

Briefing Note

Supreme Court re-states “fair comment” defence and takes defamation law a step closer to reform



Joseph v Spiller [2010] UKSC 53

The Supreme Court recently held that the “fair comment” defence to defamation proceedings does not require that the comment in question had to identify the matters on which it was based with sufficient particularity to enable readers to verify for themselves that the comment was well-founded. The comment did, however, still need to refer in general terms to the facts that led to the comment.

The defense was re-named “honest comment” and the judges remarked that the law of defamation should move on as it was archaic and needed to keep up with the increased use of the internet and social media.

The Facts

A dispute ensued between the members of a band (the Gillettes) and their booking agency regarding an alleged breach of the contract between the parties.

The defendant booking agency posted on its website that it was “*no longer able to accept bookings for this artist as the Gillettes...are not professional enough to feature in our portfolio and have not been able to abide by the terms of their contract.*” Other details of the nature of the dispute were also given.

The decisions at first instance and in the Court of Appeal

At first instance, the “fair comment” defence was struck out because the words in issue were not capable of being comment, were not in relation to a matter of public interest and because the defendant had not gone into enough detail in relation to the facts on which the posting was based.

The Court of Appeal affirmed the decision on appeal on the basis that the facts upon which the comment was said to be based were not sufficiently set out by the defendant.

The decision of the Supreme Court

The Supreme Court re-stated the law of the “fair comment” defence and allowed the appeal. Rather than consider the restrictive test which had been applied in the High Court and the Court of Appeal, the Supreme Court created a new test that “*the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based.*” In contrast to the previous test there is no requirement in this test that the reader must be able to judge from the facts provided how well founded the comment is.

Under the new formulation of the test, the facts relating to the contract were sufficiently referred to, so as to offer support for the comment.

Comment

Under the new test for the “honest comment” defence, the commentator is not required to provide as much information in order for the defence to succeed. The new defence retains an element of fairness in favour of the person defamed, but widens the scope for the use of the defence, particularly in the modern age where information is easily disseminated and made available for public knowledge.

The judges rejected a number of reforms which were suggested by the defendants, but did suggest that defamation law needed consideration by the Law Commission, with the eventual aim of reform. In addition to broadening the scope of the availability of the defence by removing the public interest requirement, the judges hope that the impending Defamation Bill, currently with the House of Lords, deals with trial by jury in defamation cases, as they believe the issues become too complex when a jury is required.

A draft of the Defamation Bill is expected in 2011.

Julian Johnstone

Head of Litigation

Principal, Druces LLP

Julian specialises in resolving clients' disputes in a cost effective and commercial manner, through negotiation, mediation, arbitration and Court proceedings. He focuses in particular on international arbitrations, shareholder and company disputes and property issues. Julian graduated from Pembroke College, Cambridge in 1989. He has over 15 years' experience in dispute resolution and litigation. He is a solicitor advocate and a CEDR qualified mediator.

Druces LLP, Salisbury House, London Wall, London EC2M 5PS
Druces LLP is a City of London law firm

This note does not constitute legal advice but is intended as general guidance only. It is based on the law in force on 11 January 2010

If you would like further information please contact Julian Johnstone on +44 (0) 20 7216 5502 or j.johnstone@druces.com or Marie-Louise King on +44 (0)20 7216 5562 or m.king@druces.com or email us at litigation@druces.com.