SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 49

EDI/A409/17

JUDGMENT OF SHERIFF KENNETH J McGOWAN

in the cause

STUART CAMPBELL

Pursuer

against

KEZIA DUGDALE

Defender

Pursuer: Sandison QC, Pugh; Halliday Campbell
Defender: O'Neill QC, Hamilton; Balfour + Manson LLP

Edinburgh, 17 August 2018

The Sheriff, having resumed consideration of the cause, allows parties, before answer, a proof on their respective averments; reserves meantime all questions of expenses.

NOTE

Introduction

[1] The pursuer writes and publishes blogs on matters pertaining to politics. He published an item on his Twitter account ("the Tweet") critical of a politician's public speaking ability, referencing the sexual orientation of the politician's father, who is homosexual. The defender, herself (then) a politician, wrote an article ("the article") in a national newspaper, criticising the Tweet. The pursuer sues the defender for damages for defamation.

[2] As this case has already attracted some commentary in the media and elsewhere, it is perhaps useful if I explain the nature of the hearing which took place before me.

Defamation defined

[3] Defamation occurs when a person ('person A') communicates a false statement or idea about another person ('person B') which tends to lower the reputation of person B in the eyes of right thinking members of society generally.

[4] Communication of the defamatory idea can be by spoken or written word or by other means e.g. a cartoon.

The communications in this case

[5] On 3 March 2017, during the Conservative Party conference, the pursuer published the following Tweet:

> "Oliver Mundell is the sort of public speaker that makes you wish his dad had embraced his homosexuality sooner".

[6] On 7 March 2017, the following article, written by the defender, was published in the Daily Record:

> "**Twitter tirade highlights divisions**
> I was shocked and appalled to see a pro-independence blogger's homophobic tweets during the Tory conference.
> Abuse and discrimination should have no part in our politics.
> But the Twitter tirade against David Mundell and his son Oliver is sadly symptomatic of our divided politics.
> People are welcome to disagree and challenge - indeed, it is healthy that we do so.
> But it is utterly unacceptable for someone to face abuse because of their sexuality, or indeed race or religion.
> Such comments are, of course, not unique to the man who tweets as Wings Over Scotland.
> But it is depressing and disheartening that there are SNP politicians who promote his work.

> As politicians, we have a responsibility to lead from the front and call out abuse for what it is – unacceptable. No elected member of any party should be endorsing someone who spouts hatred and homophobia towards others.
> It runs entirely counter to the sort of progressive, welcoming country we all want Scotland to be.
> I hope Wings Over Scotland – and the SNP politicians who share his work – will reflect on what was said and recognise it as unacceptable.
> We are divided enough.
> Scottish Labour believed together we're stronger."

The focus of the dispute

[7] The focus in this case is on the words used by the defender. References to other matters are contextual. The pursuer's Tweet, while part of that context, is not the statement which is said to be defamatory.

[8] The court is not concerned with evaluating or seeking to judge matters such as taste, humour, politics or political views, but instead with the legal requirements of a case of defamation.

The nature of the hearing before me

[9] The hearing before me was not concerned with hearing or weighing evidence or evaluating the truth of either party's case. The case came before me for a legal debate on the pleadings, to decide whether the action should be allowed to go forward, in whole or in part, to an evidential hearing.

Summary of decision

Were the words used by the defender defamatory?

[10] As I have set out more fully below, I have not decided that the defender defamed the pursuer. I have decided that as a matter of law, the words used by the defender in the article

may carry the defamatory meaning complained of by the pursuer, which means that on this issue, the pursuer is entitled to an evidential hearing to establish whether, in fact, it did carry that meaning.

Defence of fair comment

[11] On the issue of whether the words used by the defender in the article amounted to fair/honest comment, as contended for by the defender, I have concluded that the two questions which arise, namely:

a. did the words used amount to a comment rather than a statement of fact? and

b. if comment, was it fair/honest?

are both questions of fact which require to be determined at an evidential hearing.

[12] Thus, any question of evaluating parties' or witnesses' evidence and reaching factual conclusions did not arise before me and is for another day.

Authorities

[13] I was provided with the following joint list of authorities and sources. Not all were referred to in the course of the hearing.

Kinley v *Devine* [2014] CSOH 67

Archer v *John Ritchie & Co*., (1891) 18 R 719

Curran v *Scottish Daily Record, Sunday Mail Ltd* [2011] CSIH 86, 2012 SLT 359

Massie v *McCaig* [2013] CSIH 14, 2013 SC 343

Massie v *McCaig – re permission to appeal to UKSC* [2013] CSIH 37

Cayzer v *Times Newspapers Ltd.* [2015] CSIH 55, 2015 SLT 501

Keays v *Guardian Newspapers* [2003] EWHC 1565 QB

Yeo v *Times Newspapers Ltd* [2014] EWHC 2853 (QB) [2015] 1 WLR 971

R. (Ngole) v *University of Sheffield* [2017] EWHC 2669 (Admin) [2018] HRLR 1

Slim v *Daily Telegraph* [1968] 2 QB 157, EWCA Civ

R v *Central Independent Television* [1994] Fam. 192, EWCA Civ

John v *MGN Ltd.* [1997] QB 586, EWCA Civ

Branson v *Bower* [2001] EMLR 32, EWCA Civ

Jeynes v *News Magazines* [2008] EWCA Civ 130

Joseph v *Spiller* [2010] UKSC 53 [2011] 1 AC 852

Nilsen and Johnsen v *Norway* (2000) 30 EHRR 878

Mladina d.d. Ljubljana v *Slovenia* [2014] ECtHR 20981/10 (Fifth Section, 17 April 2014) (2014) 37 BHRC 342.

GRA Stiftung gegen Rassismus und Antisemitismus v *Switzerland* [2018] ECtHR 18597/13 (Third Section, 9 January 2018)

Paraskevopoulos v *Greece* [2018] ECtHR 64184/11 (First Section, 28 June 2018)

Human Rights Act 1998

Gatley on *Libel & Slander* (12th Edition)

Lowe v *Associated Newspapers Ltd* [2006] EWHC 320 (QB) [2007] QB 580

Henderson v *London Borough of Hackney* [2010] EWHC 1651 (QB)

Nigel Waterson v *Stephen Lloyd* [2013] EWCA Civ 136 [2013] EMLR 17

Lingens v *Austria*, 8 July 1986, §42, Series A no.236

Haider v *Austria* (1995) 83-A DR 66

Malisiewicz-Gasior v *Poland* (2007) 45 EHRR 21

Steel & Morris v *UK* (2005) 41 EHRR 22.

[14] I also considered *Russell* v *Stubbs* 1913 SC (HL) 14; *Defamation and Related Actions in Scots Law*, Norrie, 1995; and *The Law of Scotland*, Gloag and Henderson, 14th edition.

Submissions for defender

Fair/honest comment

[15] The article complained of constituted fair/honest comment on a matter of public interest. That comment was made, on the basis of the pursuer's own averments, in direct response to the original comment in the pursuer's Tweet: Condescendence 2.

[16] The article contained no statement or imputation that the pursuer is a "homophobe". Thus, the pursuer's averment that he had long been supportive of all aspects of homosexual rights and homosexual equality was irrelevant.

[17] What the article did do was criticise the pursuer for giving voice to homophobic sentiments. The description of the tweet as "homophobic" represented the fair and honest comment of the defender, on facts accurately referred to, on a matter of public interest.

[18] The article was part of a page of articles authored by the defender constituting a weekly opinion column in her name. A range of matters of political and social importance were covered. The article accurately referenced the fact that the Tweet had been made. It accurately referenced that it had been authored by "the man who tweets as 'Wings over Scotland'". Thus, the reader was able to access the full text of the Tweet *via* that site should they be interested to do so. The article accurately placed the tweet in the context it was made: "during the Tory conference" by a "pro-independence blogger".

[19] The description of the tweet as 'homophobic' represented the honest belief and honest comment of the defender. Those were views which she was entitled to hold and express. They were comments which could be and were made by an honest person.

[20] The statement in the article on which the pursuer pursues this action was made by the defender in the context of a political debate on a question of public interest. That debate arose out of published comments made by the pursuer. The pursuer specifically describes himself as a "political blogger" or "political commentator" and the author of the most widely-read blog on the subject of Scottish politics, and as one of the most widely-read political blogs in the United Kingdom as a whole.

[21] On his own averments, the pursuer was a public figure with a national public profile. As a public figure who describes his style as "caustic" and his criticisms of those with whom

he disagrees politically as "habitually trenchant", the pursuer must in this regard display a greater degree of tolerance than a private individual, especially when he himself makes public statements that are susceptible of criticism. Such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society. A wide latitude is therefore allowed to comment and criticism in the political and public sphere.

[22] The pursuer averred that he commented through his blog and Twitter accounts about matters of political interest; that his political hue is pro-independence and that his style was at times *caustic* and *habitually trenchantly critical* of Unionist politicians: Condescendence 2.

[23] The pursuer's position on Record was that the imputation made in the article was that he was a homophobe was one of fact not comment; and that the article referred to him having directed "abuse" at David and Oliver Mundell because of the former's sexuality, but that neither of those supposed facts was true; the pursuer's Tweet had not directed abuse at anyone on the grounds of that person's homosexuality; no honest person could have believed that the defender's comment to be well-founded and the defender did not honestly believe that any such comment was well-founded: Condescendence 4.

[24] It was open to the court to hold, without evidence, that the requirements of a successful defence based on fair or honest comment was made out on Record. Plea in law 6 should be sustained and the action dismissed.

The test for fair/honest comment

[25] An expression of opinion was not actionable: *Archer*, per Lord McLaren at 727.

[26] That was approved in *Massie,* where in refusing permission to appeal its decision, the Court also stated that the nature of fair comment in Scots law was not in conflict with the decision in *Joseph; Wheatley* or *Langlands*.

[27] What was needed to establish honest comment was for the court to find:

a. the words used constitute comment on the fact rather than an assertion of new facts;

b. the facts upon which the comment was based were true;

c. the comment was on a matter of public interest; and

d. the comment was one which *even* an obstinate and prejudiced person could have honestly made on those facts: *Joseph,* §§ 3-5 & 98-104.

Comment or fact?

[28] The words complained of as used in the article were plainly comment.

[29] In determining whether words complained of are fact or opinion, the Court will be guided by the following points:

a. the statement must be recognisable as comment, as distinct from an imputation of fact;

b. comment is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, *etc*;

c. the ultimate determinant is how the words would strike the ordinary reasonable reader and the subject-matter and context of the words may be an important indicator of whether they are fact or comment; and

d. some statements which are by their nature and appearance comment are nevertheless treated as statements of fact where, for instance, a comment implies

that a claimant has done something but does not indicate what that something is (that is, the statement is a 'bare comment': Gatley, § 12.8).

[30] Words must be read in their context; the context may point to the conclusion that words which could be a statement of fact, are comment; editorials or leaders are perhaps more likely to be treated as comment than matter in news stories, but the heading is not conclusive: Gatley, §12.11.

[31] The article in the present case was written in a weekly political opinion column by a leading Scottish politician and member of the Labour Party. That is not a matter of dispute between the parties.

[32] A liberal approach to the expression of opinion was required. Where a journalist makes inferences as to someone's motives, that may be treated as the expression of an opinion even though the inference drawn may be to the effect that there exists a certain state of affairs, including a state of mind: *Keays,* Eady J, para 44.

[33] In a comment piece, particularly one so labelled, where a journalist draws an inference about a state of mind which cannot be verified, then it would generally be clear to any reasonable reader that it was not an objective statement of fact capable of verification. A person who chooses to enter the public arena invited comment including, scrutiny of and comment about motives. Personal reputation was sufficiently protected in such circumstances by the requirement that any adverse comments be made in good faith, and that the words should be subjected, at the appropriate stage, to the objective test of whether the inferences or deductions could be drawn by an honest person with knowledge of the facts: *Keays* paras, 49 and 50.

[34] An important dimension was the general context of political speech and the influence of Strasbourg jurisprudence on alleged defamation in that context. Relevant themes were:

a. the essential role of the press in a democratic society and its duty to impart information and ideas on all matters of public interest;

b. the principle that the scope for interference with freedom of expression is limited where political speech is concerned;

c. the distinction between fact and value judgment in Convention jurisprudence and the associated need for care in approaching the task of categorisation, and the consistent jurisprudence of the Strasbourg court to the effect that statements impugning motive should be treated as value judgments, a point made repeatedly in the context of political speech: Gatley, § 12.11.

[35] Scots law also recognised that those in the public eye need to have broad shoulders and a thick skin.

[36] There was clear authority to the effect that a wide latitude was allowed to comment and criticism in the political and public sphere; it had been recognised in the late 19th century that persons must be allowed to speak freely about public political conduct and principles: *Curran,* 359.

[37] Citizens were entitled to express opinions freely regarding the public acts and utterances of their fellow citizens; criticism was not actionable provided it amounts to nothing more than an expression of opinion on a matter of public concern: *Godfrey,* Lord McLaren at 1114.

[38] The constitution tolerated the utmost freedom in the discussion of the conduct and motives of those who take part in its public business; it was only when private character was

attacked, or when the criticism of public conduct is combined with the suggestion of base or indirect motives that redress could be claimed on the ground of injury to reputation: *McLaughlan,* Lord McLaren at pp.42-43.

[39] There was practically no limit to the language that may be used in public controversy: *Waddell*, Lord McLaren at p.885.

[40] The correct approach was for the court to take as its starting point the general features of the article and the impact these are likely to have on how the words used strike the mind of the ordinary reader, bearing in mind the positioning within the paper of the article under examination; the general nature of the subject matter dealt with in that article; who has written the material, if this is apparent; and the form of expression the reader would be likely to expect from an article on this subject matter, positioned as it is, and by this author; and against that background consider the statements in the article and assess what (if any) defamatory meaning it conveys and the extent to which this is factual or comment, giving free rein to comment and wary of interpreting a statement as factual in nature, especially where it was made in the context of political issues, considering what the words in their context indicate to the reader about the kind of statement the author intends to make: in *Yeo,* Warby J at para 97.

The facts upon which the comment is based are true

[41] One issue is the extent to which it is a proportionate element of the law of fair comment to require that a statement of defamatory opinion should include or identify the facts on which the opinion is based: *Joseph,* Lord Phillips PSC at § 79.

[42] The Supreme Court concluded that what was required was that the reader could understand what the comment was about and the commentator could, if challenged, explain

by giving particulars of the subject matter of his comment why he expressed the views that he did and that a proportionate balance was struck by a simple requirement that the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it was based: Lord Phillips PS, at§ 104 and § 105.

[43] In the present case, the defender recorded that the Tweet was from Wings-Over-Scotland, made during the Tory Party Conference and referencing David Mundell and Oliver Mundell. Those facts allowed an ordinary person if so inclined to (i) access the precise terms of the Tweet and (ii) evaluate the worth or otherwise of the comment expressed by the defender in the article.

[44] It was not correct to say that the supposed facts were not true as the pursuer contended. That was based on wilful misrepresentation of the terms of the article which did not assert or imply that as a matter of fact the pursuer was a homophobe or that his posts or tweets on political subjects may be motivated by homophobia: Condescendence 5.

[45] Instead, the article condemned the readiness of the pursuer to use and reference his political opponent's sexuality (or that of their parents) and hold this up for ridicule, when it suited him to attack those with whom he disagreed with politically. That was what the pursuer himself said he did: style and content "caustic", "habitually trenchantly critical of Unionist politicians"; and that the Tweet was intended "though caustic, to be jocular": Condescendence 2.

[46] If, as the pursuer claimed, his intent in publishing the Tweet, was to highlight his view that Oliver Mundell was an appalling public speaker and that "had Oliver Mundell not been born, the pursuer would not have to listen to his speech" he could have said this in so many different equally caustic ways without referencing his father's sexuality, e.g. by expressing regret that the speaker's mother did not abort him when carrying him, or that his

father had not undergone a vasectomy or his mother a hysterectomy before the speaker was conceived. Instead he chose to reference the sexuality of the speaker's father because he thought that was funny, suitable as something to be laughed at or about.

Comment on a matter of public interest

[47] It was common ground that issues of whether or not the tone of political debate in relation to Scottish politics has become unduly divisive, and whether elected politicians ought to publicly distance themselves from abusive debate, were and are matters of public interest suitable for discussion in the columns of a newspaper.

[48] The issue raised in the article was not whether or not the pursuer is a homophobe, but whether or not it is acceptable for political commentators to reference the sexuality of members of the family of those with whom they disagree politically as a means of ridiculing or criticising their political opponents.

The comment is one which even an obstinate and prejudiced person could have honestly made on those facts

[49] The nature of the defence of fair comment was no longer a subjective one. Instead the focus was now on the objective question: could an obstinate and prejudiced person have honestly based the comment made by [the author of words said to be defamatory] on the facts on which the [the author] commented? *Joseph* at § 108. The test was objective.

[50] Applying that test, no evidence would assist the court in making that determination. In moving the court to accept that the comment made by the defender in the present case was easily within the limits of that objective test, the particular latitude applied to matters of political discussion was reaffirmed.

Conclusion

[51] Each requirement of the defence of fair comment having been satisfied, the defender accordingly moved the court to uphold plea in law 6, and to grant decree of dismissal.

Irrelevance of pursuer's averments as to his intention

[52] In *Slim,* Diplock LJ at 172 B-C observed:

> "the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it."

[53] The pursuer's position was that his intent, in publishing the tweet, was to highlight in a caustic, but jocular manner, his view that Oliver Mundell was an appalling public speaker and that had Oliver Mundell not been born, the pursuer would not have to listen to his speech: Condescendence 2. The pursuer also avers that he had long been supportive of homosexual rights and homosexual equality, referencing other material published by him: Condescendence 4. These averments were irrelevant.

[54] The meaning of the article was that the Tweet in question expressed homophobic sentiments. Homophobic sentiments included the expression of negative attitudes on grounds of sexuality and/or gender identity in relation to those who are, or who are perceived to be, or who are associated with, lesbian, gay, bisexual or trans ('LGBT') individuals.

[55] The article did not state nor impute that the pursuer was a homophobe. The article criticises the pursuer's use of homophobic sentiments as part of the criticism of those with whom he disagrees.

[56] Perception rather than intention was important in the context of 'inadvertent discrimination'. Impact can be a harm in itself and prevention of it can be part of a legitimate aim: *R. (Ngole)* per Rowena Collins Rice at §§ 98-9.

[57] So the question in the present case was not what the pursuer intended or meant, but what he said and tweeted. In particular, contrary to what the pursuer states in his note of argument, the defender has at no time written or stated that the pursuer "is a homophobe". What is said, however is that the pursuer is willing to express views in his tweet which others experience and perceive as homophobic. His intention in so doing is entirely irrelevant. His averments on this matter are accordingly irrelevant. They should therefore be excluded from probation.

Scots law of defamation and ECHR

[58] The defender relied upon her Article 10 European Convention on Human Rights ("ECHR") to freedom of expression.

[59] The English courts had long stressed the compatibility of the law on defamation/libel and slander with the requirements of the ECHR: *John per* Sir Thomas Bingham MR at 611B, 619G; *R* v *Central Independent Television plc*, per Hoffmann LJ at 203B-E.

[60] The Scots law of defamation has to be understood against the background of, and applied by the courts consistently with, the relevant Convention rights and ECHR principle: Section 12(1) and (4) Human Rights Act 1998 ("HRA").

[61] Article 10 ECHR provides for the right to freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference by public authority.

[62] HRA allowed for restrictions on freedom of expression only insofar as these were proportionate, aimed at one or more of the legitimate ends specified in Article 10(2) ECHR and achieved that end in the least restrictive manner compatible with the exercise of the other rights and freedoms contained in ECHR.

[63] Article 10 ECHR provided a distinct and high level protection for political expression. The European Court of Human Rights ("ECtHR") had repeatedly affirmed that "freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention"*:* *Lingens*; *Haider* at §3b; *Malisiewicz-Gasior* at §64.

[64] As a result, political expression, including expression on matters of public interest and concern, required a high level of protection under Article 10: *Steel & Morris* at §88.

[65] In political matters involving public figures, protection of the right of freedom of expression is particularly important. Those in public life are expected to show a greater degree of tolerance towards criticism on matters relating to their public life than others not in public life.

[66] The pursuer's description of himself in Article 2 of his Initial Writ was relevant: *Nilsen and Johnsen*.

[67] ECtHR had confirmed that where an impugned statement directed against a politician was made in the context of a political debate on a question of public interest, few restrictions were permissible under Article 10(2) ECHR; a politician must in this regard display a greater degree of tolerance than private individuals, especially when he himself makes public statements that are susceptible of criticism; journalistic freedom permitted

degrees of exaggeration, provocation, or immoderate statements; even offensive language used outside the protection of freedom of expression may be protected when serving merely stylistic purposes; and the crossing of political invective into the personal sphere was part of the hazards of politics and the free debate of ideas, which were the guarantees of a democratic society: *Mladina d.d. Ljubljana* at §§ 40, 45, 46.

[68] There was a necessary distinction to be made between statements of fact and value judgments. The former can be demonstrated. The truth of value judgments was not susceptible of proof. A requirement to prove the truth of a value judgment, being impossible to fulfil, infringed freedom of opinion itself, a fundamental part of the right secured by Article 10. Where a statement amounted to a value judgment, the proportionality of an interference may depend on whether there existed a sufficient "factual basis" for the impugned statement: if there was not, that value judgment may prove excessive. In order to distinguish between a factual allegation and a value judgment, it was necessary to take account of the circumstances of the case and the general tone of the remarks, bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact. It was not the [ECtHR's] task to settle the underlying dispute about issues such as 'the definition of racism'. The nature and severity of the sanction imposed were factors to be taken into account when assessing the proportionality of an interference (with an Article 10 right) and even if mild may have a "chilling effect" on the exercise of right to freedom of expression as it may discourage criticism of political statements and policies in the future: *GRA Stiftung gegen Rassismus und Antisemitismus* v *Switzerland* [2018] ECtHR 18597/13 (Third Section, 9 January 2018) (at §§ 37-8, 41, 66-70, 75-77.

[69] The above principles applied even to "amateur" journalists. In order to assess the intention of the author of impugned words, it was necessary to have regard to context. It was not appropriate simply to examine the disputed expressions, detached from the context of the article in which they appeared, but also to consider whether the context of the case, the public interest and the intention of the author of the impugned article justified the possible use of a dose of provocation or exaggeration; even where the language used by the author could have been considered provocative, and although an individual who takes part in a public debate of general concern must not overstep certain limits, particularly with regard to respect for the reputation and rights of others, a degree of exaggeration, provocation, or immoderation is permitted; and turns of phrase expressing an author's value judgment concerning another person's public activities was not susceptible of proof: *Paraskevopoulos* at §§ 40-1.

[70] The present claim in principle interferes with the defender's right to freedom of expression: Article 10(1) ECHR. This court will be acting unlawfully in allowing this matter to proceed unless it is satisfied that this damages action is in fact aimed at a legitimate end of the protection of the pursuer's reputation or other rights: Section 6 HRA.

[71] If the court was not satisfied that, in the circumstances, the remarks complained of constituted any form of harm to the pursuer's reputation or other rights, the action could not be permitted to proceed. Words directed not to a person's private or family life, but to the manner in which a political speech (expressing public views on a very sensitive topic, where the speaker must have known that his speech might cause a critical reaction among his political opponents) had been perceived*: GRA Stiftung gegen Rassismus und Antisemitismus* at §§ 75-7.

[72] This court had to be satisfied also that this action, in addition to being proportionate, was necessary in a democratic society for achieving a legitimate aim. The following considerations were relevant:

a. the exceptions under Article 10(2) ECHR to freedom of expression had to be construed strictly, and the need for any restrictions established convincingly;

b. there was little scope for restrictions on freedom of expression in political speech and comment and matters of public interest, because these matters attract a high level of protection under the ECHR;

c. the limits of acceptable criticism are wider as regards a person who places himself in the public eye than might be afforded to a purely private individual: the pursuer in his political blogger *persona* lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and must display a greater degree of tolerance;

d. ECtHR had accepted that journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation, so a degree even of apparent express hostility and the making of serious accusation or criticisms do not obviate the right to a high level of protection to free expression in journalism;

e. since Article 10 ECHR protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed, it is not for courts to substitute their own views as to what reporting technique or tone should properly be adopted by those writing for publication in the press;

f. a distinction needs to be made between statements of fact and value judgments: while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof;

g. the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10;

h. in this case the remarks complained of were clearly a value judgment expressing how the pursuer's avowedly political speech gratuitously referring to the sexuality of a political speaker's father had been perceived by the defender.

[73] The application of these Article 10 derived propositions to the circumstances of this case means that this court is obliged to uphold and vindicate the defender's freedom of expression by sustaining the defender's first plea in law and dismissing this action on the basis that no relevant case against the defender has properly been made out.

Submissions for pursuer

[74] The pursuer offered a proof before answer.

ECHR jurisprudence

[75] The courts of England and Wales had said that their domestic law of defamation was ECHR compliant. That was true for Scots law also. Thus, it may be interesting to look at ECHR jurisprudence to see how other states apply defamation law, but such cases could be no more than illustrative. Care required to be taken since we did not know the details of the technicalities of the law of defamation in other countries. For example the *Slovenia* case took us back to the fact/comment distinction.

The basis of the claim

[76] The issue here was whether the article complained of could amount to a fair and honest comment in domestic (Scots) law. As this was a debate, the issue was pursuer's pleadings rather than the defender's which fell to be scrutinised. In order to succeed in a motion for dismissal at this stage, the defender needed to show that the pursuer's case was "bound to fail".

[77] The defender's submissions missed the point. The defender's argument was predicated on the supposition that what the pursuer complained of is the description to him of homophobic sentiments. But that was not correct. The pursuer's case was that the defender's article suggested that he was a homophobe: Condescendence 4. (The true extent of the meaning of "homophobic" was a matter of dispute).

[78] The result was that most of the arguments for the defender either did not apply at all; or took on a different appearance.

[79] What could the court determine about this at this stage? The action could only be dismissed if the court was convinced that the defender's article as a whole was not capable of bearing a defamatory meaning.

[80] The crucial issue for present purposes was the single question as to whether the article contained defamatory innuendo: *Cayzer*.

[81] The relevant parts of the article were set out in Condescendence. Dismissal was only appropriate if the words used by the defender were not capable of amounting to a suggestion that the pursuer was homophobic. Given the content of the words used, the court could not reach that conclusion.

[82] The issue of fair and honest comment did not arise until and unless that primary issue was resolved. The defender's supposition about the nature of the pursuer's case was wrong.

Fair/honest comment in the law of Scotland

Scope

[83] It had been suggested by the defender that the law of Scotland on this issue was as set out in *Joseph*. But no Scottish authority said exactly that.

[84] The law of Scotland was as per *Archer*: *Massie*, Lord Brailsford, para 30 - 32. *Joseph* was English law.

[85] In dealing with the application to appeal, the Inner House did not endorse *Joseph* or say that it was part of Scots law: *Massie*, Lord Carloway, paragraph 7.

[86] So care was required in determining what Scots law was.

When does a fair/honest comment defence fall to be considered?

[87] Seeking to introduce the question of fair comment at this stage suggested a 'pick and mix' approach, which was not permissible.

[88] Adopting the *Archer* approach, Scots law laid down three requirements for the fair comment defence. There had to be (i) an expression of opinion; (ii) as to a state of facts; (iii) which facts must be truly set forth. That was the proper approach.

Fact or opinion?

[89] Elements (i) and (ii) went together. It was common ground that for the defence of fair comment it was necessary to demonstrate that the words complained of were an expression of opinion and not a statement of fact.

[90] The pursuer's case was that the words used gave rise to an innuendo that he was homophobic. Hence, that was an assertion of a matter of fact, not opinion.

[91] Looking at the words used by the pursuer in his Tweet, the question was whether it could be said that he had directed abuse at Oliver Mundell because of his sexuality.

[92] The court could only sustain plea in law 6 of the defender if it was persuaded now (i.e. at this stage of the proceedings) that it would be impossible for the court to reach the conclusion after proof that the words complained of were an assertion of fact: Gatley, 12.8.

[93] If there was any dubiety about that, it was impossible to sustain plea in law 6 at this stage.

[94] This was not simply a matter of easy categorisation as between opinion on the one hand and fact on the other.

[95] In order to accede to the defender's argument, the court would need to be persuaded that it would be impossible to conclude that the words used by the defender in the article were nothing other than comment.

[96] The article itself did not say what the pursuer had written in his Tweet. It did not preface the defender's comments with a phrase such as "I think…". Instead, it made a further reference to "homophobic tweets" and "abuse". These were all put forward as matters of fact.

[97] The defender had written that she was "shocked and appalled" but that was a fact. She had made reference to "abuse because of sexuality". That was also a fact. She wrote "spout hatred and homophobia". That was also a fact.

[98] So the article as a whole was a mixture of fact and comment.

[99] It was accepted that all opinion or comment articles will be a mixture of fact and comment. An entire article could not be purely comment. But in this case the allegations were not put up for discussion but taken for granted.

[100] If that analysis was correct, that was the end of the defence for the purposes of this debate.

[101] It was clear that the defender really had little to say about this point. It was accepted that placing the words in the context was essential. Nevertheless, content cannot deprive a "fact" of its character as a fact.

[102] Much was taken for granted by the defender in the article and the facts themselves were not put up for debate.

Political speech

[103] It was accepted that politicians have to have thick skins and that greater latitude was permissible when comments took place in a public forum. But when it came to issues of private character, it is not the law that the person who participates in the public arena is not entitled to protect his or her private character.

[104] The defender's position was articulated by reference to *McLaughlan*, pp 42 – 43. But the pursuer's position was that in the article, the defender had made an assertion about the pursuer's private character which was not true. The innuendo deriving from the words used

by the defender was: "You (the pursuer) are homophobic". An allegation of that nature did not need to be borne by a person in the public eye.

Part (iii) of Archer test

[105] A matter of fact must be truly stated. So what was the meaning of the words used by the defender? The pursuer says that the words mean "(he) is homophobic". At this stage, the pursuer need only show that that meaning *could* be ascribed to the words used. In other words, the pursuer need only show that the words used were capable of having that meaning.

[106] If either of the above propositions were correct, the case had to go to proof for resolution.

What if Joseph is the law of Scotland?

[107] Assuming that the elements in *Archer* were present, what additional elements would there be?

Public interest

[108] This was already subsumed into Scots law. But if it was engaged as a separate element, it was about the nature and quality of political discourse.

[109] If the pursuer has homophobic views and allowed those to influence his public utterances, that is a part of public interest.

Honesty/malice

[110] It was clear that this was a "jury question", that is a question of fact to be determined by the fact finder: Gatley, 12.27.

[111] It was not self-evidently a matter of law for the judge to determine at the stage of debate.

[112] Issues about what must be pled were not a speciality of the law of defamation: *Henderson,* quoted at Gatley, paragraph 12.36. It was never appropriate for the case to be pled for which there was no evidence and the requirement for fair notice arose in every case.

[113] Malice may not be part of Scots law at all: *Archer*.

[114] In her defences to the initial writ, the defender originally denied knowing who the pursuer was. The averments complained of were not inspecific. Matters about which the defender would be cross examined were foreshadowed in Article 4(b), to which there had been no response in the pleadings.

[115] Accordingly, it was not possible to characterise the pursuer's position on record as a bare assertion of malice.

[116] At this stage, all the pursuer needed to do was to show that the averments were not bound to fail even if proved.

Conclusion

[117] If for any of the foregoing reasons, the court was not convinced that the pursuer was bound to fail, the defender's plea in law 6 could not be sustained at this stage.

Pursuer's intentions

Content of Article 2

[118] There was no longer any reference to the pursuer's intention in his pleadings.

Article 4

[119] The averments had to be seen in light of the defender's argument of *veritas*: Answer 4.

Article 4(a)

[120] This had already been dealt with.

Article 4(c)

[121] There was an adequate basis for these averments.

Article 4(d)

[122] The pursuer's position was firstly that the words used by the defender had not been a fair and honest comment; and secondly the averments of malice were relevant to the question of qualified privilege which was a live issue.

Reply for defender

Fair comment

[123] The test in relation to fair comment was objective. What kind of evidence what was a fact and what was a comment? There was none. The test as to whether the words

complained of amounted to fair comment was an objective one which could and should be applied now.

Malice

[124] In the Inner House in *Massie*, Lord Carloway at page 7 had said:

> "Although the court was not persuaded that a subjective 'honest belief' in the comment was a requirement of the defence, that was a relatively minor part of the reasoning which led to the court's ultimate decision to recall the *interim* order."

[125] So, the averments directed at questioning the defender's subjective honesty were irrelevant: for example those at the foot of page 2 of the Record from "Explained and averred that the defender…" to "… not honestly stated." Subjective honesty was not the test.

[126] At page 3 of the Record the averments "The pursuer, in his blog…" to "including the defender" were also irrelevant.

[127] Even if the defender's motivation was spite, honesty was neither here nor there: *Joseph*, 108.

[128] In Scots law, this was not part of the test at all. The question was did the words complained of amount to fair comment in this case on this matter? It was not open season on the subjective honesty.

[129] The averments in the last 4 lines of Article 4(b) from "The defender…" to "… will be founded upon" should not be admitted to probation.

Veritas and justification

[130] These were different issues. The pursuer had averred no proper case for cross examination on them.

Defamatory meaning

[131] It was accepted that the specific statement "you are a homophobe" would be capable of being defamatory. But the words used by the defender did not say that the pursuer was a homophobe.

[132] If the pursuer was correct and the words used by the defender carried that innuendo, the question for this would be: could a person who read pursuer's Tweet think that the pursuer was homophobic? If so, it is clear that defender's article was a comment on that.

[133] It had been suggested that the defence of fair comment was a jury issue: Gatley, paragraph 12.27. But the objective limits were very wide.

Malice

[134] There required to be factual averments from which a proper inference could be drawn: *Henderson*, paras 34 – 35.

[135] There were no such averments in the present case.

[136] It had been suggested that the court should allow inquiry by means of proof unless it was satisfied that no reasonable fact finder could, if what was averred was proved, find dishonesty had been established.

[137] But that was not the law. There was no presumption of good character or in favour of allowing proof: *Branson*, paragraph 13.

Conclusion

[138] It was not appropriate to take an over analytical approach to the words used: *Slim*, 171E. An objective test was appropriate: *Slim*, 177G.

[139] What was being argued here was not a general relevancy issue but instead a specific defence based on free speech.

[140] There was no presumption that the words used by the defender were "factual". It was not as simple as taking the words used *pro-veritate*. It was legitimate to ask what kind of evidence might be adduced to resolve the fact/opinion question. On the basis of the pleadings there was nothing to be proved or otherwise which would assist in that exercise.

[141] The pursuer's complaint about the words used by the defender were set out in the first part of Condescendence 4. But the pursuer's Tweet was a clear reference to other people's private lives. It ridiculed a matter related to homosexuality. The defender was commenting on that. That comment came against the background of political debate and free speech.

Reply for pursuer

Malice

[142] The law on this issue came from *Archer* as applied in *Massie*. It was not part of the question which required to be decided at this stage unless one took the pick and mix approach contended for by the defender.

[143] In any event, what did *Joseph* decide? Was it part of the ratio at all?

[144] Even if objective malice was now the test, that did not mean that the averments fell to be excised as they were still relevant to the defence of qualified privilege.

Presumption

[145] The presumption of good character was part of the law of defamation: *Kinley*, paragraph [9].

Procedure

[146] The Scots law of procedure was not to be found in English Court of Appeal cases. Jury questions can cover objective question and were particularly apt for questions involving issues of nuance *et cetera*. In so far as reliance was placed on *Slim*, it was clear that there had been a trial.

Grounds of decision

The starting point

[147] In some respects, the debate in this case involves a consideration of procedural as much as substantive law, in the sense that Mr O'Neill for the defender contended that the action could (and should) be dismissed at this stage, before factual inquiry, whereas Mr Sandison for the pursuer contended that such an approach was to put the procedural cart before the horse.

[148] Before dealing with the matters argued before me, it is, I think, helpful to focus exactly what the pursuer's case is, on Record and in law.

Defamatory meaning and innuendo

[149] The source of the words complained of has already been identified. It was accepted by Mr O'Neill that if one person accuses another of being a homophobe, that would be, on the face of it, defamatory in the sense of being liable to lower him in the esteem of the right thinking members of society. But the pursuer does not say (and could not) that the defender expressly said that. Instead, the pursuer's case is that that is the imputation or innuendo to be derived from the words used.

[150] Where there is a dispute as to whether a statement carries a defamatory meaning, whether by express statement or by innuendo, there is a two stage process to be gone through. First, the court plays a 'gatekeeping' role to decide whether, as a matter of law, the words complained of are reasonably capable of having defamatory meaning ascribed to them. Second, if that test is satisfied, an evidential hearing is permitted with the fact finder having the task of determining whether the defamatory meaning contended for is a:

> "… reasonable, natural or necessary inference from the words used, regard to be had to the occasion and the circumstances of their publication.": *Russell*, per Lord Shaw at 24.

[151] Mr O'Neill appeared to me not to meet this point head on. Instead, he said that if the pursuer was correct and the words used by the defender carried that innuendo, the question for this court would be: could a person who read the pursuer's Tweet think that the pursuer was homophobic? If so, it was clear that the defender's article was a comment on that.

[152] While the content of the pursuer's Tweet is no doubt a relevant circumstance in determining whether the defamatory innuendo complained of could properly be derived from the words used by the defender, I was rather left not knowing whether or not it was accepted on behalf of the defender that the 'gatekeeping' test set out above had been met or not.

[153] Having considered the content of the defender's article, I have concluded that the tone, content and vocabulary used is *capable* of carrying the innuendo complained of by the pursuer.

[154] The first paragraph references "homophobic tweets". But further on in the article the word "discrimination" is used; and it is said that it is "… Unacceptable for someone to face abuse because of their sexuality, or indeed race or religion." Further on in the article it is said

that "No elected member of any party should be endorsing someone who spouts hatred and homophobia towards others."

[155] Taking all of that together and making allowances for the context of publication (including the pursuer's Tweet) I think that as a matter of law, the innuendo is one which the words used *may* reasonably bear.

[156] So to emphasise what I am deciding here, I am not saying that the defender defamed the pursuer. I am simply saying that as a matter of law, the words used *may* carry the defamatory meaning complained of by the pursuer. Accordingly, on this issue the pursuer is entitled to an evidential hearing to establish the facts. It will be a matter for whoever hears the evidence to determine whether the words used *did as a matter of fact* bear that defamatory meaning, taking account of the circumstances and the other lines of defence taken.

Fair comment

What is the correct procedural approach to a fair comment defence?

[157] Mr O'Neill's ultimate position, developed by reference to the various other arguments which he outlined, was that it was open to the court (at least in this case) to determine the nature of the statement complained of at the stage of debate; to conclude that it was (i) a comment and (ii) and fair/honest; and as such, could not be defamatory - hence the action should be dismissed.

[158] It appears to me that irrespective of the state of Scots law on the precise scope of the defence, there are a number of difficulties with that approach.

[159] Firstly, the onus of proof is on the defender: Gatley, paragraph 12.2; Norrie, page 139[1].

[160] Secondly, the court can play a gatekeeping role in respect of the defence of fair/honest comment, similar to the one it plays in relation to the question of defamation [see above]. But the determination of the fact/comment distinction in particular may not be straightforward and gives rise to a 'jury question' i.e. a question of fact: Norrie, 1995 page 140; Gloag and Henderson, paragraph 29.21(1); Gatley, paragraph 12.8[2].

[161] Thirdly, even once it is decided that a statement amounts to comment, questions of fairness and/or honesty are questions of fact: Gloag and Henderson, paragraph 29.21 (4); Gatley, paragraph 12.27[3].

[162] I accept that there may be cases (and this may be one) where it is difficult to envisage what type of evidence might be led which would shed light on whether the statement was a factual one or comment. But the point remains that it is a factual question to be determined by the fact finder after proof and not one to be determined on the basis of the pleadings and debate where the categorisation is disputed.

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[1] Gatley: "…the five elements that must be proven by the defendant…"; Norrie: "Once these three elements have been proved by the defender the onus is shifted onto the pursuer…".

[2] Norrie: "The role of the judge is to determine whether the statement can be so construed as to contain both fact and comment…If…the statement is reasonably capable of being considered as a comment, then it is for the jury to determine whether it is indeed comment or fact; G&H: "Fact and comment may be so bound up together that it is difficult to distinguish the one from the other. In that situation…the jury has to decide… into which category the statements respectively fall…"; Gatley: "If satisfied that the words complained of must fall into one or other category, the judge will rule to that effect. If the judge considers that reasonable people could take either view, then the matter must be left to the jury."

[3] G&H: "Normally it is for the jury to decide whether the comment was fairly and honestly made."; Gatley: "The question the jury must answer is this:…"

Is Joseph part of the law of Scotland

[163] At this stage, I am concerned only as to whether factual enquiry should be permitted. The law, both procedural and substantive, which leads me to that conclusion does not appear to be controversial.

[164] There may be a good going argument in due course as to whether *Joseph* is or is not part of Scots law, but I do not require to answer that question at this stage. It is more properly addressed at the full hearing. Put another way, even if *Joseph* is part of Scots law, that does not change the type of question which must be answered (factual) and who should answer it (fact finder).

Human Rights Jurisprudence

[165] I agree with Mr Sanderson that the Scots law of defamation being regarded as Convention compliant, examples from other jurisdictions must be regarded with care. That is not to say that they are not potentially important and helpful examples as to how elements like public interest and the importance of a free press should be evaluated in assessing the defence of fair comment, but in my opinion that is a matter for argument at the proof stage.

Relevance of specific averments

Article 2: The pursuer's intention

[166] Mr O'Neill argued that averments about the pursuer's intention were irrelevant. But Article 2 (now) contains no averment to that effect and so this argument falls away.

Article 4(a): the pursuer's support for homosexual rights

[167] Plainly there is a dispute as to the meaning of the defender's words and what if anything they impute. Part of the context in which that must be examined is the pursuer's Tweet. And there is evidently a dispute as to whether, in using the words he did, the pursuer 'gave voice to homophobic sentiments' and whether that does or does not encompass homophobia.

[168] In Answer 4 (page 10 of Record) the defender avers "*Separatim esto*…the meaning [of the article] is that contended for by the pursuer …that meaning is also substantially true."

[169] My feeling is that the averments about the pursuer's position on homosexual rights is of doubtful relevance, but I am not at this stage able to say that they are plainly irrelevant to the questions which will arise for determination after proof. Accordingly, they must remain in the pleadings meantime.

Article 4(b): Malice/honesty

[170] Mr O'Neill sought deletion of a variety of averments. I accept that the test of whether a comment is 'honest' is an objective one: *Telnikoff* v *Matusevitch* [1992] AC 343 per Lord Keith of Kinkel at 354, cited at Norrie, page 147, footnote 5. But in my view, proof of malice or a collateral improper motive *could* be factors relevant to determining the issue of honesty.

[171] Moreover, where the defence of fair comment is relied upon, it is for the pursuer to prove an absence of genuine belief in the words used: Gloag and Henderson, paragraph 29.21(4). In my view, it cannot be said at this stage that the pursuer's averments (on this issue) would be bound to fail if proved.

Disposal

[172] I propose to allow parties, before answer, a proof on their respective averments, with all pleas standing. Expenses are reserved.

[173] If parties are able to resolve any questions of expenses by agreement, good and well. If they are not, an appropriate motion can no doubt be enrolled.