[2021 Gib LR 132]

BARRASS, TAYLOR and FINANCIAL SERVICES COMMISSION v. CRUZ

COURT OF APPEAL (Elias, J.A.): April 13th, 2021

2021/GCA/02

Civil Procedure—pleading—striking out—in defamation action, certain particulars of malice and bad faith struck out but core complaint of malice and bad faith properly pleaded—claimant entitled to 60% of costs on appeal and 80% of costs below (where Supreme Court struck out fewer particulars)

The respondent brought a claim in defamation.

Enterprise Insurance Company plc ("Enterprise") was an insurance company established in Gibraltar. The respondent was a non-executive member of Enterprise's board of directors and its non-executive chairman. The appellants were the Chief Executive Officer of the Gibraltar Financial Services Commission, the Commission's Director of Legal Enforcement and Policy, and the Commission itself.

In 2016, Enterprise was placed into liquidation. The appellants issued a press release concerning the collapse of Enterprise, which was published on the Commission's website and allegedly to a large number of publishees including local and international media outlets. The respondent asserted that the press release made serious and damaging allegations against him, including that there was reason to believe that he had misled the Commission about Enterprise's true financial position and that he had failed to run it in a sound and proper manner. Further, the respondent alleged that the reference in the note accompanying the press release to offences under the Financial Services (Insurance Companies) Act 1987 implied that there were reasonable grounds to suspect that he was guilty of a criminal offence.

The respondent claimed damages (including general, special and/or aggravated damages), interest on the special damages and an injunction restraining the appellants from further publishing the allegations and requiring them to remove the press release from the Commission's website.

The appellants issued an application seeking the following relief: (a) that the respondent's pleadings of malice and bad faith be struck out; (b) that summary judgment be entered for the appellants on the grounds of statutory immunity under s.19(1) of the Financial Services Commission Act 2007;

(c) that summary judgment be entered for the appellants on the grounds of qualified privilege; (d) that the claim be struck out as an abuse of process; and (e) that the claim be stayed. The appellants alleged that even if the press release did damage the respondent's reputation, they were protected in law by two defences: the statutory defence in s.19(1) of the Financial Services Commission Act 2007 and the common law defence of qualified privilege. Those defences were not absolute. The statutory defence would be lost if a defendant acted in bad faith and the defence of qualified privilege would be lost if a defendant acted out of malice. The respondent had not alleged bad faith or malice in the particulars of claim, but there were particulars in paras. 14(w) and 14(x) of the pleadings, concerning the claim for aggravated damages, which were treated as identifying particulars of malice and bad faith.

The Supreme Court (Yeats, J.) dismissed the appellants' application save for ordering that three of the particulars of malice and bad faith be struck out (that decision is reported at 2020 Gib LR 36). The appellants' appeal was upheld in part and the Court of Appeal struck out more particulars. As the court held that a core complaint of malice and bad faith had been properly pleaded and that some five particulars were in principle capable of establishing malice and/or bad faith, it was not necessary to consider the summary judgment applications.

Two matters arose from the judgment. First, the court was asked to determine the question of the costs of the appeal and the costs below (reported at 2021 Gib LR 14) (it had been agreed that the appellants should bear the respondent's costs in the Supreme Court but the appellants submitted that that required reconsideration in view of their success on appeal). The second matter concerned the effect of the judgment on the particulars of claim and whether particulars which had been struck out as evidence of malice and bad faith could nevertheless stand as matters demonstrating high-handed and aggressive conduct capable of justifying an award of aggravated damages. The respondent's counsel had amended the particulars of claim to give effect to the judgment of the court and sought the court's approval of the amendment. The appellants submitted that the court had no power to do so.

Held, ruling as follows:

(1) The appellants should pay 60% of the respondent's costs in the Court of Appeal and 80% of his costs in the Supreme Court. The court accepted the respondent's contention that he should be seen as the successful party before the Court of Appeal. The principal focus had been on the particulars which were not struck out. Furthermore, the appellants' aim had been to bring the proceedings to an end, which they had failed to achieve. In the circumstances, it would be appropriate to apply a reduction of 40% to the respondent's costs to take account of the appellants' partial success. In respect of the costs in the Supreme Court, the respondent was substantially the successful party. The appellants were entitled to some credit for the extent to which they succeeded on appeal. Taking a broad brush approach,

the respondent was entitled to 80% of his costs below. The appellants were to bear their own costs (paras. 13–18).

(2) The respondent was not seeking approval of a true amendment but an adjustment of the pleading seeking to give effect to the court's ruling, which was within the jurisdiction of this court. It was not for the Supreme Court to determine whether the adjusted particulars of claim gave effect to this court's judgment. The amendment fairly reflected the ruling. The particulars in para. 14(w) had been re-cast to reflect the particulars which the court said were properly pleaded and capable of demonstrating malice and/or bad faith. The particulars of para. 14(x) had been retained in so far as they were said to show aggressive and high-handed conduct supporting a claim for aggravated damages but they were specifically not relied upon to support an allegation of malice or bad faith (save for para. 14(x)(iv) which provided that particulars of malice in para. 14(w) would also stand as particulars of bad faith) (paras. 21–23).

Legislation construed:
Court of Appeal Rules 2004, r.68: The relevant terms of this rule are set out at para. 8.

D. Browne, *Q.C.*, *J. Montado* and *G. Callus* (instructed by Isolas LLP) for the defendants/appellants;
J. Santos and *D. Martinez* (instructed by Hassans) for the claimant/respondent.

1 **ELIAS, J.A.:**This is the judgment of the court comprising Sir Maurice Kay, P., Sir Colin Rimer, J.A. and myself. It relates to two issues arising out of the judgment of this court ("the substantive judgment," reported at 2021 Gib LR 14) in which the court upheld in part an appeal against a refusal by Yeats, J. to strike out (save in certain very minor respects) the particulars of malice and bad faith made in the course of a defamation claim brought by the respondent, Mr. Cruz, against the appellants, the Financial Services Commission and two of its officers. The alleged defamation arises out of a press release made by the Commission following the order for the compulsory winding up of an insurance company, Enterprise Insurance Co. plc, in which Mr. Cruz was the non-executive chairman.

2 There were in fact five applications before Yeats, J. They were that the claimant's pleadings of malice and bad faith be struck out; that summary judgment be entered for the defendants on the grounds of an alleged statutory immunity; that summary judgment be entered for the defendants on the grounds that the publication was protected by the common law defence of qualified privilege; that the claim be struck out as an abuse of process on three separate grounds; and that the claim be stayed.

3 The two summary judgment applications were inextricably linked to the strike out application. There are potentially two defences to the defamation claim: a statutory defence under s.19(1) of the Financial Services Act 2007, and the common law defence of qualified privilege. The respondent alleged that these defences were not available in the circumstances of this case. In any event, it was common ground that the statutory defence did not apply if the publication was made in bad faith and the defence of qualified privilege was inapplicable if the publication was motivated by malice. The summary judgment applications were, therefore, contingent on the particulars of malice and bad faith being struck out in their entirety. These were not summary judgment applications made on the basis that the incontrovertible evidence demonstrated that the claim was wholly without merit and could not succeed. The respondent submits that this only became clear when the appellants' skeleton argument was produced for the court below.

4 In fact, the judge struck out only three relatively minor particulars and so the issue whether he should grant summary judgment, either under the statutory immunity or the defence of qualified privilege, did not have to be determined and the judge did not determine it. The abuse of process and stay applications were considered by the judge and rejected.

5 The appeal to this court was against the judge's refusal to strike out the particulars of malice and bad faith in their entirety. In addition, the two strike out applications were renewed but again were contingent on all the particulars being struck out. We struck out a substantial number of the particulars (some 15 out of 20) but held that a core complaint of malice and bad faith had been properly pleaded and that some five particulars were properly pleaded and were in principle capable of establishing malice and/or bad faith, depending upon the evidence at trial. Accordingly it was not necessary to determine the summary judgment applications. In any event, the court considered that it would probably not have been willing to determine either of them in the course of this interlocutory procedure even if the particulars had all been struck out. This was because the application relying on qualified privilege required a consideration of evidence, and the application relying on the statutory immunity was too complex to be decided at that stage, at least unless the parties were agreed that it should be (which they were not).

6 There is one further point to note about the somewhat unusual procedure adopted in this case (see paras. 10–13 of the substantive judgment for a fuller account). There were in fact no particulars of malice or bad faith directed to the defences of statutory immunity or qualified privilege in the particulars of claim. These detailed particulars were all contained in the section of the pleading dealing with damages. The respondent (claimant) was not intending to raise malice or bad faith until a defence had been served which relied upon these defences, in which case he was proposing to meet them

by raising allegations of malice and bad faith in his reply. Mr. Justice Yeats accepted that in principle that was a perfectly proper position for a claimant to adopt, but he took the pragmatic view that since it did not appear that any other allegations of bad faith or malice would be relied upon, he would determine the application as if the particulars pleaded in the damages section had also been pleaded to counter the two defences. As Sir Patrick Elias, J.A. put it in his judgment (2021 Gib LR 14, at para. 13): "the pleadings of malice and bad faith are to be treated as directed towards rebutting the as yet unpleaded defences of statutory immunity and qualified privilege."

7 The parties remain at odds over two matters arising out of the judgment. The first is the question of costs, both the costs of the appeal and the costs below. It was agreed below that the appellant should bear all the respondent's costs but the appellants submit that this now requires reconsideration in view of their success on appeal. The second matter relates to the question what exactly has been the effect of the judgment on the particulars of claim. More specifically, where particulars have been struck out as evidence of malice and bad faith, can they nonetheless stand as matters demonstrating high-handed and aggressive conduct capable of justifying an award of aggravated damages?

The issue of costs

8 The general principles are not in dispute. Rule 68 of the Court of Appeal Rules 2004 confers on the court a broad discretionary power:

> "The court may make such order as to the whole or any part of the costs of appeal or in the court below as may be just, and may assess the same or direct taxation thereof."

9 The general rule, however, is that the successful party should be paid costs by the unsuccessful party: see CPR r.44.2(2).

10 The parties are deeply divided about who is the successful party. The appellants submit that since they have succeeded in striking out such a large proportion of the particulars on bad faith and malice, and have as a result shortened the trial significantly, they ought to be seen as the successful party. The appellants accept, however, that they should not be entitled to recover all of their costs both because they failed to strike out some of the particulars on malice and bad faith, and because there was no determination of the statutory immunity or qualified privilege defences. To take account of these factors, the appellants submit that the respondent should pay 50% of the appellants' costs.

11 The respondent submits that it would be grossly unjust to treat the appellants as the successful party. Indeed, his primary case is that so trivial was the appellants' success that he should have all the costs of the appeal. He submitted, somewhat optimistically, that "the paragraphs that were

struck out are relatively minor, and gave rise to minimal evidence and submissions." He contends that it is a mistake simply to look at the proportion of the particulars which were struck out. This court recognized that para. 14(w)(i) and (ii) was the core of the case and contained its essential feature which was essentially that the Commission had detailed knowledge of the financial state of the company and could not in good faith have issued the defamatory press statement in the form it did. Furthermore, although the arguments on statutory immunity and qualified privilege were not resolved, the arguments had to be prepared and advanced with respect to them. That was the risk which the appellants took in making those applications.

12 In the alternative, the respondent submits that if any allowance is to be made for the appellants' success in the appeal, it should be limited to 30% of the costs of the strike out only, and the respondent should receive the full costs incurred in preparing the arguments on the two defences of qualified privilege and statutory immunity.

13 We accept in substance the respondent's contention that it should be seen as the successful party. A mathematical approach to the strike out success is inappropriate, and in our view the respondent is right to say that the principal focus was on the particulars which were not struck out. Furthermore, the appellants' aim was to bring the proceedings to an end and it failed in that objective, leaving the heart of the case on malice intact. Also in our view the respondent should have all his costs relating to the two defences; arguments had to be prepared in case they became relevant and the appellants took the risk that they would not be determined.

14 Bearing all these matters in mind, we have concluded that in the circumstances it would be appropriate to apply a reduction of 40% to the respondent's costs to take account of the fact that the appellants have been partially successful in the appeal. We therefore decide that the appropriate order is that the respondent should receive 60% of his costs of the appeal, and the appellants should bear their own costs.

The costs below

15 There is also an issue about the costs below. The order made below, by agreement between the parties, was that the respondent should receive all of his costs, and £85,000 was paid on account. In view of its partial success on appeal with respect to the strike out, the appellants submit that the order will have to be overturned and it submits that it should receive 40% of its costs below. By contrast, the respondent submits that given the range of matters considered below in which the appellant was unsuccessful, there ought to be no change in the original order that the appellants should bear all the costs.

16 We consider that the appellants' claim is grossly exaggerated and quite unrealistic. There was substantial cost incurred below by the need for the respondent to produce a detailed witness statement in response to numerous witness statements from the appellants. This was partly to deal with the abuse argument but also because it was not made clear to the respondent until the production of the appellants' skeleton argument below that the summary judgment applications were contingent on the strike out application being entirely successful. We do not accept Mr. Browne's submission that it would have been obvious that the summary judgment claims were being advanced on that basis. The respondent quite naturally had to respond fully to the witness statements relied upon by the appellants.

17 It is important to emphasize that before Yeats, J. there were five different applications and on appeal it was only the strike out application which was (in part) successful. We make some allowance for that, but in our view the respondent is still substantially the successful party below and had to produce a very detailed witness statement. We think that, contrary to the respondent's primary submission, some credit should be given to the appellants for the extent to which they succeeded on appeal. Taking a broad brush approach to the issue, we have decided that the respondent should be entitled to 80% of his costs below. He will, of course, have to give credit for the £85,000 paid on account.

18 Accordingly, the order will be that the respondent is entitled to 80% of the costs of the hearing before Yeats, J. and 60% of the costs of the appeal. The appellants should bear their own costs of both these proceedings.

19 The respondent's proposed draft order invites us to order a payment on account of the costs of the appeal. Since we have no details of costs actually incurred, we can only award a very conservative sum. In the circumstances we fix the sum at £30,000.

The effect of the strike out

20 Counsel for the respondent, Mr. Santos, has amended the particulars of claim in order to give effect to the judgment of the court. He asks the court to approve the amendment as part of the order arising out of its judgment. The appellant submits that the Court of Appeal has no power to grant permission to amend the particulars of claim and that any application will need to be made to the Supreme Court.

21 We reject the appellants' submission. This is not a true amendment; it is simply an adjustment of the pleading seeking to give effect to the court's ruling, and that is something which plainly lies within the jurisdiction of this court. It is not for the Supreme Court to determine whether the adjusted particulars of claim give effect to the Court of Appeal's judgment.

22 The only issue is whether the amendment does fairly reflect the ruling. In our view it does. The particulars in para. 14(w) have been re-cast to reflect the particulars which the court said were properly pleaded and were capable of demonstrating malice and/or bad faith. However, the particulars in para. 14(x) have been retained in so far as they are said to show aggressive and high-handed conduct supporting a claim for aggravated damages but they are specifically not being relied upon in support of an allegation of malice or bad faith (save for para. 14(x)(iv) which provides that particulars of malice in para. 14(w) will also stand as particulars of bad faith).

23 In our judgment this amendment is entirely consistent with the effect of the judgment. There was no debate before us about whether the matters pleaded could properly stand in support of the claim for aggravated damages. As we have said, the somewhat artificial way in which the application to strike out was advanced was to treat the particulars of malice and bad faith as if they were directed towards the defences of statutory immunity and qualified privilege. Only to that extent were the pleadings challenged. The particulars in para. 14(x) were specifically stated to be both in support of the claim for aggravated damages for high-handed and aggressive behaviour as well as constituting evidence of the individual defendants' states of mind which were potentially relevant to liability for defamation. So far as the latter was concerned, the judge accepted that the particulars were being relied upon to show bad faith when the publication was made, albeit that there is no specific reference to bad faith in terms in para. 14(x). The strike out application was directed only to the question whether these particulars as pleaded were capable of supporting the bad faith allegation; it was not an application contending that they could not stand independently as evidence in support of aggravated damages. There was no issue taken about that, and no argument with respect to it.

24 Mr. Browne has argued that we should not consider the amendment but submitted that if we did, there are various legal points he would wish to make to oppose allowing the particulars in para. 14(x) to remain in the particulars of claim, even in relation to damages. We agree that if this were an amendment going beyond giving effect to the judgment, it would not be appropriate for us to deal with it and the Supreme Court would be the appropriate jurisdiction. Mr. Browne makes some potentially telling points about why the respondent ought not to be allowed to rely upon these matters. For example, he submits that in the light of the other provisions on damages, the time spent examining these matters would be disproportionate to their likely impact on the damages claim. But these are matters which it would be inappropriate for us to deal with, and we would be addressing issues which were not directly before us in the appeal itself.

Conclusion

25 In our judgment:

(1) The appellants should pay 60% of the costs of the respondent in the Court of Appeal and 80% of his costs in the Supreme Court.

(2) There should also be a payment on account of £30,000 with respect to the costs in the Court of Appeal.

(3) The amendments made to the particulars of claim fairly reflect the ruling in the substantive decision. This court has no jurisdiction to hear arguments to the effect that the particulars in para. 14(x) cannot properly stand in support of the respondent's claim to aggravated damages.

26 We invite counsel to agree a form of order reflecting the substantive judgment and this ruling.

Ruling accordingly.