JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 43 OF 2008

BETWEEN	**PAGET DeFREITAS**	**1ST APPELLANT**
AND	**CLOVIS BROWN**	**2ND APPELLANT**
AND	**THE JAMAICA OBSERVER LTD.**	**3RD APPELLANT**
AND	**ENOCH KARL BLYTHE**	**RESPONDENT**

PROCEDURAL APPEAL

Charles Piper in consultation with Winston Spaulding Q.C. instructed by Charles Piper for the Appellants.

Respondent served with Notice of Appeal but no submissions filed.

March 11, 2009

HARRISON, J.A.

1. This is a procedural appeal filed on behalf of the defendants Paget DeFreitas, Clovis Brown and the Jamaica Observer Ltd. (the appellants). They have filed this appeal against the decision of Hibbert, J. who on April 30, 2008 granted leave to Enoch Karl Blythe (the respondent):

> i.) To file a Reply outside of the fourteen (14) days period which the Rules require and;

ii.) For the Reply to be filed and served within seven (7) days.

2. The Notice of Appeal has been supported by the following grounds of appeal:

(a) The Learned Judge erred in law in granting an application made pursuant to Part 69.2(c) for the Claimant/Respondent to file and deliver a Reply raising the issue of malice on the basis that malice had not been raised on his claim.

(b) The Learned Judge erred in law in permitting the filing of a Reply raising the issue of malice despite the provisions of Rules 8.9 (1) and 69.2(c) of the Civil Procedure Rules 2002.

(c) The Learned Judge erred in law in not taking into account that the Claimant/Respondent's Statement of Claim could not be amended by filing a Reply in order to comply with the requirements of the rules of procedure.

(d) The fact that the application made it clear that the Claimant/Respondent intended to adduce unspecified evidence not previously pleaded and not set out in the application or accounted for in any way in the relevant documents before the Court, clearly indicated that the entire

procedure being used was erroneous and unsustainable in law.

3. The appellants have sought the following orders:

(i) That the Judgment of the Learned Judge be set aside.

(ii) That costs of the appeal and cost of the application in the Court below be the Defendants' to be agreed or taxed.

4. The Appellants have filed and served their written submissions pursuant to Part 2.4(2) of the Court of Appeal Rules 2002 (the COAR). These submissions were served on the Respondent on May 8, 2008 but no submissions were filed in response.

5. In summary, Mr. Piper has contended that:

(a) Respondent has failed to adhere to the procedural requirements prescribed in the CPR and as such the learned judge fell into grave error in making his order of April 30, 2008.

(b) Since malice is an essential ingredient in defamation matters it must be pleaded specifically by the Claimant in compliance with the mandatory requirement of Part 69.2 (c) of the CPR. The particulars in support of the allegation must be set out in the particulars of claim at the same time as the averment of malice is made.

(c) Rule 69(2) makes no provision for the filing of a Reply.

(d) Even though leave was granted to file a Reply which for the first time alleged malice, the statement of claim has remained defective nevertheless.

(e) The case management and pre-trial review stages of the proceedings had passed, so the procedure adopted by the Respondent could not have been intended by the Rules.

(f) The application to file Reply was wrong procedurally, in form and in substance, under the Civil Procedure Rules.

(g) The procedure adopted sought to circumvent the proper requirements of compliance with the Rules.

6. I now turn to the factual background. It has been summarized in the Appellants' written submissions and are set out hereunder:

> "1. The proceedings were commenced on July 31, 2000 by Writ of Summons and Statement of Claim of the same date. By the endorsement to the Writ of Summons and the Statement of Claim, the Claimant/Respondent seeks damages for an alleged libel contained in an article and cartoon published on the 14'" November, 1999.
>
> 2. There is no plea (as required) in the Writ of Summons or Statement of Claim that the Defendants or any of them acted with malice in publishing the article or the cartoon (quite distinct from the particulars of malice) and there were no particulars in support of malice at any stage of the proceedings up to the Claimant/Respondent's application for leave to file a Reply.

3. The Defence of the Third Defendant was filed on the 10th November, 2000 and, pursuant to an order dated May 16, 2001, Defence of the First and Second Defendants was filed on May 21, 2001.

4. Permission was given to the Defendants to amend their Defences by a pre-trial review order made on January 12, 2007.

5. An Amended Defence was filed on behalf of the Defendants on January 26, 2007.

6. The action was fixed for trial on the 5th 6th, 7th and 8th November, 2007. On the 1st November, 2007 Notice was given to the Claimant/Respondent of the Defendants' intention to raise a preliminary point of law concerning the failure of the Claimant/Respondent to plead malice in the context of the claim and the Defence.

7. In response to the Defendants' preliminary point, on November 6, 2007 the Claimant/Respondent filed application for leave to file a Reply. On the same date the Claimant/Respondent also filed a Reply bearing the Court's stamp as having been filed on that date. This document raised the issue of malice by the Claimant/Respondent for the first time. It alleges at paragraph 4 that "the words and cartoon complained of were published maliciously and that malice may be inferred from the following facts". Thereafter, it sets out purported particulars on which the Claimant/Respondent is relying for malice to be inferred.

8. These assertions include a reference to six articles which it is alleged maintains "the Claimant/Respondent's complicity in unlawful conduct of the nature imputed to him in the defamatory publication of 14th December, 1999 and ensuring its wider publication". The document concludes with a paragraph alleging that the article and cartoon were published maliciously knowing it was false or recklessly not caring whether it was true or false. Notably, there were no particulars given of the matters to which reference was being made.

9. The trial did not commence on the 5th November, 2007 as the assigned Judge recused himself. The

> Defendant/Appellants' Notice to the Claimant/Respondent and the Claimant/Respondent's Notice of Application for Leave to File Reply were scheduled for hearing on the 30th April , 2008 by Mr. Justice Hibbert. The Learned Judge determined to hear the Claimant/Respondent's Application for Leave to File Reply first. Having heard submissions he made the order which is the subject of this appeal. The Defendant/Appellants reserved the hearing of their preliminary point since, among other things, the issue of the absence of a plea of malice was relevant to their application".

7. Now Rule 69(2) specifically states:

> "69.2 The particulars of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 -
>
> (a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; and
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> (b) where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, give particulars of the facts and matters relied on in support of such sense; and
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> (c) where the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation".

8. The amended Rule 8.9A of the CPR makes provision for certain consequences if the case filed by the claimant is not properly set out. The rule states as follows:

> 8.9A – "The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission".

9. What is abundantly clear in this appeal is that neither the Writ of Summons nor the Statement of Claim had pleaded malice. The Respondent no doubt saw the necessity of fulfilling this procedural requirement so a Notice of Application was filed on November 6, 2007 which sought leave to file a Reply. The grounds on which the application was made are set out below:

> (i) The Defendants have pleaded the defences of fair comment and qualified privilege and the Claimant intends to adduce evidence at the trial from which a Court may draw the inference that the Defendant (sic) in publishing the defamatory material was actuated by malice.
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> (ii)The Defendants, by their pleadings have averred the absence of malice and the Claimant is required to give particulars in support of the allegation of malice and/or irresponsible journalism in accordance with Part 69.2 (c) of the Civil Procedures (sic) Rules 2002."

10. It seems obvious to me that this application was triggered off because of a Notice to the Respondent which stated that at the commencement of the trial, a point in limine would be raised on behalf of the Appellants "concerning the failure by the Claimant to plead malice in the context of the Claim and Defence herein".

11. The Reply that was filed pursuant to the Order of Hibbert J., stated as follows:

REPLY

> "2. The words and cartoon complained of are defamatory statements of fact and not comment as alleged in paragraph 10 of the Amended Defence.
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> 3. Further, it is denied that the words and cartoon were published on an occasion of qualified privilege. The meeting

> concerned was closed to the public and the article and cartoon do not fairly or accurately report the proceedings at that meeting. Further that section 9 of the Defamation Act does not apply.
>
> 4. Further or alternatively, the words and cartoon complained of were published maliciously, and that malice may be inferred from the following:
>
> Particulars
>
> ....."

12. Malice was now alleged for the first time. The issue for determination now, is whether the procedure adopted by the Respondent was permissible under the CPR. Rule 69.2 of the CPR indisputably makes no provision for the filing of a Reply. It only deals with the mandatory requirement that an allegation of malice and the particulars in support of that allegation - must be set out in the particulars of claim at the same time as the averment of malice is made.

13. It has always been a cardinal principle of pleading (which has certainly not been altered by the CPR) that a claim should not anticipate a potential defence (popularly known as 'jumping the stile'). Once, however, a defence has been raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on that point. The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a 'defence to the defence'. See Blackstone's Civil Practice 2004.

14. Conventionally, a reply may respond to any matters raised in the defence but where the defence takes issue with the absence of facts which must be pleaded in the particulars of claim, the proper course should be for the claimant to seek to amend his statement of case accordingly.

15. In my judgment, there is merit in the submissions of Mr. Piper. Accordingly, the learned Judge's decision to grant permission to the Respondent to file a Reply pursuant to the application based on rule 69.2(c) of the CPR in order to introduce not only the allegation of malice but also particulars of malice, was clearly wrong. The appeal is therefore allowed. The order of the learned judge is hereby set aside with costs of the appeal and costs of the application in the Court below to the Appellants to be agreed or taxed.