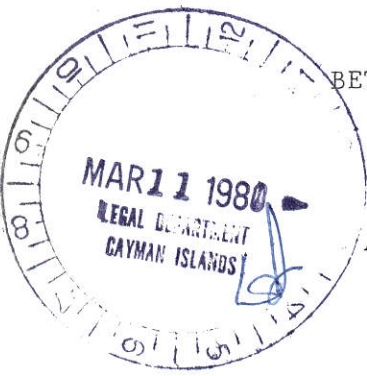


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IN THE GRAND COURT OF THE CAYMAN ISLANDS
 HOLDEN AT GEORGE TOWN on 28th February 1980
 BEFORE THE HONOURABLE SIR JOHN SUMMERFIELD, C.B.E., Q.C.

Causes Nos. 256/7/8/9 of 1979



BETWEEN : JAMES M. BODDEN : PLAINTIFFS
 G. HAIG BODDEN
 CHARLES KIRKCONNELL
 and TRUMAN BODDEN
 AND : JAMES A. LAWRENCE : DEFENDANTS
 and
 THE CAYMAN FREE PRESS LTD.

Mr. Ramon Alberga, Q.C. instructed by Messrs. Truman Bodden & Co. for plaintiffs
 Mr. DeLisser, instructed by Mr. W. W. Connolly for first defendant

RULING

These proceedings relate to four applications under rule 41 (1) (a) of the Grand Court (Civil Procedure) Rules to strike out part of the defence in each of four libel actions.

There are four plaintiffs, one ⁱⁿ each of the four separate actions, and the statement of claim of each, as amended, is, with the exception of formal matters relating to his identity, status and business etc., in terms identical to those in other actions. The first defendant in each action is the same person. He is the author of a letter, published in the Caymanian Compass, which is the subject matter of the suit. His defence in each of the four actions is in identical terms. The second defendant in each action is the proprietor and publisher of the Caymanian Compass, a locally published newspaper. No defence had yet been filed on behalf of the second defendant in any of the actions.

The defence of the first defendant is based on justification and fair comment. It is that part of the defence which relates to fair comment that is sought to be struck out, namely paragraph 4 thereof and the particulars thereto.

By consent the four applications which are in the same terms were heard together.

Paragraph 4 of each of the statements of claim, as amended sets out the body of the letter complained of. It is in the following terms:

..."I am very enthused by Mr. Jim Bodden's letter to the press as published in the April 27 issue of the Compass. I quote from

paragraph 7 of that letter "I challenge any one to show me a time in the history of these Islands when the Islands had a more dedicated, hardworking, honest and progressive government than it has now".

MR. JIM BODDEN, I ACCEPT THAT CHALLENGE.

The Civil Service is continuous, and the last sentence of para 7 of Mr. Jim's letter makes it clear that he is referring to the policies of the elected government that took office in 1976. On that basis, and with or without reference to any other Elected Government I charge that this present elected Government is not dedicated to the principles of good government, but that it stinks of nepotism, cronyism, favouritism and oppressive policies that are aimed at total ^{power} control. I charge that in general it is hard-working only in the pursuit of self interest and self-glory. I charge that it is often dishonest with the public when issuing information on vital issues. I charge that its policies and actions are eroding the main pillars of the economy, and if not soon reversed, the Caymanian people will be left with an economy that indeed will resemble Jerusalem after it had been sacked by the Romans in A.D. 70 and its proud inhabitants scattered to the four corners of the world. I charge that the present elected Government is deliberately sowing the seeds of social disaster in our community by its constant unjustified attacks on the expatriate population, and with its constant attacks and harassment of those honest and upright Caymanians who dare speak up against such policies. I charge that in a period of the Islands' greatest economic development the present elected government is not addressing itself to the growing social problems of the people. I will offer Mr. Jim the option of choosing the manner in which I am to demonstrate that this government falls far short of his claim, and is indeed guilty of the charges I have placed against it, and without intending to restrict his choice, I will offer the following suggestions.

(1) A series of face to face public debates with Mr. Jim, or if Mr. Jim deems it necessary with him or any or all members of his elected Government, in which they will answer questions on the

policies and actions of the present Government, or

(2) Mr. Jim or Mr. Jim and his elected colleagues can answer prepared questions posed to them, and the Press can then publish both the questions and answers.

I do not really care how it is done but I have accepted Mr. Jim's challenge, and stand prepared to proceed along any line that will bring this information to the public. If I do not hear from Mr. Jim on this I must accept, and surely the Caymanian Public will accept that he was only running a bluff with his challenge."

Paragraph 4 of each of the defences is in the following terms:

"4. The said words set out in paragraph 4 of the Statement of Claim are fair comment upon matters of public interest namely the conduct of the elected Government since taking office in 1976.

PARTICULARS OF FACTS AND MATTERS ON WHICH
COMMENT WAS BASED

(1) "nepotism."

- (a) The handling of the Gazette contract.
- (b) The acquisition of prison lands and the ensuing benefits of the roadway.
- (c) The contracts for the Cayman News Bureau.

(2) "cronyism and favouritism."

- (a) The contract involving Tom Guest and Mary Solomon
- (b) The appointments to the Cayman Protection Board.
- (c) The Constitution of the Board of Directors of Cayman Airways.
- (d) The granting of a gun licence to Charles Christian.

(3) "Policies that are aimed at total control."

- (a) Warning letter to Press in March, 1977.
- (b) James Bodden's warning to the Civil Service on the floor of the Assembly on 9th April, 1979.
- (c) James Bodden's warning to the Magistrate on the issue of bail to Jeff Watler.
- (d) James Bodden's statement on the floor of the Assembly on 9th April, 1979 concerning control of the Police.
- (e) The handling of the Television Franchise.

(4) "in the pursuit of self interest and self-glory."

- (a) The use of Government funds to build up ICCI.

- (b) The blasting of the channel of South Sound.
 - (c) The Bank proposal by James Bodden.
 - (d) The special vote of Ten thousand dollars (\$10,000.00) in 1977 and 1978 and Fifteen thousand dollars (\$15,000.00) in 1979 as described in Hansard of 20th November, 1978.
 - (e) The reorganization of Cayman Airways.
- (5) "Often dishonest with Public when issuing information on vital issues."
- (a) The reasons given for the termination of Lacsca agreement.
 - (b) The use of loan funds - Cayman Airways.
 - (c) The mis-statements by James Bodden as the ultimatum to the Auditors of Cayman Airways and the reason for the hold up of the Audited accounts.
 - (d) The statements in the Hansard of 5th April, 1979 and in the Economist on the 29th June, 1979 by James Bodden as to the profits of CAL.
 - (e) The statement by Haig Bodden on 12th April, 1979 that the Nor-wester company had published "every detail of the Cayman Energy contract to the detriment of that company."
- (6) "deliberately sewing the seeds of social disaster in our community."
- (a) The dumping of marl fill in the driveway to the manager of CUC's home after the cutting off of electrical supply to James Bodden's home in 1977.
 - (b) The words used by Haig Bodden (Hansard 5th April, 1978) concerning the debate on the continental shelf Law that a Mental Health Law was coming in to deal with mischievicious persons like James Lawrence who wrote letters to the Press.
 - (c) Truman Bodden's insinuation that Desmond Seales and Mary Lawrence and others were communists and that they had conspired to wreck the economy of the colony. (Hansard April 11th, 1979).
 - (c) The implications of the words by Charles Kirkconnell in the above debate suggests violence to the staff of the Nor-wester in vigilante style.
 - (e) The implications of the words used by James Bodden (Hansard April 9th, 1979) that Bankers and Lawyers

were undermining the authority of the Laws of Cayman."

Rule 41 (1) (a) of the Grand Court (Civil Procedure Rules provides:

"41. (1) The Court may at any stage of the proceedings, of its own motion or on the application of any party, order to be struck out or amended any pleading or indorsement, on the ground that -

(a) it discloses no cause of action or defence"...."

No evidence is admissible on an application under the sub-rule.

The substance of this sub-rule corresponds with the substance of O.18 r. 19 (1) (a) of the English Rules of the Supreme Court and one can safely look to the Supreme Court Practice 1979 for guidance on the application of this provision.

It is clear that it empowers the court to strike out part of a statement of claim or defence and it has not been contended otherwise. It is equally clear that only in plain and obvious cases should recourse be had to the summary process under this rule.

The basis of each application is that the offending passages in the letter complained of are statements of fact and not comment and that, therefore, as a matter of law, the defence of fair comment is not open to the defendant. Alternatively, it is contended that if those offending passages, or any of them, amount to comment, then there are no facts in the letter on which to base any such comment and that, therefore, again as a matter of law, the defence of fair comment is not open to the defendant.

The point at issue is one which could have been taken as a preliminary point in proceedings corresponding those contemplated by O. 33 r. 3 of the English Rules of the Supreme Court. I am satisfied that the issue can be ventilated, probably more conveniently and to the advantage of all parties, under the process which has been adopted. If any authority for that view is necessary, in my opinion it is contained in *Kemsley v Foot and Others* 1952 A.C. 345.

In this application I am not concerned with whether the any comment was fair or whether it was on some matter of public interest. I am concerned only with the question of whether the offending passages or any of them are comment and, if so, whether there is a substratum of fact in the letter complained of upon which to base any such comment.

The principles to take into account are conveniently set out in *Gatley on Libel and Slander* and the relevant extracts follow.

"702. Fair comment distinguished from justification.

The defence of fair comment must be distinguished from that of justification. Under the latter (subject now to the provisions of section 5 of the Defamation Act 1952) the defendant must prove the truth of every defamatory fact alleged and every injurious imputation made. Under the former (subject now to the provisions of section 6 of the Defamation Act 1952), the defendant must prove that the facts on which the comment is founded are true and that the comment on these facts is "fair."

"705. Definition. A comment is a statement of opinion on facts. "A libellous statement of fact is not a comment or criticism on any thing." It is comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say that he did the act so criticised."

"709. Words must be read in their context. But words which, taken by themselves, would appear to be a positive allegation of fact, may be shown by the context to be a mere expression of opinion or argumentative inference. To write of a man that he is "a disgrace to human nature" is a defamatory allegation of fact. But if the words were, "He murdered his father, and therefore is a disgrace to human nature," the latter words appear from the context to be merely comment. So the context may show that the defendant, in alleging that a public man has been guilty of some disgraceful or dishonourable conduct, or has been actuated by corrupt or dishonourable motives, bases such allegations on facts which he truly states or clearly refers to. In such a case his allegations, if fairly warranted by these facts, may be defended as comment on, or reasonable inference from, such facts. It is for the jury, subject to the direction of the judge, to decide whether in the particular case the defendant's allegations are allegations of fact or expressions of opinion, and, if expressions of opinion, whether such expressions of opinion are fairly warranted by the facts truly stated or referred to.

Where the jury found that the words complained of were defamatory and untrue, and yet were fair comment, it was held that the findings were not inconsistent, in that the first finding proceeded on the hypothesis that the words ^{were,} or might be, statements of fact, and this hypothesis was then negatived in the second; the defence of fair comment was accordingly upheld."

"710. Dicta on the above paragraph. "comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed, and from which his conclusion can be reasonably inferred....If, although stated as a fact, it is preceded or accompanied by such other facts, and it can be reasonably based upon them, the words may be reasonably regarded as comment, and comment only, and if honest and fair, excusable; and whether it is to be regarded as a fact or comment it is a question for the jury, to be determined by them upon all the circumstances of the case."

"An inference or comment may take the form of a statement of fact. The question is not whether the words which the defendant used stated a fact or not, but whether, reading them in the environment, the impression conveyed to the audience was that the defendant was merely making a bald statement that the defeated men were criminals, or that that was an inference which the speaker thought should be drawn from certain facts which he mentioned or referred to. If the former is the true view, then, no doubt, in the absence of justification, the plaintiff must succeed. If the latter, then, assuming that the facts on which the inference is based are true, and the inference itself is just and fair, he must fail."

"The plea is that the words are fair comment made in good faith and without malice upon a matter of public interest. Under a plea of that character the defendant is entitled to show and indeed he must show what the facts were upon which he commented, that they are facts, that the matter is one of public interest, that the comment is fair and that the comment was made in good faith and without malice."

"711. Allegation must be recognisable as comment, not fact.

But in order that an allegation prima facie defamatory may be defended as fair comment the allegation must be recognisable by the ordinary reasonable man as comment and not as a statement of fact. If the defendant alleges that a public man has been guilty of disgraceful conduct, or has been actuated by corrupt or dishonourable motives, and does not state what those disgraceful acts are, or assign any grounds from which such motives can reasonably be inferred, his allegations are allegations of fact, and not expressions of opinion, and he cannot therefore rely on the defence of fair comment. If a statement in words of fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words were addressed, there would be little, if any, room for inference that it was understood otherwise than as a bare statement of fact, and then if untrue there would be no answer to the action." "If the facts be correctly stated the reader is in a position to form his own conclusions."

"712. In *Kemsley v. Foot* on an interlocutory application to strike out a plea of fair comment on the ground that no or no sufficient statement of the facts on which the comment was made appeared in the article complained of, Lord Porter stated that "the question in all cases is whether there is sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action." But "if a writer chooses to publish an expression of opinion which has no relation by way of criticism, to any fact before the reader, then such an expression of opinion depends upon nothing but the writer's own authority, and stands in the same position as an allegation of fact. It cannot be protected by a plea of fair comment." "To state accurately what a man has done, and then to say that [in your opinion] such conduct is dishonourable or disgraceful, is comment which may do no harm, as everyone can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity for judging for himself of the character of the conduct condemned, nothing but a false picture being presented for judgment."

"714. Comments distinguished from facts. It is thus clear that a critic should never mix up his comments with the facts on which they are based. Ideally, he should set out his facts first, and so separate them from his comments that the reader can readily distinguish the two and judge the value of the criticism. If the two are so entangled that inference is not clearly distinguishable from fact, then those to whom the statement is published may be regarded as founded upon unrevealed information in the possession of the publisher, and it may stand in the same position as any ordinary allegation of fact.

"715. Dicta in *Hunt v. Star*. "If," said Fletcher Moulton L.J. in *Hunt v. Star*, "the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses."

The main principles on which the applicants rely, as contained in the relevant parts of the extracts from *Gatley* above, stem from the following cases cited :

Davis & Sons v. Shepstone 1886 11 A.C. 187 at p. 190;
Hunt v. The Star Newspaper Co. Ltd. 1908 2 K. B. 309 at pp. 318 and 319 - 321; *Kemsley v. Foot and others* 1952 A.C. 345 at pp. 353 - 360;
British Guiana Rice Marketing Board v. Peter Taylor & Co. Ltd. 11 W.I.R. 1967-68 208 at pp. 211 - 214; and *London Artists Ltd. v. Littler* 1969 2 K.B. 375 at p. 390 - 398.

In *Hunt v. Star Newspaper Co. Ltd.* Fletcher Moulton L.J. observed at p. 320

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

This is the language of Kennedy J. in the case to which I have just referred. It is based on the judgments in Campbell v. Spottiswoode, a case of the highest authority, and is in my opinion, unquestionably a true statement of the law. The only portion of the statement which requires examination is the phrase "except so far as the facts truly stated warrant the imputation."

Speaking for myself, the words "warrant the imputation" can bear but one meaning, and that meaning is stated so plainly by Lord Atkinson in the opinion delivered by him in the case of Dakhyl v. Labouchere in the House of Lords that I cannot do better than quote his language: "Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn."".

It would appear that Dakhyl v. Labouchere, a House of Lords case, is unreported except as a footnote to the Hunt v. Star Newspaper Co. Ltd. report.

at page 394

In London Artists Ltd. v. Littler Edmund Davies L.J. quotes the following passages from Turner (or se Robertson) v. Metro-Goldwyn-Mayer Pictures Ltd. 1950 All E.R. 449

"It is for the jury in a proper case to determine what is comment and what is fact, but a prerequisite to their right is that the words are capable of being a statement of fact or facts. It is for the judge alone to decide whether they are so capable...."

He goes on to observe :

"It follows that the question whether the words complained of were reasonably capable of being regarded as mere comment is likewise essentially a matter for the judge, it being incumbent upon the defendant to establish that they were so capable: see Jones v. Skelton [1963] 1 W.L.R. 1363, 1379. If the judge takes the view that they amount clearly to assertions of fact alone, no question of fair comment arises and that

plea must not be left to the jury.

It may be difficult in a particular case to distinguish between assertions of fact, on the one hand, and comment in the form of expressions of opinion, on the other. Yet the problem must be solved, be it by judge alone or by jury, and this for at least two reasons:

First, if the words complained of are comment, it is not necessary to prove their truth, but merely that they express a view such as an honest (though possibly prejudiced) man might form.

Secondly, comment must be disentangled from fact, for fair comment is available as a defence only in relation to facts which are either (a) true, or (b) if untrue, were published on a privileged occasion:"

It would appear, therefore, that it is a matter for the judge to determine whether the words complained of are reasonably capable of being regarded as mere comment. In doing so he can only look to the publication itself. No amount of evidence can affect the construction to be placed on the words complained of in the context of the publication in which they appear and which is the subject matter of the suit (except, perhaps, to the extent that such evidence relates to matters inferentially incorporated in the publication - a factor which cannot arise here having regard to the content of the publication complained of).

Where, however, the offending words are reasonably capable of being regarded as mere comment there must be a substratum of fact in the publication complained of on which that comment can be based.

In *Kemsley v. Foot and others*, Lord Porter states at p. 356

in all cases

"The question, therefore, is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject matter of the action, and I find my view well expressed in the remarks contained in *Odgers on Libel and Slander* (6th ed., 1929), at p. 166. "Sometimes, however," he says, "it is difficult to distinguish an allegation of fact from an on what "expression of opinion. It often depends is stated in the rest "of the article. If the defendant accurately states what some

"public man has really done, and then asserts that 'such
"conduct is disgraceful,' this is merely the expression of his
"opinion, his comment on the plaintiff's conduct. So, if
"without setting it out, he identifies the conduct on which
"he comments by a clear reference. In either case, the
"defendant enables his readers to judge for themselves
"how far his opinion is well founded; and, therefore, what
"would otherwise have been an allegation of fact becomes merely a
"comment. But if he asserts that the plaintiff has been guilty
"of disgraceful conduct, and does not state what that conduct
"was, this is an allegation of fact for which there is no
"defence but privilege or truth. The same considerations
"apply where a defendant has drawn from certain facts an
"inference derogatory to the plaintiff. If he states the
"bare inference without the facts on which it is based, such
"inference will be treated as an allegation of fact. But if
"he sets out the facts correctly, and then gives his inference,
"stating it as his inference from those facts, such inference
"will, as a rule, be deemed a comment. But even in this case
"the writer must be careful to state the inference as an
"inference and not to assert it as a new and independent fact;
"otherwise, his inference will become something more than a
"comment and he may be driven to justify it as an allegation
"of fact."

But the question whether an inference is a bare inference in this sense must depend upon all the circumstances. Indeed, it was ultimately admitted on behalf of the appellant that the facts necessary to justify comment might be implied from the terms of the impugned article and therefore the inquiry ceases to be— Can the defendant point to definite assertions of fact in the alleged libel upon which the comment is made? and becomes— Is there subject-matter indicated with sufficient clarity to justify comment being made? and was the comment actually made such as an honest, though prejudiced, man might make?"

In that case there was a finding that there was a substratum of fact in the offending publication. Where such a substratum of fact exists

a defendant is not confined to that alone. He may rely on other facts, not in the publication complained of, to support his defence of fair comment.

Bearing these principles in mind I have analysed the publication complained of as set out in paragraph 4 in each of the amended statements of claim. I am satisfied that in each case the passages complained of (as set out in the particulars relating to the defence of fair comment in paragraph 4 of each defence) are statements of fact and not comment. That being so the defence of fair comment is not open to the defendant.

If I am wrong about that, and any of these passages are reasonably capable of being regarded as mere comment, there is no substratum of fact in the publication complained of on which to base any such comment. There are just no facts at all on which to base any such comment. None of the facts set out in the particulars to the defence of fair comment are contained in the publication.

It has been suggested that the introductory passage to the letter, namely:

"I quote from paragraph 7 of that letter "I challenge any one to show me a time in the history of these Islands when the Islands had a more dedicated, hardworking, honest and progressive government than it has now". constitutes such a substratum of fact.

How can those words possibly constitute statements of fact to merit the comment of nepotism, cronyism, favouritism or any other charge contained in the letter?

For the foregoing reasons I am of the opinion that on the pleadings as they currently stand the defence of fair comment is not open to the defendant.

Accordingly, the applications are allowed. I order that paragraph 4 and the particulars thereto in each of the defences be struck out.

The Plaintiffs are awarded the costs of this application.

7.3.80


SIR JOHN SUMMERFIELD.