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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT IN NORTHERN IRELAND

Between:

JOHN FINUCANE

Plaintiff/Appellant

and

MARK COLLINS

Defendant/Respondent

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Mr Peter Girvan (instructed by Carson McDowell, Solicitors) for the Appellant
Mr Paul Bacon (instructed by Reavey & Co, Solicitors) for the Respondent

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Before: Keegan LCJ, Horner LJ and Colton J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal from an interlocutory order made by McAlinden J ("the judge"). Section 35(2)(g) of the Judicature (Northern Ireland) Act 1978 provides that no appeal to the Court of Appeal shall lie without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court. The judge refused leave to appeal his order. By agreement of the parties the court listed the appeal as a "rolled-up" hearing to deal with leave and the substance of the matters raised.

Factual Background

[2] For the purposes of this interlocutory appeal we need only summarise the factual background. The appellant is a member of Parliament for North Belfast representing Sinn Fein. He is also a solicitor. The respondent is a member of the Democratic Unionist Party and a councillor in the mid and east Antrim Borough

Council. It is accepted that the respondent is the owner and operator of a personal Twitter account registered under the handle "@MarkCollinsDUP."

[3] The defamation action arises as a result of the defendant's post on Twitter on 18 November 2019. The twitter post arose from a reply by councillor Mark Collins to @McDaid at BBC Talkback as follows:

> "He supports and promotes the IRA, he isn't innocent by any means 😳"

[4] In brief, the context of the case is as follows. In November 2019 the appellant was subjected to attacks against him and his family during his campaign to be elected an MP. This included a banner being raised which referred to the appellant, inter alia, being "a human rights abuser" and "steeped in the blood of the innocent." The BBC programme reported on and posted tweets about attacks issued against the appellant and his family. On the same day on his own twitter feed the respondent retweeted and endorsed a tweet by an account known as the Black Dub@thebull39 which stated:

> "Well done to the Shankill loyalists who erected the banner today. It has SF foaming their collective mouths. They don't like the truth."

[5] Then, in response to the BBC Talkback tweet and comments from other twitter account holders praising the reporting of this issue the respondent posted the tweet which is under challenge in this case.

The litigation history

[6] A pre-action protocol letter on behalf of the appellant alleging defamation followed swiftly after the tweet on 20 November 2019. A writ of summons was issued on 31 January 2020. The respondent entered an appearance on 6 February 2020 and a Statement of Claim was served on 24 September 2020. A Defence was served on 30 November 2020.

[7] Thereafter, various interlocutory applications were made. First, the appellant applied by Notice of Motion dated 3 February 2021 for rulings in respect of defamatory meaning and to strike out the particulars of meaning and justification alongside the defence of honest comment. Second, the respondent made a cross application dated 27 April 2021 which sought to strike out discrete particulars of aggravated damages within the Statement of Claim. These two applications were heard before the judge over dates on 20 May 2021 and 12 November 2021. After the first hearing on 20 May 2021 the judge gave some indications in relation to the issues raised in the applications. The matter then came back to court on 12 November 2021.

[8] There is no written judgment from the judge however in a helpful skeleton argument filed by Mr Girvan the court determinations on 20 May 2021 are summarised as follows:

(i) The appellant's pleaded meaning within the Statement of Claim is a capable meaning, namely that the tweet meant "that the plaintiff supports and promotes the IRA and condones acts of terrorism perpetrated by the IRA."

(ii) The respondent's application to strike out the identified particulars of aggravated damages was refused.

(iii) The Defence was poorly pleaded and that the particulars of meaning within the defence did not pass muster as a meanings defence.

(iv) The Defence required to be amended as none of the particulars of meaning pleaded in the defence were capable meanings.

(v) The court provided a provisional view that the particulars of para 5(g) of the defence was probably as close as the defence got to a pleading, a capable defamatory meaning, however, this would also have to be amended.

(vi) The court expressly reserved the application in respect of strike out of justification and fair comment defences until after the amended defence.

(vii) The court directed the respondent to file an Amended Defence by 30 June 2021.

[9] The respondent served an Amended Defence on 18 August 2021. This Amended Defence withdrew all pleaded meanings other than one which had been expressly rejected by the court at the May hearing. The particulars of meaning were then repeated as both particulars of justification and honest comment.

[10] The appellant considered that the Amended Defence remained defective and so a resumed hearing took place on 12 November 2021. This resulted in an Order which issued on 23 November 2021. The court determined as follows:

(i) The withdrawn defamatory meaning at para 5(g) of the Amended Defence could be reinstated with the deletion of the word 'therefore' so that the permitted defamatory meaning within the Amended Defence was "the Plaintiff as a member of Sinn Fein sympathises with, lends support to and promotes the Irish Republican Army.

(ii) The court refused the appellant's application to strike out the particulars of justification in the Amended Defence.

(iii) The court refused the appellant's application to strike out the defence of honest comment.

(iv) The court directed an Amended Amended Defence to be served within six weeks.

(v) The court set a review date for the action on 4 March 2022.

Issues on Appeal

[11] There is no dispute between the parties that the words used in the tweet are capable of bearing some defamatory meaning. Therefore, this appeal was principally focused on the judge's determination on the viability of the pleaded defences of justification and honest comment and whether the words complained of are capable of bearing the meaning asserted by the respondent. The appellant maintains that the judge erred as a matter of law in three respects:

(i) When holding that the defamatory meaning of the tweet pleaded by the respondent was a capable defamatory meaning.

(ii) When refusing to strike out all and/or any of the particulars of justification in each version of the defence.

(iii) When refusing to strike out the defence of honest comment in each version of the defence.

[12] The respondent has not appealed the application to strike out parts of the Statement of Claim dealing with aggravated damages. We are therefore dealing with two core questions. First, we have to decide whether the judge erred in relation to the pleaded meaning. The second question is whether the judge erred in relation to his refusal to strike out the defences of justification and honest comment.

Applicable Legal principles

[13] What is the test to be applied in this court when an appeal is brought from an interlocutory order? We have been referred to a number of authorities in this regard such as *Ewing v Times Newspapers Ltd* [2013] NICA 74 and *Harkin v Brendan Kearney & Co, Solicitors* [2015] NICA 79. These cases refer to the test for leave to appeal as follows:

(i) The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. The word realistic makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.

(ii) The court can grant the application if it is so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.

[14] This case arises in a specialist area of law. In relation to defamation actions in this jurisdiction certain special considerations apply which we summarise as follows. A plaintiff enjoys a presumptive entitlement to trial by judge and jury which remains a starting point for such actions and can only be taken away in tightly controlled circumstances, see *Stokes v Sunday Newspapers Ltd* [2016] NICA 60. The ultimate question of fact whether a matter is defamatory or not is a matter for the jury. It follows that the court must be careful in any interlocutory application which calls for the determination of questions of fact because to do so risks usurping the jury as the arbiter of fact. Finally, the striking out of a defamation action or any part of it, must satisfy a high threshold, see *James Bowen and others v Commissioner of Police for the Metropolis* [2015] EWHC 1249 QB.

[15] Order 82 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides a mechanism in defamation actions where upon application a court may adjudicate on pleaded meanings at a preliminary stage of any proceedings.

> "3A.-(1) At any time after the service of the statement of claim either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings.
>
> (2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the pleadings, he may dismiss the claim or make such other order or give such judgment in the proceedings as may be just."

[16] The aim of this provision is to achieve certainty at an early stage where disputes arise. The case of *Matt v Newsgroup Newspapers Ltd* [1998] QB 250 at 526 (e)-(g) encapsulates the point as follows:

> "The whole purpose of the new rule is to enable the court in appropriate cases to fix in advance the ground rules on permissible meanings which are of such cardinal importance in defamation actions, not only for the purpose of assessing the grave injury to the plaintiff's reputation but also for the purpose of evaluating any

> defences raised, in particular, justification or fair comment."

[17] With these legal principles in mind, we turn to consider whether the judge has erred in relation to his assessment of meaning and in his ruling refusing to strike out the defences/particulars of justification and honest comment.

[18] The Supreme Court has recently considered the question of meaning in *Stocker v Stocker* [2019] UKSC 17. This case concerned a Facebook exchange between Mrs Stocker and her ex-husband's new partner Ms Bligh. In the exchange, Mrs Stocker told Ms Bligh that Mr Stocker had "tried to strangle her" and that he had been removed from the house after making threats. Mr Stocker brought defamation proceedings against Mrs Stocker. At first instance the judge decided that the words "tried to strangle" meant that Mr Stocker had attempted to kill his wife. The defence of justification was rejected.

[19] In reaching this meaning the first instance judge had applied a definition from the Oxford English dictionary. The Court of Appeal stated that the use of dictionaries does not form part of the process in establishing the natural and ordinary meaning of the words. However, the Court of Appeal upheld the first instance judge as it considered that the dictionary definition was only used as a check. Mrs Stocker appealed. That appeal was upheld by the Supreme Court. The Supreme Court found that the use of dictionary definitions to confine the possible meanings was an error in law, see para [60]. In addition, the court found that even if all of the allegations were considered not to have been established, the defence of justification should not fail by reason only that the truth of every charge is not proved, having regard to the truth of what was proved.

[20] The *Stocker* decision deals with some issues which are not germane in this case. However valuable guidance is also provided to how a court faced with a dispute should determine meaning. The principles found in paras [39]-[46] are of general application as follows:

> "39. The starting point is the sixth proposition in *Jeynes* – that the hypothetical reader should be considered to be a person who would read the publication – and, I would add, react to it in a way that reflected the circumstances in which it was made. It has been suggested that the judgment in *Jeynes* failed to acknowledge the importance of context – see *Bukovsky v Crown Prosecution Service* [2017] EWCA Civ 1529; [2018] 4 WLR 13 where at para 13 Simon LJ said that the propositions which were made in that case omitted "an important principle [namely] … the context and circumstances of the publication …"

40. It may be that the significance of context could have been made more explicitly clear in *Jeynes*, but it is beyond question that this is a factor of considerable importance. And that the way in which the words are presented is relevant to the interpretation of their meaning – *Waterson v Lloyd* [2013] EWCA Civ 136; [2013] EMLR 17, para 39.

41. The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read.

42. In *Monroe v Hopkins* [2017] EWHC 433 (QB); [2017] 4 WLR 68, Warby J at para 35 said this about tweets posted on Twitter:

> 'The most significant lessons to be drawn from the authorities as applied to a case of this kind seem to be the rather obvious ones, that this is a conversational medium; so, it would be wrong to engage in elaborate analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter.'

43. I agree with that, particularly the observation that it is wrong to engage in elaborate analysis of a tweet; it is likewise unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on.

> 44. That essential message was repeated in *Monir v Wood* [2018] EWHC (QB) 3525 where at para 90, Nicklin J said:
>
> > 'Twitter is a fast moving medium. People will tend to scroll through messages relatively quickly.'"

[21] Lord Kerr also referenced the role of the appellate court when looking at these matters. At para [58] he says:

> "A reviewing court should be slow to disturb a finding of a trial judge as to the meaning of a claimed defamatory statement. This is mainly because it is a finding of fact, whereas the construction of a written contract is a question of law."

[22] The Supreme Court described the appellate exercise at para [59] as one of "disciplined restraint." The court also said this:

> "Certainly, the trial judge's conclusion should not be lightly set aside but if an appellate court considers that the meaning that he has given to the statement was outside the range of reasonably available alternatives, it should not be deterred from so saying by the use of epithets such as "plainly" or "quite" satisfied. If it was vitiated by an error of law then the appellate court will have to choose between remitting the matter or, more usually in this context, determining the meaning afresh. But if the appellate court would just prefer a different meaning within a reasonably available range, then it should not interfere."

[23] The point at issue here is different from that in *Stocker*. Here we are not concerned with the validity of the meaning applied by the judge to the tweet but rather whether the judge confused meaning and potential justification/honest comment. The difference may be subtle however it is nonetheless important in establishing the correct parameters of a defamation case and informing accurate pleadings.

This case

[24] With commendable clarity and brevity the Statement of Claim drafted by Mr Girvan simply refers to the meaning from the language of the tweet. At para 6(1) of that particulars are pleaded as follows:

> "That the plaintiff supports and promotes the IRA and condones acts of terrorism perpetrated by the IRA."

[25] Clearly there are three elements to this meaning:

(i) That the plaintiff supports the IRA;

(ii) That the plaintiff promotes the IRA; and

(iii) That the plaintiff condones acts of terrorism perpetrated by the IRA.

[26] In fact no issue is taken with this meaning. However, the judge has allowed an additional meaning raised by the respondent at para 5(g) of the Amended Defence. This reads as follows (with our emphasis):

> "The plaintiff *as a member of Sinn Fein* sympathises with, lends support and promotes the Irish Republican Army." (our italics)

[27] The above pleading has introduced the appellant's membership of Sinn Fein into the meaning. Mr Girvan argues that this is impermissible. Mr Bacon did not oppose this submission with any vigour which is understandable as the tweet itself does not refer to Sinn Fein. The further submission made by Mr Girvan is that an attempt to rely upon justification which equates to an assertion that every member or supporter of Sinn Fein promotes and supports the IRA is absurd.

[28] We understand the latter point. However, at this interlocutory stage of proceedings we think that the legal issue which arises can be dealt with as follows. It is clearly arguable that an ordinary and reasonable reader would associate the appellant with Sinn Fein. He is an elected representative. The tweet also arose following discussion of the appellant in his capacity as an elected representative. The context is crucial to this case as *Stocker* explains. Therefore, we are of the view that the appellant's own membership of Sinn Fein can be raised as part of any defence of justification or honest comment.

[29] From our reading of the transcripts of the hearings that took place it is apparent to us that the judge was trying to accommodate the points we reference above. The difficulty arises because in doing so the judge has expanded the meaning of the tweet to include reference to Sinn Fein. We do not think that this approach is correct. The appellant's political identity is not part of the ordinary and natural meaning of the words used. However, it is not irrelevant. It is something which the respondent is, in our view, entitled to raise in support of the pleaded meanings. The appellant's own membership of Sinn Fein can be raised as part of any defence of justification or honest comment. In principle, it would be wrong to exclude this from consideration by a jury.

[30] Accordingly, we will alter the judge's Order so that the permitted meaning is that as pleaded by the appellant, broken down into three elements as set out in para [25] above. This adjustment should bring better focus to the case.

[31] The real question is whether the judge should have allowed the particulars of justification and honest comment as they stood. We are bound to say that the case has suffered from imprecise and confused pleadings to date. Putting that observation to one side, a more fundamental difficulty is the failure of all to engage with the key question as to whether the defamatory tweet is fact or opinion or a mix of both. Obviously, a determination of this issue is required before the particulars can be properly adjudicated upon.

[32] *Gately on Libel and Slander* at para 11.13 refers as follows:

> "An allegation can be published in such a way that it is made with varying degrees of certainty. The variation was analysed in *Chase v News Group Newspapers*, in which the Court of Appeal ordered three distinct levels (i) that the claimant is guilty of some impugned behaviour; (ii) that there are grounds to suspect that the claimant is guilty of the impugned behaviour and (iii) that there are grounds for investigating whether the claimant is guilty of the impugned behaviour. The approach to the defence of truth in these respective scenarios is somewhat different. When an allegation is made with the highest degree of certitude, then the imputation of guilt must be defended. The approach to proof of the defence of truth in a Chase level 2 reasonable grounds to suspect case was summarised by Eadie J in a passage approved by the Court of Appeal in *Musa King v Telegraph Group Ltd* [2003] EWHC 1312. In such cases it is necessary for the defendant to prove the primary facts and matters giving rise to reasonable grounds of suspicion objectively judged. It is impermissible to plead as a primary fact the proposition that some person or persons announced, suspected, or believed the claimant to be guilty. A defendant may adduce hearsay evidence to establish a primary fact, but this in no way undermines the rule that the statements or beliefs of any individual can not themselves serve as primary fact. Generally, it is necessary to plead allegations of fact tending to show that it was some conduct on the claimant's part that gave rise to the grounds of suspicion. This is the so-called conduct rule. This rule is not absolute, however, such that – for example, strong circumstantial evidence can contribute to reasonable grounds for suspicion, albeit that such

> evidence must permit an inference to be drawn regarding the conduct of the plaintiff and will not be sufficient by itself. Importantly, a defendant can not rely on post publication events in order to establish the existence of reasonable grounds: the issue has to be judged as at the time of publication. The defendant may rely upon facts subsisting at the time of publication, even if he or she was unaware of them at that time. A defendant may not confine the issue of reasonable grounds to particular facts of his own choosing, since the issue has to be determined against the overall factual position as it stood at the material time (including any true explanation the claimant may have given for the apparently suspicious circumstances pleaded by the defendant. Finally, a defendant may not plead particulars in such a way as to have the effect of transferring the burden to the claimant of having to disprove them. The position where the defendant seeks to justify a Chase 3 level meaning – the lesser imputation that there are grounds for investigation of the claimant's conduct is less clear. It would seem, however, that such grounds may exist independently of the conduct of the claimant. Indeed, they may be based on pure hearsay, as in the case of the complaint which a police officer investigates. Certainly, it has been suggested that the proposition that law enforcement authorities announce suspects or believe the claimant to be implicated may be enough on which to base a defence of reasonable suspicion. In *Jameel v Times Newspaper Ltd* [2003] EWHC 2609 Gray J held that in such a case the plea of justification need not be based upon conduct by the claimant unless the basis asserted for the need for investigation was such conduct. If this correct, then it would imply that the repetition rule does not apply to Chase Level 3 imputations.

[33] *Gately* at para 12.3 also states:

> "The defence of honest comment has long been considered one of the most difficult areas of the law of defamation. In *Joseph v Spiller* the Supreme Court was invited by counsel to consider options for the reform of the defence. However, the core distinction to be made is that between fact and comment."

[34] The determination of fact or comment in a defamation case is not a simple matter and is highly fact sensitive. A statement that may be regarded as an assertion

of fact may be comment for the purposes of a defence if it comprises an inference from other facts which are relied upon. In addition, defamatory words may comprise a mix of fact and comment. That assessment is undertaken in the context of a particular case. In circumstances such as this a court must assess a tweet which also includes an emoji and decide in context what an ordinary and natural reader would make of it. We are not convinced that this exercise has been properly conducted to date and hence the pleading of particulars of justification and honest comment requires further consideration. We do not consider that the appellate court is the appropriate forum for first consideration of such matters.

Conclusion

[35] We acknowledge the detailed consideration the judge applied to this case which is apparent from the transcripts. However, we consider that the defamatory meaning should simply be that which follows from the language of the tweet. The judge was wrong to expand on this in the way that he did by insertion of words relating to the appellant's membership of a political party. In our view, the judge erred in permitting the respondent to refer to the appellant's membership of Sinn Fein as a meaning. The political identity of the appellant is relevant to the defences of justification and honest comment but should not have been included as a meaning.

[36] It follows that we will grant leave to appeal and allow the appeal in part in relation to meaning. Having established the proper meaning, we remit the remaining legal issues for determination to a different judge who can manage the case to trial. We express no view on the overall merits of this case.

Disposal

[37] The Order of 12 November 2021 is set aside. We ask that counsel draft a revised Order reflecting the judgment of this court on meaning, remitting all other matters to a first instance judge. We are minded to reserve costs to the trial judge, however, we will hear the parties as to this and any other matter that arises.