the defence of fair comment to succeed. (Determination 2).
    3. That the respondent's knowledge that the appellant "remains a respecter of Rastafarian beliefs," and the lack of "widespread interest on both sides of the House

of Parliament" were not in any way relevant to the comment made in the posting. (Determination 3).

23. The thrust of Mr. Johnston's argument is that the facts relied upon are sufficient to found the defence of fair comment and that all of the factual matters set out in the amended defence are relevant to the comments made by the appellant in the posting. Whilst the meaning in paragraph 5(a) of the Statement of Claim is accepted i.e that the respondent is a dishonest hypocrite who has dubious motives for introducing a motion in Parliament for random testing of MPs, that alleged in paragraph 5(b) and (c) is not. Whether or not they are defamatory, submits Mr Johnston, is a matter for the jury. His case is that they are not defamatory. To summarise therefore, Mr Johnston's case is that the true meaning of the publication is a matter for the jury. The publication only means what is alleged in 5(a) and not what is alleged in 5(b) and 5(c). The Chief Justice was wrong in his conclusion in Determination 1 that the posting only makes sense if the appellant is calling the respondent a criminal; he was wrong to conclude that the "dishonest hypocrite" comment only makes sense if "implicated in" means "criminally implicated" as opposed to "innocently implicated".
24. Mr. Johnston's argument continues that the second Determination flows from the first namely that for the defence of fair comment to succeed the appellant would have to prove that the respondent is a criminal. This too was wrong as was the third Determination.
25. In order to succeed in this appeal, Mr. Johnston must establish that the facts relied upon are sufficient to found the defence of fair comment. What are the supporting facts? Mr. Johnston relied in argument on the following:
    - Lack of support for the motion in the House.
    - What the former Head of Narcotics said.
    - The respondent's knowledge that the appellant is a Rastafarian.

26. In his skeleton argument he went further, saying an honest person aware of the facts that:

- the respondent remains connected to a leading importation company which was implicated in a notorious drug importation investigation.
- the respondent was considered by the former Head of Narcotics at the Bermuda Police Service (with reason) to be an active suspect in an investigation concerning a conspiracy to import drugs.
- the estimated street value of the drugs imported at Dunkley's Dairy was $3.375 million.
- two persons were convicted in relation to the drug importation and those persons lived in a separate dwelling-house on land in Devonshire owned by the respondent.
- the respondent was seen by the former Head of Narcotics greeting a "renowned drug dealer in his office as if he knew him".

could come to the honestly held view that the respondent was hypocritical in bringing forward a motion for the random drug testing of sitting members of Parliament.

27. Mr. Johnston does not rely on a justification defence in respect of paragraph 5(a) of the Statement of Claim – the dishonest hypocrite claim; the defence here is honest comment. He argues that the Chief Justice was wrong in concluding in Determination 1 that the comment only makes sense if the respondent is a criminal and that paragraph 5(b) and (c) can only be read in that way. He submits that the posting does not bear the meaning alleged in (b) and (c) or at the very least it is a matter for the jury whether it does or does not. It is for the jury to decide the meaning of the publication and it only means what is alleged in (a) and not (b) and (c). The judge's error in Determination (1) has informed his conclusions in Determinations (2) and (3) which are also wrong. The defence of honest comment does not, he submits, only succeed if the appellant proves the respondent is a criminal. Mr. Johnson further submits that the judge's third determination is wrong, but as Bell JA pointed out in argument it

is difficult to see how the matter there referred to e.g the respondent's knowledge of the appellant's respect for Rastafarian beliefs has any relevance to the comment in the posting.

28. The comment is not, argues Mr Johnston, just a bare comment. There is enough to be left to the jury He relies on the words of Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 176:

> "Where an action for libel is tried by judge and jury, it is for the parties to submit to the jury their respective contentions as to what is the natural and ordinary meaning of the words complained of, whether or not the plaintiff's contention as to the most injurious meaning has been stated in advance in his statement of claim. And it is for the judge to rule whether or not any particular defamatory meaning for which the plaintiff contends is one which the words are capable of bearing."

29. We were also referred to the Privy Council decision in *Jones v Skelton* [1963] 1 WLR 1362 in which the Judicial Committee pointed out at p 1379 that if the words are reasonably capable of being regarded as statements of fact or of being regarded as expressions of opinion it is for the jury to decide which they are.

30. The correct approach was emphasised by Nicholls LJ, as he then was, in *Control Risks Ltd and Ors v New English Library Ltd and Anr* [1990] 1 WLR 183,189H:

> "Whether the words complained of in the present case include a comment, recognisable as such, on a matter of public interest is a question to be decided by the jury at the trial. I agree with the judge that in the present case there are passages which it would be open to the jury to find are defamatory statements of fact and there are other passages which it would be open to the jury to find are comment on a matter of public interest. But it will be for the jury to decide whether the plaintiffs are correct in their submission that the alleged comment is incapable of being distinguished from statements of fact. This is a matter to be decided by the jury at trial. Where I have to part company with the judge is that I am unable to accept that here statements of fact and comment are so intertwined that no reasonable jury properly directed could conclude that a comment to the effect now

> crystallised by the defendants in the form set out above is to be found with reasonable clearness in the words complained of."

31. Mr. Johnston submits that the Chief Justice was in error as to his role; he usurped the function of the jury. There were sufficient facts upon which to base the comment for the matter to be left to the jury.

32. There is a further point. The Chief Justice said at paragraph 13 of his judgment that he declined to follow *dicta* in post 1952 English cases that the appellant was not required to prove the truth of every allegation of fact relied upon as a basis for the comment. He regarded the law as correctly stated by Fletcher Moulton LJ in *Hunt v Start Newspaper Company Ltd* [1908] 2 KB 309, 320:

> "In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails."

33. There is no statutory provision in Bermuda equivalent to section 6 of the Defamation Act 1952 which applied in England until it was repealed and replaced by section 3 of the Defamation Act 2013. Section 6 of the 1952 Act provided:

> "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly or expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

34. Accordingly in Bermuda there is no statutory provision that affords a defendant a fair comment defence where each allegation of fact upon which the comment is based is not proved to be true.

35. Mr. Johnston, however, submits that the Chief Justice was wrong and he relies on *Kemsley v Foot and others* [1952] AC 345, a decision which predated the 1952 Defamation Act. In that case, under the heading "Lower than Kemsley," a periodical published an article criticising the conduct of a newspaper unconnected with him. In an action for libel an application was made to strike

out the defence of fair comment on the grounds that it could not proceed because no facts appeared in the article to support the statement in the headline. It was held that in order to admit the plea of fair comment it was unnecessary that all the facts on which the comment was based should be stated in the alleged libel. There was a sufficient substratum of fact to be implied from the words, *viz*, that the plaintiff was responsible for the press of which he was the active proprietor. The critical passage is in the speech of Lord Porter beginning at p 357:

> "In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in particulars delivered in the course of the action? In my opinion, it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory to the plaintiff; 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.
>
> In the present case, for instance, the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that press is a low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendant's' plea. The protection of the plaintiff in such a case would, in my opinion, be, as it often is in cases of the like kind, the effect which an allegation of a number of facts which cannot be substantiated would have upon the minds of a jury who would be unlikely to believe that the comment was made upon the one fact or was honestly founded upon it and accordingly would find it unfair."

36. It is to be noted that Lord Porter went on to say that he did not believe he had said anything that was at variance with the authorities and he cited Fletcher Moulton LJ in the *Star Newspaper* case.

37. *Kemsley* was decided in February 1952 and the Defamation Act 1952 was passed the following October. Mr Johnston argues that it was passed to support and clarify the common law. True the Defamation Act did not apply to Bermuda, but neither should the common law be regarded as frozen in its pre 1952 state. Sensible development of the law is to be found by looking at the English authorities.

38. *Joseph and Ors v Spiller and Anr* [2011] 1 AC 852 is a more recent case in which the defence of fair comment was considered by the Supreme Court. Lord Phillips of Worth Matravers PSC considered the earlier case of *Tse Wai Chun v Cheng* [2001] EMLR 777 in which Lord Nicholls of Birkenhead had set out the five elements of the fair comment defence. He had expressed the fourth in these terms:

> "The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded."

39. It was this proposition that was directly in issue in *Joseph v Spiller*. The facts on which the defendants wished to rely in support of their plea of fair comment included a fact to which they had made no reference in the publication complained of. If they were permitted to do so it would have run foul of Lord Nicholls' fourth proposition which counsel submitted was contrary to authority and wrong. The issue raised by the appellant was the extent to which, if at all, the defence of fair comment requires that the comment should identify the matter or matters to which it relates.

40. Lord Phillips had this to say about *Kemsley v Foot*:

> "94 My reading of the position is as follows. The House had held that the defence of fair comment could be raised where the comment identified the subject matter of the comment generically as a class of material that was in the public domain. There was no need for the commentator to spell out the specific parts of that material that had given rise to the

> comment. The defendant none the less had quite naturally given particulars of these in order to support the comment. Lord Porter held that it was not necessary to prove that each of these facts was accurate provided that at least one was accurate and supported the comment.
>
> 95 This passage does not support the proposition that a defendant can rely in support of the defence of fair comment on a fact that does not form part of the subject matter identified generally by the comment. Even less does it support the proposition that a defendant can base a defence of fair comment on a fact that was not instrumental in his forming the opinion that he expressed by his comment. The last sentence of the passage that I have cited makes this plain.
>
> 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."

41. Lord Phillips said he could not reconcile Lord Nicholls' fourth proposition in *Cheng* with *Kemsley v Foot*. He said that Lord Nicholls' proposition echoed what Fletcher Moulton LJ had said in *Hunt v Star Newspaper Co Ltd* but his observations were obiter. He went on at 885A:

> "There is no case in which a defence of fair comment has failed on the ground that the comment did not identify the subject matter on which it was based with sufficient particularity to enable the reader to form his own view as to its validity. For these reasons, where adverse comment is made generally or generically on matters that are in the public domain I do not consider that it is a prerequisite of the defence of fair comment that the readers should be in a position to evaluate the comment for themselves."

Then he concluded at p 885G:

> "It is a requirement of the defence that it should be based on facts that are true. This requirement is better enforced if the comment has to identify, at least in general terms, the matters on which it is based. The same is true of the requirement that the defendant's comment should be honestly founded on facts that are true."

42. He then rewrote Lord Nicholls' fourth proposition so that the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based. So, submits Mr. Johnston, broad identification of the subject matter on which the comment is based is sufficient.
43. Mr. Johnston's next point relates to Determination 3. The Chief Justice's conclusion was that the respondent's knowledge that the appellant remains a respecter of Rastafarian beliefs and the lack of widespread interest on both sides of the House of Parliament were not relevant to the comment made in the posting. The Chief Justice based this conclusion on the observation of Lord Phillips in *Joseph v Spiller* at p 859E, the requirement that the comment must be germane to the subject matter criticised, which he called the "pertinence" requirement.
44. Mr. Johnston argues that Lord Phillips was envisaging a much broader and looser connection between the comment and the subject matter than was the Chief Justice. He submits that the subject matter was proposal of the motion in the House. In that context, he argues, the comment was plainly germane and the matter should have been left to the jury.

The Respondent's Submissions

45. Mr. Frith, who appeared before us for the respondent, submits that there are two fundamental flaws in the argument of Mr. Johnston; it fails on the law of Bermuda and it fails on the basis of the law of fair comment as properly understood. He invited the Court to consider the whole of the thread, emphasising that the video was an important part of it. The striking feature, he contends, is the absence of fact on which to base the comment that the defendant is a dishonest hypocrite for supporting the introduction of random

drug testing in the Bermuda House of Assembly. What is relied upon in support of the fair comment defence is as set out in paragraph 7 of the amended defence. The respondent sets out the alleged defamatory meaning of the thread in paragraph 5(a) of the statement of claim. Whilst the appellant admits the meaning of 5(a) he gives a bare denial of the meaning of 5(b) and (c) without proffering any alternative. Mr Frith submits the words must mean something. He argues that there are two separate requirements that Mr Johnston has elided, namely that the comment must be based on facts that are true and that it must indicate explicitly or implicitly at least in general terms the facts on which it is based. (see para 43 above). Mr Frith continues that the defence of fair comment cannot be left to the jury unless sufficient facts can be identified to allow a defence of fair comment to be made (see *Gatley* 1.10 page 12). The judge was right to strike out the defence because "the allegation of dishonest hypocrisy is merely a comment which is parasitic on the more serious innuendo. No basis of fact is indicated either expressly or impliedly and there is no basis of fact to justify the comment. As Lord Nicholls said in *Cheng* at page 6:

> "Third the comment must be based on facts which are true or protected by privilege: see for instance *London Artists v Littler* [1969} 2 QB 375,395. If the facts on which the comment purports to be founded are not proved to be true or published on a privileged occasion, the defence of fair comment is not available."

46. Whilst Lord Nicholls' judgment was considered by the Supreme Court in *Joseph v Spiller* this point was never in issue. What was in issue was his description of proposition four.
47. Mr Frith, referring to *Kemsley v Foot,* emphasised that public knowledge that Kemsley was a newspaper proprietor is not comparable to common knowledge that the respondent was a drug dealer. It is a requirement of the defence of fair comment that the comment should be based on facts that are true and this proposition was not disturbed by *Joseph v Spiller,* (see *Hunt v The Star Newspaper Co Ltd* at page 217).
48. Mr Frith points out that this is not a *Kemsley* case. There are no notorious facts about the respondent that require a category four analysis. A comment on

conduct is only justified if the conduct is true. If the facts on which the comment is based have no prospect of being proved to be true the matter cannot be left to the jury. This case in truth falls at the category three hurdle and never gets to category four. There are no facts, just references to the investigating officer and speculation or comment on his part.

49. In summary, Mr Frith submits that the appellant admits the allegation in para 5(a) of the statement of claim – the dishonest hypocrite allegation – is well founded but says 5(b) and (c) should go to the jury. There is no alternative defence of justification. But the dishonest hypocrite allegation only makes sense if the respondent was involved in the dishonest importation of drugs; otherwise there can be no hypocrisy. There is nothing to go to the jury and the Chief Justice was right to strike out this aspect of the defence. Mr Johnston's response is that Mr Frith is asking the court to determine the meaning of the publication and that is precisely what the Chief Justice did. The court should not usurp the jury's function.

Analysis and Conclusion

50. The two relevant factors for the defence of fair comment to succeed in the present case are (1) there must be a basis of fact on which the comment is founded and (2) the comment must be germane to the subject matter criticised. These are to be found in the third and fifth propositions approved by Lord Phillips in *Joseph v Spiller.* Hard as I have tried I have been unable to detect any factual basis for the comment that the respondent is a dishonest hypocrite other than that he has been involved in criminal drug activity, which is not how the case is put. Nor is the problem overcome by Mr Johnston's revised drafting of para 7 of the amended defence (see para 8 above).
51. As to the three principal determinations of the Chief Justice, he was right to rule that the comment in the posting only makes sense if the appellant is calling the respondent a criminal; the respondent would have to prove the respondent is a criminal for the defence of fair comment to succeed and the respondent's knowledge of the appellant's Rastafarian beliefs and the lack of interest in the motion were irrelevant to the comment in the posting. Mr Johnston was unable in argument to identify sufficient facts upon which to

found a defence of fair comment. Lack of support for the motion in the House is nothing to the point. What the former Head of Narcotics said was no more than speculation or his opinion and the respondent's knowledge that the appellant is a Rastafarian is irrelevant. In my judgment there was no factual basis on which to found a defence of fair comment. There was nothing to leave to the jury and the Chief Justice was right, indeed bound, to strike out paragraph 7 of the amended defence.

52. The issue whether the appellant has to prove the truth of every allegation of fact relied on as a basis for the comment or whether the truth of one fact is enough does not arise in the light of my conclusion that there is no factual basis at all to underscore the comment. I would therefore prefer not to express an opinion on this issue.

53. I would dismiss the appeal.

Signed

Baker, P

I agree *Signed*

Bell, JA

BERNARD, JA

BACKGROUND

1. On 31st October 2013 the Respondent who is the Premier of Bermuda issued a Specially Endorsed Writ of Summons against the Appellant, Leader of the Opposition, claiming damages for defamation arising out of a publication in a Facebook thread on 30th September 2013. At that time the Respondent was the Deputy Premier and Minister of Public Safety for Bermuda.
2. The Facebook thread referred to and incorporated a video taken in Florida by Larry Smith, the former Head of Narcotics in Bermuda. It was widely available and referred to an investigation carried out in 2003. The Respondent alleges in his Statement of Claim that both the video and the Facebook thread clearly means that he is a dishonest hypocrite for supporting the introduction of random drug testing in the Bermuda House of Assembly as he had been involved in the criminal importation of drugs into Bermuda. For the purpose of determining the issues involved in this appeal, the following is the relevant portion of the Facebook thread at paragraph 3.1 of the Statement of Claim:

> *"At 8:59 a.m. "Morning Ms. Furbert, this motion is solely the doings of Minister Dunkley (the irony). Only Walton Brown spoke on our side, and three members from their side (reluctantly). In other words, there is very little support for it but the OBA members are silent. Dunkley has motivations that only he can explain. If the motion is about standards, then it should be based on being honourable (being honest). That said, we should have lie detector test as a start. Lord knows we would not have a sitting Parliament. In terms of how it will work, none of us has any idea. When I look across the isle, all I can do is shake my head, especially when we all know what the former head of Narcotics had to say about Minister Dunkley, and we all know two men have served time in prison for it. Imagine a PLP MP, as a leading importer of goods, also being the head of National security and border control? Irony and hypocrisy at its finest, delivered by a man whose sole purpose is power and control".*

3. On 25th November 2013 the Appellant filed a Defence, and pursuant to a Summons filed by the Respondent for an order to strike out the Defence, an

Amended Defence was filed on 24th July 2014. On 8th October 2014 the Respondent filed a summons to strike out paragraph 7 of the Amended Defence alleging "honest comment" which reads as follows:

> *"Further or alternatively, insofar as the words set out at paragraph 3 contained the following comment or expression of opinion, namely the Plaintiff's continuing connection with a leading Bermudian goods importation company that was implicated in a well-known drug importation investigation should raise some concerns with the Bermudian electorate, and that, in light of this, the Plaintiff's fascination with promoting a motion in the House of Assembly on the random drug-testing of sitting Members of Parliament is hypocritical; the Defendant contends that the said words constituted honest comment on a matter of public interest.*
> *Particulars of Honest Comment:*
> *(1) It is a matter of public record that the Defendant remains a respecter of Rastafarian beliefs; and openly practiced Rastafarianism. This open practice included the liberal use of cannabis (prohibited by the Misuse of Drugs Act 1972) for medicinal and spiritual purposes. There is a further widespread view amongst various parts of the Bermudian populace that the Defendant still makes continual use of cannabis. As such, the Plaintiff appears to be of the view that if the House of Parliament instituted random drug-testing, and promoted the idea that the use of cannabis is morally reprehensible, the One Bermuda Alliance, and the Plaintiff, may be able to score points with the electorate, and at the same time, do political damage to the Defendant's political reputation.*
> *(2) The motion for the random drug-testing of sitting members of Parliament, when introduced, did not appear to have wide-spread interest on both sides of the House of Parliament. The said motion was "solely the doings" of the Plaintiff.*
> *(3) Paragraph 6 of this Defence is repeated (along with all the admitted particulars of innuendo pleaded in the Statement of Claim)."*

4. Counsel for the Appellant sought to have the said paragraph re-amended to read this way:

> *"Further or alternatively, insofar as the words set out at paragraph 3 contained the following comment or expression of opinion, namely that the Plaintiff's fascination with promoting a motion in the House of Assembly on the random drug-testing of sitting Members of Parliament is hypocritical because of his connection with a leading Bermudian goods importation company that was implicated in a well-known drug investigation in which two men with some connection to the Plaintiff served prison sentences; the Defendant contends that the said words constituted honest comment on a matter of public interest, namely the standard by which the Bermudian electorate should judge parliamentarians, the Plaintiff's motivation for bringing forward such a motion, and whether such a motion is misguided in the circumstances"*
> (Amendments underlined)

5. It is important to set out in *total* the content of paragraph 5 of the Respondent's Statement of Claim since it relates to admissions made by the Appellant. This is the wording and import of paragraph 5:

> "5. In their natural and ordinary meaning, and/or by innuendo, the words complained of at paragraph 3 above were meant to mean that the Claimant:
>
> *a. is a dishonest hypocrite who has dubious motives for introducing a motion in Parliament for random drug testing for sitting MPs; and/or*
>
> *b. has been and continues to be a leading importer of narcotics, a crime for which two men have already been imprisoned; and/or*
>
> *c. abuses his public office in order to facilitate and further his involvement in the illicit importation of drugs for his own personal gain …."*

6. The Appellant in paragraph 5 of his Amended Defence admits the meaning contended for in 5a. of the Respondent's Statement of Claim, but denies the meaning contended for in 5b. and 5c.

RULING OF THE HONOURABLE CHIEF JUSTICE

7. On 3rd December 2014 the Honourable Chief Justice after hearing submissions from Counsel for the Respondent and for the Appellant struck out Particulars (1) and (2) of paragraph 7 of the Appellant's Amended Defence on the ground that the averments were wholly irrelevant to the defamatory matters complained of. The Appellant was granted leave to re-amend paragraph 7 of the Amended Defence substantially in the terms of paragraph 23 of his Skeleton Argument and which is set out earlier at paragraph [4] of this judgment. The Chief Justice went on to state that if the Appellant wished to pursue this limb of his Defence, he must add one or more words into the body of paragraph 7 of the Defence to make it clear that it is his case that the Respondent was criminally implicated in the drugs importation incident in question. He stated further that unless he filed an appropriately Re-amended Defence within 28 days, paragraph 7 will be struck out in its entirety.
8. The Chief Justice rather than dismissing the balance of the Respondent's strike-out summons, ordered that the summons be relisted for hearing after witness statements have been served and filed, no doubt giving the Appellant an opportunity to adduce evidence on its face capable of proving the factual allegations upon which the fair comment defence was based; if he could not, the balance of paragraph 7 would be potentially liable to be struck out at that stage.
9. The learned Chief Justice in arriving at his decision analysed the defence of fair comment and relied on the case of *Tse Wai Chun v. Cheng*[2] and *Joseph v. Spiller*[3] in which the elements and principles of the defence were discussed. His analysis embraced the following questions:

[2] [2001] EMLR, 777
[3] [2011] 1AC, 852

Is there a comment?

10. In determining whether there was a comment the Chief Justice found that the body of paragraph 7 pleaded facts coupled with a comment. He indicated that the Appellant admits that the words he used accused the Respondent of "being a dishonest hypocrite", but unlike the position in *Hunt v Star Newspaper Co Ltd*[4] where the allegation of fraudulent conduct was "*the most important allegation of fact in the whole case*", the allegation of dishonest hypocrisy is merely a comment which is parasitic on the more serious innuendo.

Is the factual foundation for the comment true?

11. The Chief Justice conceded that it was difficult at this juncture to imagine what evidence the Appellant will be able to adduce at trial which could justify leaving the fair comment defence to the jury, and reasoned that the Appellant can only make such egregious allegations and escape liability for damages through his fair comment defence if, amongst other things, he proves the factual foundation for what he contends was a fair comment to be true. He stated that the Court cannot properly conclude at this juncture, before the Appellant has served and filed his evidence, that he will be unable to adduce sufficient evidence to prove the truth of the facts upon which the comment are based.
12. The Chief Justice, however, stated that for the avoidance of doubt he was only assuming for the purposes of the present interlocutory application that the Respondent will succeed in proving that the Appellant's words bear the disputed defamatory meaning complained of. He concluded that it will of course be for the jury to determine whether or not the words complained of bear the disputed defamatory meaning contended for by the Respondent, it being common ground that the words used are defamatory to some extent.

Are the facts upon which the comments are based sufficiently identified?

13. In answering this question the Chief Justice concluded that in his judgment paragraph 7 of the Defence (including paragraph (3) of the Particulars) sufficiently identifies a factual foundation for the hypocrisy comment.

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[4] [1908] 2 KB, 309

14. However, because of the exceptional nature of the strike-out remedy and its availability only in plain and obvious cases, the Chief Justice found that he should err in favour of the Appellant in construing the amended Defence and not adopt an interpretation which resolves ambiguities of drafting in favour of the Respondent, the strike-out applicant.

Is the comment germane to the conduct or matter criticised?

15. In this respect the Chief Justice was guided by a passage in the judgment of Lord Phillips of Worth Matravers in *Joseph v. Spiller* where he described what he characterised as the "pertinence" requirement as one that had never arisen in any reported case, and is to this effect:

> *"… The requirement to show that the comment is germane to the subject matter criticised and is one that an honest person could have made, albeit that that person may have been prejudiced, or have had exaggerated or obstinate views, is one that is bizarre and elusive. I am not aware of any action in which this has actually been an issue. I shall describe this element as 'pertinence'."*

APPELLANT'S SUBMISSIONS

16. Counsel for the Appellant crafted his submissions on what he termed three principal determinations of the Chief Justice's judgment.

> 1. The comment in the posting only makes sense if the Appellant is calling the Respondent a criminal.
>
> 2. The Appellant would have to prove that the Respondent is a criminal for the defence of fair comment to succeed.
>
> 3. The Respondent's knowledge that the Appellant "remains a respecter of Rastafarian beliefs" and the lack of "widespread interest on both sides of the House of Parliament" were not in any way relevant to the comment made in the posting.

17. Development of the above determinations also rests on three planks:

> (a) There is no deficiency in the pleadings, but even if there is, it would be simple to correct by amendment;
> (b) The pleading sets out comment and not an imputation of fact;

(c) The facts relied upon are sufficient to found the defence of fair comment (The Sufficiency Argument).

He submitted that in light of the three determinations made in the judgment, there was no need to pursue all of the same arguments in the appeal, and concluded that the Appellant need only advance the Sufficiency Argument along with one more, namely, that all of the factual matters set out in the pleading were relevant to the comments the Appellant made in the posting, and which he termed "the Pertinence Argument".

18. He explained the Sufficiency Argument as being the facts in the pleading which the Appellant relies upon to found a defence of fair comment and which itself is divided into two "legs".

1. The Judge misunderstood the relationship between paragraph 7 of the pleading and the remainder of the Appellant's Defence to the claims brought against him by the Respondent (i.e. Determination (1) which is flawed).

2. The Judge was wrong to conclude that the Appellant had to prove every allegation of fact which was pleaded (Determination 2 which is erroneous).

19. His three-point analysis of the first leg of his sufficiency argument involving the posting is this:

1. The subject is identified, but only some of the Appellant's statements are about the Respondent;

2. The majority of the passage is in general terms, and references to the Respondent merely indicate one specific instance where the Appellant argues that standards of MPs have been lax or where there should be some electoral concern;

3. The Appellant explicitly calls the Respondent a hypocrite which Counsel asserts is the sting of the libel, and which the Appellant admits in paragraph 7 of his Amended Defence bears that meaning.

20. With regard to the remaining allegations in the Statement of Claim, Counsel posited that the principal defence is that the passage does not bear the

meanings proffered by the Respondent, and the fair comment defence has been brought into play. The overarching question is whether it was fair comment to suggest that the Respondent was a hypocrite with dubious motives in introducing the relevant motion in Parliament.

21. Counsel joins issue with the Chief Justice for proffering his own views on how the honest comment defence may be construed, and how to proceed on any "hypothesis" that the Respondent would succeed at trial in establishing disputed meanings. In his view the singular meaning of a publication is for the jury, and made reference to the cases of *Jones v Shelton*[5] and *Slim v Daily Telegraph Ltd*[6]. Furthermore, to proceed on any hypothesis is to openly violate the approach set out in *Branson v Bower No. 2*[7], and encroach upon the province of the jury.

22. Another criticism of the judgment was that the Chief Justice should have recognised that the question whether the posting expressed a comment or made an allegation of fact was separate from whether the comment was fair. The relevant comment that the Respondent is "a dishonest hypocrite" is the one which must be tested for fairness, not another comment as formulated by the Chief Justice.

RESPONDENT'S SUBMISSIONS

23. Counsel for the Respondent contends as an opening gambit that the Defamation Acts 1952 and 2013 of England and Wales do not apply to Bermuda, and the defence of honest comment or fair comment is governed by the common law. The statutory amendment of the fair comment defence in Section 6 of the Defamation Act 1952 does not extend to Bermuda.

24. Counsel submitted that by this appeal the Appellant seeks to avoid having to establish the factual allegations upon which an "honest comment" defence is based. In Bermudian law there being no statutory provision which allows a defence of fair and honest comment to succeed without proof of the allegations of fact upon which the comment is based, the cases relied on by the Appellant post 1952 should be treated with extreme caution. The position in Bermuda is

[5] [1963] 1WLR, 1362
[6] [1968] 2 QB, 157
[7] [2002] QB, 737

that of the common law prior to 1952 as set out in *Hunt v The Star Newspaper Co Ltd.*[8]

25. In relation to paragraphs 7(1) and 7(2) of the Amended Defence, Counsel submitted that they do not provide a foundation for the alleged defamatory comments with no provable facts capable of supporting the allegations. Paragraph 7(3) simply repeats paragraph 6 of the Amended Defence which admits some, but not all, of the particulars of innuendo pleaded at paragraph 5 of the Statement of Claim.

26. Counsel reminded the Court that the appeal is in relation to the ruling striking out sections of the Amended Defence, and the subsequent re-amendments are not relevant to the determination of whether the Chief Justice's ruling of 3rd December, 2014 should be overturned. If there is no real prospect of evidence to support the necessary factual basis for the fair comment Defence the relevant sections of the Amended Defence should be struck out; he made reference to *Hunt v Times Newspapers Ltd.*[9]

DISCUSSION

27. It is accepted as stated by the Chief Justice in paragraph 11 of his Ruling that the Defamation Act 1952 did not form part of the laws of Bermuda; hence Section 6 which spoke to the defence of fair comment and English legal authorities concerning it had and still do not have any relevance to cases of defamation brought before the Bermudian courts. Where such a defence arises recourse must be had to the common law and cases decided prior to 1952. The Chief Justice indicated that the Libel Act 1857 of Bermuda contains no equivalent statutory expansion of the fair comment defence as it existed in the common law of England prior to 1952. In the circumstances he declined to follow the dicta in post 1952 English cases relied on by Counsel for the Appellant. It should be noted that in England a Defamation Act 2013 has been enacted which repealed the 1952 Act, and a new defence of "honest opinion" has been created under Section 3 replacing the defence of fair comment. I agree that in relation to the defence of fair comment one must consider the common

[8] [1908] 2KB, 309
[9] [2012] EWHC, 110

law position and cases decided in accordance with it outside of statutory provisions.

28. Counsel for the Appellant in his submissions identified the overarching question as being whether it was fair comment to suggest that the Respondent was a hypocrite with dubious motives in introducing the relevant motion in Parliament. As stated earlier the Chief Justice made reference to and adopted the analysis of the five elements of that defence by Lord Nicholls of Birkenhead in *Tse Wai Chun v Cheng*[10] and adopted by Lord Phillips of Worth Matravers PSC as propositions in *Joseph v Spiller*[11], the case having been cited to this Court by Counsel for the Appellant, and also relied upon by Counsel for the Respondent. According to the Chief Justice no issue was joined on the question of whether the subject matter of any comment met the public interest requirement which Lord Nicholls listed as the first of the five elements of the defence of fair comment at common law. An analysis of these five elements may be useful to ascertain whether paragraph 7 of the Re-amended Defence meets the test:

> (1) Admittedly no issue was joined on the element of public interest, but there is no doubt in this case involving as it does both the Premier and the Leader of the Opposition of the Government of Bermuda;
>
> (2) To say that the Respondent's fascination with promoting a motion in the House of Assembly on the random drug-testing of sitting Members of Parliament is hypocritical because of his connection with a leading Bermudian goods importation company that was implicated in a well-known drug investigation in which two men with some connection to the Plaintiff served prison sentences, is mixed comment and fact. The facts of the Respondent's connection with the goods importation company implicated in the drug investigation and his connection with the two men who served prison sentences have to be established appropriately by evidence led at the trial and to the satisfaction of a jury if there is a jury trial.

[10] [2001] EMLR, 777
[11] [2011] 1AC, 852-859

(3) The comment that the Respondent is hypocritical must be based on the alleged facts mentioned in (2) and which ought to be proved to be true at the trial.

(4) The comment by the Appellant must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment that the Respondent is a hypocrite is being made. These facts were indicated explicitly in general terms for a reader to judge how far the comment was well-founded. The Defendant, however, will still have to establish the truth of the facts at the trial for a judge or a jury, if there is a hearing before a jury. The Chief Justice was also of a similar view that the Appellant in that case can only escape liability if he proves the factual foundation to be true for what he contends was a fair comment, and the Court cannot properly conclude this until his evidence has been filed.

(5) This is the most difficult to establish as the comment must be one which could have been made by an honest person, however prejudiced he might be and however exaggerated or obstinate his views; further, it must be germane to the subject matter criticised. This element of fair comment has been criticised by Lord Phillips in *Joseph v Spiller* and described as "pertinence" stating that he was not aware of any action in which it has actually been an issue; he found it to be bizarre and elusive.

29. Of great significance and relevance is the case of *Kemsley v Foot and Others*[12] decided in February 1952 where it was held that in order to admit the plea of fair comment it was unnecessary that all the facts on which the comment was based should be stated in the alleged libel, and failure to establish all the facts given in the particulars of defence would not necessarily disentitle a defendant to succeed. The reason was that in that case the facts were not set out in the alleged libel but in the particulars of the claim and were not published to the world at large. The case concerned an application to strike out the defence not unlike the one before us, but on the ground that it could not succeed because no facts appeared in the newspaper article to support the statement. Lord Porter in his judgment identified the question in all cases where the defence of

[12] [1952] AC, 345

fair comment arises as being whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action. He also expressed the opinion that in a case where the facts are fully set out, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence, the rationale being that those to whom it is published can read them and may regard them as facts derogatory of the plaintiff. I would not go as far as this in the present case as in my opinion there is a sufficient substratum of fact indicated in the words which may be regarded as derogatory of the Respondent. However, the truth of the facts which form the substratum of fact needs to be established at a trial.

30. In the present case when one scrutinises the posting it suggests hypocrisy on the part of the Respondent in the use of the words "irony and hypocrisy at its finest" among the comments. The Appellant admits the meaning in paragraph 5(a) of the Statement of Claim that the Respondent is a dishonest hypocrite, and is the comment which needs to be tested for fairness.
31. Unlike *Kemsley v Foot* the comments in both the posting and the Particulars are based on some facts which may have been known to members of the public, but which need to be established at the trial.
32. Although *Kemsley v Foot* was decided in February 1952 and the Defamation Act 1952 came into effect on 30th October, 1952 it is relevant and important as a common law precedent.
33. Reference must be made to dicta of Fletcher Moulton, LJ in *Hunt v Star Newspapers Co Ltd* concerning the law as to fair comment which in order to be justifiable must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment; further, if the facts upon which the comment purports to be made do not exist the foundation of the plea fails. For this reason the Appellant's comments need to be supported by justifiable facts as stated earlier, and it is also for this reason that leave was granted by the Chief Justice to re-amend paragraph 7 of the Amended Defence.
34. A comparison with the approach to a defence of fair comment taken in *Hunt v Star Newspapers Co Ltd, Kemsley v Foot,* and the third element in *Joseph v Spiller* following *Tse Wai Chun v Cheng* reveals some similarity. All indicate

proof and veracity of the facts on which a comment is based. The dicta of both Fletcher Moulton, L.J. in *Hunt* and Lord Phillips in *Joseph v Spiller* reflect the need for the existence of justifiable facts on which a defence of fair comment can survive.

CONCLUSION

35. For all of the reasons stated above I would dismiss the appeal and uphold the orders of the learned Chief Justice.

Signed

Bernard, JA