

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 49 OF 1993

Suva High Court Civil Action No. 71 of 1993

BETWEENFINBAR KENNYAPPELLANT

-and-

FIJI TIMES LIMITEDRESPONDENT

Mr. R.J. Katz and Mr. R. Patel for the Appellant  
Mr. B.N. Sweetman for the Respondent

Date and Place of Hearing : 25th August 1994, Suva  
Date of Delivery of Judgment : *28th October 1994*

JUDGMENT OF THE COURT

This is an appeal, pursuant to leave granted by His Lordship, from a decision of Scott J. delivered on 15th September 1993 in Chambers, ordering particulars of allegations in the Plaintiff's Statement of Claim.

The Plaintiff's cause of action is for damages for defamation and is alleged to arise from an article published in the September 1992 edition of Pacific Islands Monthly. The Defence of the Defendant in paragraph 12 pleads the defence of "fair comment". By Notice of Motion issued 15th June 1993 the Plaintiff sought particulars of paragraph 12 of the Defence of the Defendant in the following terms:-

"The particulars of the facts relied on by the Defendant upon which the alleged comment was based."

The arguments advanced before Scott J. are summarised in his decision. It is apparent no attempt was made to amend the Notice of Motion to seek particulars in broader terms such as was sought in the Notice of Appeal filed 3rd December 1993 and in the Submissions of Counsel for the Appellant (paragraph 2 page 9).

The allegations upon which the Plaintiff sues, as particularised in paragraph 8 of his Statement of Claim, comprised comment. So much is conceded by the Respondent in paragraph 2 of its submission to this Court.

This appeal calls into question the sufficiency and adequacy of the particulars ordered to be given by Scott J. In deciding this appeal it is necessary to determine the Plaintiff's entitlement to particulars which identify the alleged comment, and his entitlement to particulars of the facts upon which any such comment is based. The appeal before us centred upon those issues and we are grateful to Counsel for their careful and detailed submissions.

As we understand the concession made by the Respondent reflected in paragraph 2 of its submission, the allegations in paragraph 8 of the Statement of Claim are conceded to contain matters of comment, but not necessarily to be entirely comment. The distinction between, on the one hand, allegations of fact and, on the other hand, comment upon facts, is often blurred and difficult to determine. That question has recently engaged the attention of the House of Lords in Telnikoff -v- Matusevitch (1991) 4 All E.R. 817. See also O'Shaughnessy -v- Mirror Newspapers Limited (1970) 125 C.L.R. 166. There is no doubt but that the determination of what is fact and what is comment is a question for the trial Judge upon which this Court is not presently concerned. See Control Risks Ltd. -v- New English Library Ltd. & Anor. (1989) 3 All E.R. 577 at 581, 582. It is however, of relevance to this Court's deliberations that the demarcation between fact and comment might not be readily apparent to a Plaintiff from the text of an allegedly defamatory article, and may justify that Plaintiff in seeking particulars. We fully appreciate the Appellant's submissions to the effect the alleged defamation consists of fact, and is not comment. However, in the absence of an application to strike out the defence of fair comment, it is not necessary to consider that aspect further. The question is, the defence having been pleaded, is the

Plaintiff entitled to any and if so what particulars of it?

The question with which this Court is primarily concerned in the present appeal was considered by the Court of Appeal in Control Risks Ltd. & Ors. -v- New English Library Ltd. & Anor. (supra). There, in the course of his judgment with which the others members of the Court (Dillon L.J. and Sir George Waller) agreed, Lord Justice Nichols said:-

"In my view the starting point is to identify the comment the Defendants say is to be found in the words complained of and which they are seeking to defend as fair comment. At once one runs into difficulty with the pleading as drafted ... A Plaintiff is entitled to know what case he has to meet under a defence of fair comment just as much as he is entitled to know what case he has to meet when faced with a defence of justification. Where justification is pleaded, a Defendant is now required to spell out in his pleading the meaning of the words, which, if it is their true meaning, he will seek to justify ... In my view, by parity of reasoning, when fair comment is pleaded the Defendant must spell out, with sufficient precision to enable the Plaintiff to know what case he has to meet, what is the comment which the Defendant will seek to say attracts the fair comment defence."

(The underlining is ours).

We respectfully agree with that opinion.

We were referred to comments by Lord Denning M.R. in Lord -v- Sunday Telegraph Ltd. (1971) 1 K.B. 235 at 239 which relate to the Master of the Rolls' appreciation of amendments to R.S.C. Order 82 Rule

3(2). That Rule of Court has not been adopted in the High Court Rules in Fiji. The comments by the Master of the Rolls are, accordingly, of limited assistance in the present case, and, in any event, do not deny the prima facie right of a Plaintiff to the particulars sought herein. In any event, in our view, they must be regarded as overtaken by the subsequent decision in Control Risks Ltd. & Ors. -v- New English Library Ltd. & Anor. (supra).

In paragraph 11 of its submissions the Respondent undertakes to comply with the order of Scott J. In those circumstances we do not propose to consider further the particulars which he has therein ordered. We merely observe those particulars are beyond the scope of the particulars sought in the Plaintiff's Notice of Motion. The framing of those particulars appears to have arisen from the arguments advanced by the parties before Scott J. and, in any event, in our view they are particulars to which the Plaintiff would be entitled upon an appropriate request.

In our opinion the Plaintiff is, in addition, entitled to further and better particulars of the Defence of the Defendant as follows:-

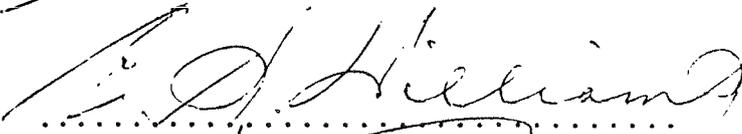
- (a) Further and better particulars identifying the comment or comments in that part or those parts of the alleged defamation to

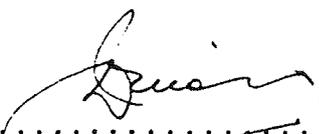
which paragraph 12 of the Defence of the Defendant relates;

- (b) Further and better particulars identifying the fact or facts upon which the Defendant relies for the said comment or comments.

We therefore allow the appeal. We order the Defendant give further and better particulars as ordered by Scott J. and, in addition, as above set forth, within 30 days of the delivery of this judgment. The costs of this appeal and of the application in the Court below, to be costs in the cause.

  
 .....  
 Sir Moti Tikaram  
President, Fiji Court of Appeal

  
 .....  
 Sir Edward Williams  
Judge of Appeal

  
 .....  
 Justice Dillon  
Judge of Appeal