IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 98/92

Reported in 31 J.L.R p. 1

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

BETWEEN	ERIC ANTHONY ABRAHAMS	PLAINTIFF/APPELLANT
AND	THE GLEANER COMPANY LIMITED	
AND	DUDLEY STOKES	DEFENDANTS/RESPONDENTS

Winston Spaulding, Q.C., B. J. Scott, Q.C. and Susan Richardson, instructed by Clough, Long & Company, for the appellant

Emil George, Q.C. and Richard Ashenheim, instructed by Milholland, Ashenheim & Stone, for the respondents

October 25, 26, 27, 28, 29, 1993 and January 24, 1994

WRIGHT, J.A.:

Having had the benefit of reading the judgment in draft of Downer, J.A., I shall not advert to the facts beyond the necessity of demonstrating my concurrence with the course he proposes.

Once again the citizen, like the stripling David, is confronted with the awesome, but necessary, power of the press, the Goliath of the equation. Public officials need to be wary of the press, the people's watchdog, but at the same time so incredible is the power which it exercises that the press is not left to run amuck but must abide by the legal leashes which apply in order to prevent avoidable damage. In other words, the press must respect the rules which apply to its operation.

By October 13, 1992, the date when the Summons for Further and Better Particulars was heard by Bingham, J., fully five years had elapsed and, if the contention of the appellant be correct,

and I think it is, there had not been by that time a proper defence filed to what are undoubtedly very damaging allegations. The learned judge dismissed the application which can only mean that in his judgment the appellant is not entitled to any of the very detailed particulars sought.

There is no equivocation about the very serious charges of corruption levelled against the appellant and there has clearly been no endeavour to nullify the effect of those allegations. The appellant complains in paragraph 9(i) of the Statement of Claim:

> "The Plaintiff on September 17, 1987, after the publication of the libel complained of in paragraph 3 spoke to the Second Defendant, and at the Second Defendant's request sent to the Defendants a statement denying the allegation. The Defendants neglected and refused to publish the said statement in breach of the undertaking of the Second Defendant to do so in the **Star** newspaper of September 18, 1987."

What the respondents did was to exacerbate the situation by publishing the libel in the **Daily Gleaner** of September 18 and then on September 19 by a clarification in the **Daily Gleaner** removed any possible doubt that the appellant was the butt of their accusation. Such tenacity in pursuit would indicate that the respondents are fully justified and can support their actions with facts. And yet the defence for which particulars are sought is dated 18th December, 1991 - over four years since the last publication. Be it noted that in the intervening years, without any adjudication on the merits of the case there have been five judgments - a judgment in default of defence which was later sought to be set aside in a hearing which lasted eight days before Edwards, J. who refused the application; two judgments of this court, the first setting aside the judgment of Edwards, J and the second refusing conditional leave to the appellant to appeal to Her Majesty in Council. The fifth judgment was that of Bingham, J. refusing further and better particulars. Indeed,

the years have been prolific in the production of judgments, the instant being the sixth and yet the appellant is no more able today than he was at the commencement of these proceedings to identify with clarity who are his companions in crime.

The respondents took cover behind the defence of Justification and Qualified Privilege, defences which present their own difficulties.

Justification

This plea appears at paragraph 5 of the defence thus:

> "The words set out in paragraphs 3, 4 and 5 of the Statement of Claim are, in their natural and ordinary meaning and without the meanings alleged in paragraphs 6 and 7 of the Statement of Claim, true in substance and in fact."

There is a cardinal rule which was stated long ago by Darling, J in **Mangena v. Lloyd** (1908) 98 L.T. at page 643 as recorded in **Gatley on Libel and Slander** 7th Edition at paragraph 1036:

> "A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation for failure to establish this defence at the trial may properly be taken in aggravation of damages."

This requirement was quoted with approval by Lord Denning, M.R. in **Associated Leisure Ltd. and others v. Associated Newspapers Limited** (1970) 2 All E.R. 754 at 757-8.

But that is not all. There is the very relevant requirement, which is at issue in the instant case, namely, the supplying of particulars. There is, however, an important distinction on which the respondents before us sought to rely:

> "Where the libel imputes a specific offence e.g. that the plaintiff on a day, and at a place named, stole a specified article, it is sufficient to plead 'The said words are true in substance and in fact.' In such a case particulars of justification will not be ordered." See **Gatley on Libel and Slander** 7th Ed. para. 1046; **Gordon Cumming v. Green** (1891) 7 T.L.R. 408.

This rule was subject to some modification in **Marks and another v. Wilson-Boyd and others** (1939) 2 All E.R. 605 in which the

Court of Appeal (Scott, Clausen and Goddard, LJJ) held (headnote):

> "There is no absolute rule of practice that, whenever a plea of justification is raised in the common form 'that the words are true in substance and in fact' an order for full particulars of the facts and matters relied upon in support of the plea must be made. Each case must depend on its particular facts, and, where the charges made are sufficiently specific, no general order for particulars should be made though an order may be made for particulars of specific matters."

However, the court was careful to observe at page 609:

> "We think it right to emphasize that we are neither laying down nor over-ruling any point of importance relating to practice, but are merely dealing with the facts of this particular case."

This was a case in which the defendants were resisting an order to give full particulars of the facts and matters relied upon in support of their plea of justification. The alleged libel was contained in lengthy letters and forms of statutory declaration published to a large number of persons interested in the Whiskey trade in connection with evidence given by the plaintiffs at a public enquiry in the United States of America by the Federal Alcohol Administration of that country. The court dismissed the defendants' appeal.

In **Wooton v. Sievier** (1913) 3 K.B. 499 it was held, inter alia:

> "That where a defendant raises an imputation of misconduct against a plaintiff, the plaintiff ought to be enabled to go to trial with knowledge of the acts which it is alleged he has committed and upon which the defendant intends to rely as justifying the imputation; and that if the particulars are such as the defendant ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of his witnesses." See also **Zierenberg v. Labouchere** (1893) 63 L.J. 89.

Before us Mr. George, Q.C. contended that the allegation against the appellant is a specific one of receiving "kickbacks" and that, accordingly, no particulars are required. But the defence must have been otherwise minded at the time when the defence was

filed because it purported to have supplied particulars in paragraph 5:

" PARTICULARS

1. John Gentles, a former Director of Tourism during the time when the Plaintiff was Minister of Tourism, swore to an affidavit on the 14th January, 1988, in which he says inter alia that he identified the Plaintiff's signature before a Federal Grand Jury on a number of documents including public relations and advertising contracts and cheques either drawn by or made payable to the Plaintiff or negotiated to the Plaintiff.

2. Federal authorities in Connecticut, U.S.A., are investigating public relations and advertising executives who are suspected of making payments to Jamaican Government Officials for the award of contracts by Jamaican Government agencies to the firms of those executives.

3. The words complained of at paragraphs 3 and 4 of the Statement of Claim were received by the Defendants from a usually reliable source, namely Associated Press of 50 Rockefeller Plaza, New York, U.S.A."

But if the purpose of supplying particulars is to prevent the element of surprise at the trial, which is indeed the case, then it is difficult to see how these particulars could suffice. However, Mr. George, Q.C. submitted that long before the defence was drafted the appellant was in possession of Gentles' affidavit with the facts. That affidavit dated January 4, 1988, was filed in support of the respondents' application to set aside the default judgment. And it is contended that by reference to that affidavit the appellant would know what is being said. The seven-paragraph affidavit reads:

" I, JOHN GENTLES, being duly sworn, make oath and say as follows:

1. My true place of abode and postal address are at 400 East Randolph, Chicago, Illinois, U.S.A. and I am a Hotelier.

2. I served as Director of Tourism in Jamaica from about December 1980 until February 1983. In about the

" month of April 1981 I was also appointed Chairman of the Jamaica Tourist Board.

3. I have read the words set out in paragraphs 3, 4 and 5 of the Statement of Claim filed herein.

4. The words set out in each of those paragraphs are true in substance and in fact. New York business executives in fact paid kickbacks to Jamaican officials for lucrative tourism promotion contracts. Included among these payments were cheques either made payable to the Plaintiff and further negotiated by him.

5. It is true that the United States of America federal authorities in Connecticut are investigating public relations and advertising executives suspected of making payments to Jamaican Government officials for the award of contracts by Jamaican Government agencies to the firms of those executives.

6. The matters involved are currently being investigated by a Federal Grand Jury in Connecticut aforesaid and I have given evidence before the said Grand Jury. I was asked to identify a number of documents and the signatures therein and these included public relations and advertising contracts and cheques either drawn by or made payable to the Plaintiff or negotiated to the Plaintiff and on which the Plaintiff's signature appeared. I identified the Plaintiff's signature on those cheques.

7. I am aware that the Plaintiff is a key figure in the Federal Grand Jury's investigation."

The vice inherent in paragraph 4 of this affidavit is that it has arrayed against the appellant a host of unspecified New York business executives. Can these allegations be called particulars? The fact is that these so-called particulars emphasize the need for particulars. But paragraph 5 has gone even further in that it implicates the appellant in the drawing of "kickback" cheques. Nowhere has Gentles said he was privy to the drawing of any of those cheques. It follows, therefore, that hearsay evidence is involved with every cheque to which he

seeks to connect the appellant the amount of such evidence depending upon how devious are the "kickback" schemes.

Despite these obvious deficiencies it was made abundantly clear that the respondents had no intention of providing any further particulars because Mr. George, Q.C. submitted that they are relying on the veracity of Gentles and that if the appellant's signature appears on even one of the cheques that would suffice. Further, when he was asked what time would be required to comply with an "unless order" he responded that he could not tell then he ventured one year about which he said he was serious. The position, then, is that already six years have gone since the publication of the libel as well as of the filing of the Statement of Claim and now the projection of the defence is that it would require another year before the appellant would be enabled to file a reply to the defence. Haply, therefore, the case might come on for trial in an overall period of around ten years! Such a situation is indeed embarrassing. No court could be expected to lend its support. But fortunately such an outcome need not be. Quite unwittingly Mr. George, Q.C. has supplied particulars of justification, not for the libel, but for the course proposed by the court. In explaining the delay in filing a defence he said that was due to the difficulty in obtaining an affidavit from Gentles. Further he had sought to obtain copies of Gentles' evidence before the Grand Jury and of the record of the proceedings but, having sought legal opinion, he was advised that it was extremely difficult - almost impossible - to obtain such documents. However, at this stage he intended to apply to the court for the documents. What he had learned is that the proceedings before the Grand Jury are private hence the difficulty encountered. It is clear, therefore, that the respondents do not have and so cannot supply the requisite particulars even within a reasonable time.

The appellant's main thrust was to obtain the particulars so as to be able to reply to the defence and send his action on

its way. Mr. Spaulding, Q.C. was therefore quite reluctant, as if unprepared, to apply to strike out the defence. However, he did eventually aggregate the admitted deficiencies of the defence and since such a course can be accommodated under the second prayer in his grounds of appeal, viz:

> "Grant such further or other relief which the Honourable Court may deem appropriate in the circumstances."

he did move the court to strike out both the pleas of justification and qualified privilege. As to this latter plea, the judgment of Downer, J.A. has amply shown its irrelevance to the case and requires no further treatment by me. With regard to the plea in paragraph 6 of the defence "that the defendants will also rely on section 7 of the Defamation Act" it is sufficient to say that it has been clearly demonstrated that the defendants are in no position to justify any of the charges against the plaintiff.

In the circumstances, not only is there no defence to the action but to further prolong the agony would be embarrassing. Accordingly, in exercise of the court's inherent jurisdiction, the defence is ordered struck out and the case is hereby remitted to the court below to be proceeded with on the basis that there is no defence. The appellant is to have the costs of appeal and in the court below.

DOWNER J A

The appellant, Eric Anthony Abrahams a former Minister of Government, has sought by way of a summons, further and better particulars from the respondents, the Gleaner Company Limited and its editor in chief, Dudley Stokes. This request is in respect of their defence to the libel action he has instituted against them. It was Bingham J who dismissed the summons and this has given rise to an important interlocutory appeal. It is important because firstly, it emphasises the court's insistence in adversary proceedings that an appropriate defence is filed before it is permissible to set down an issue for trial; and secondly, it demonstrates the requirement for proper averments in the defence, in order that the constitutional guarantee of the right to a fair hearing within a reasonable time, enshrined in section 20 (2) of the Constitution is afforded to the appellant Abrahams.

In order to understand the significance of the issues, it is necessary to advert to the history of the action. The action was instituted from as far back as 24th September 1987, in respect of articles published in the Star of 17th September and the Gleaner of 18th and 19th September 1987. An appearance was entered but no defence was filed. Because of the failure to file a defence within the required time, the appellant Abrahams entered a judgment in default on 23rd October 1987. The next stage was that the respondent Company and its editor brought proceedings to set aside the interlocutory judgment in default, and the respondents were unsuccessful in that regard before Edwards J on 16th December 1988. This Court (Wright, Downer, Bingham (Ag.))JJA on 11th December 1991, set aside the order of Edwards J and gave the respondents leave to file a defence.

The appellant Abrahams then sought leave to appeal to Her Majesty in Council to restore the default judgment. This application was refused: (Rowe P, Wright & Gordon)JJA, on 18th February 1992. The respondents having by then filed their defence, the appellant Abrahams sought further and better particulars with respect to the issues of justification and qualified privilege. Bingham J dismissed the summons on 13th October 1992, and from his order Abrahams has appealed. It is worth noting that for six years interlocutory hearings have been pursued and as yet there is no summons for directions. This factor must be borne in mind in resolving the issues in this appeal.

Did the defence disclose a plea of justification?

The appellant's statement of claim sets out in its entirety, the article published in the Star of September 17 1987. It is necessary to refer to extracts which pinpoint the gist of the libel.

> " 'All I can say is I suspected the Minister of Tourism was exacting a toll,' the writer, Robin Moore of Westport, told the Advocate of Stamford in a copyright story published Tuesday. 'Call it a bribe, call it anything you want,' said Moore, the author of 'The French Connection,' a novel on drug smuggling."

Then under the caption Key Figure the article continued:

> "Moore said Monday that his files helped lead Federal agents to suspect that Anthony Abrahams, Jamaica's former Tourism Minister was being paid by American business-men for the multi-million dollar tourism contracts."

Then the articles further state:

> "Moore, 61, said the notes in his diary are impressions of what was going on between Abrahams and the United States companies. The subjects also appeared in letters between him and friends in Jamaica.

> 'I have not definitive proof that this ever happened - it was just a suspicion of mine,' Moore said. 'People were talking. There was no secret about the situation with the (former) Minister of Tourism.' "

Paragraph 4 of the statement of claim reads:

> "4. On page 2 of the Daily Gleaner newspaper dated September 18, 1987, under the heading 'Robin Moore: I suspected Jamaican Tourism Minister,' the Defendants maliciously and falsely printed and published of the Plaintiff and of him in the way of his said offices and occupations and in relation to his conduct therein, the following defamatory words:"...

Those defamatory words which followed were substantially a repetition of the article in the Star.

Further on page 3 of the Daily Gleaner of September 19 1987, under the caption "Clarification" the Gleaner made it clear that the words in the article referred to Abrahams and not the then current Minister of Tourism, the Honourable Hugh Hart. It was further alleged in the statement of claim, that the natural and ordinary meaning of the words in the article was that the Honourable Minister was guilty of criminal conduct as prohibited by the common law and the statutory provisions of the Corruption Prevention Act. Even on the most favourable interpretation, this was a grave charge to make. If an action for libel had not been instituted by Abrahams, then having regard to the constitutional implications, it might well have been appropriate to have set up a Commission of Enquiry or consider the institution of criminal proceedings against him.

The Draft Defence of 18th January 1988 which sets out the defence of justification at the hearing to set aside the default judgment, reads:

> "5. The words set out in paragraphs 3 and 4 of the Statement of Claim are true in substance and in fact."

It is a requirement of law that before a defence of justification is raised, counsel ought to have knowledge of the truth of the libel: see **Wootton v. Sievier** [1912] 3 K B 499 at p. 506. Even more emphatic is a later statement by Lord Denning M R in **Associated Leisure Ltd v. Associated Newspapers** [1970] 2 All E R 754 at p. 757 which said:

> "... I am sure Devlin J did not wish in any way to detract from the rule, well settled, which I will read from Gatley:
>
> > 'A defendant should never place a plea of justification on the record unless he has clear and sufficient evidence of the truth of the imputation, for failure to establish this defence at the trial may properly be taken in aggravation of damages.'
>
> I have always understood such to be the duty of counsel. Like a charge of fraud, he must not put a plea of justification on the record unless he has clear and sufficient evidence to support it."

Bearing in mind the libels published in the "Gleaner" and the "Star", the following paragraphs from the affidavit of John Gentles, former Director of Tourism dated 14th January 1988 are important:

> "3. I have read the words set out in paragraphs 3, 4 and 5 of the Statement of Claim filed herein.
>
> 4. The words set out in each of those paragraphs are true in substance and in fact. New York business executives in fact paid kickbacks to Jamaican officials for lucrative tourism promotion contracts. Included among these payments were cheques either made payable to the Plaintiff or negotiated to the Plaintiff and received by the Plaintiff and further negotiated by him."

Having regard to this affidavit evidence, the general averment in paragraph 5 of the draft defence adverted to, was permissible in seeking leave to set aside a default judgment.

As Lord Esher puts it in **Zierenberg & Wife v. Labouchere** [1893] 63 L J 89 at p. 91, after explaining the manner of the old pleadings, he then states the modern mode as follows:

> "... Afterwards the rule of pleading was changed, and it was allowed in the plea to plead a justification generally, but the defendant was still bound before the trial to give the same particulars as before had been put in the plea if they were required."

This principle has been further refined when the defence pleaded, seeks to justify a particular meaning: see **Lucas-Box v. News Group Newspapers Ltd.** [1986] 1 W L R 147.

It is clear that counsel for the respondent must have recognised, given the general charge of bribery and corruption in the pleaded defence, particulars comparable to that required in an indictment, were necessary. Edwards J, in his judgment to set aside the default judgment at page 14 sets out the relevant authorities:

> " 'When setting up a plea of justification a defendant must plead his case with sufficient particulars to enable the plaintiff to know clearly what is the case, what is the possible defamatory meaning of the words complained of, which the defendant is seeking to justify. So said Ackner L.J. in **Lucas-Box v. News Group Newspapers Ltd.** [1986] 1 A.E.R. 177 at 183.' "

Then in **Viscount DeL'Isle v. Times Newspapers Ltd.** [1987] 3 All E R 499 at 507 Mustill L J as he then was, said:

> "The essence of the decision in the **Lucas-Box** case (and here it may have broken new ground) is that the justification must be pleaded so as to inform the plaintiff and the court precisely what meaning the defendant will seek to justify." [Emphasis supplied]

Further, in Prager v. Times Newspapers Ltd. [1988] 1 All E R p. 310 Nicholas L J said:

> "Whatever may have been the practice to date, in future a defendant who is relying on a plea of justification must make it clear to the Plaintiff what is the case which he is setting up. The particulars themselves may make this clear, but if they are ambiguous then the situation must be made unequivocal."

It is now obligatory to examine the particulars in the defence to determine whether the appellant's claim for further and better particulars was justified. Paragraph 5 of the defence reads:

> "
>
> **PARTICULARS**
>
> (1) John Gentles, a former Director of Tourism during the time when the Plaintiff was Minister of Tourism, swore to an affidavit on the 14th January, 1988, in which he says inter alia that he identified the Plaintiff's signature before a Federal Grand Jury on a number of documents including public relations and advertising contracts and cheques either drawn by or made payable to the Plaintiff or negotiated to the Plaintiff.
>
> (2) Federal authorities in Connecticut, U.S.A., are investigating public relations and advertising executives who are suspected of making payments to Jamaican Government officials for the award of contracts by Jamaican Government agencies to the firms of those executives.
>
> (3) The words complained of at paragraphs 3 and 4 of the Statement of Claim were received by the Defendants from a usually reliable source, namely Associated Press of 50 Rockefeller Plaza, New York, U.S.A."

As the defendant must be afforded his constitutional guarantee of a fair hearing before an impartial tribunal [see section 20 (2) of the Constitution] he must know of the identity

of the public relations and advertising contracts which purport to establish that the appellant was the recipient of bribes. Further, the cheques drawn by him or made payable or negotiated by him must also be identified.

Proper pleadings are essential to our adversary system especially where jury trials are the normal mode: see section 45 Judicature (Supreme Court) Act. If the identity of the documents and negotiable instruments is denied to the appellant Abrahams, how would he prepare his defence? If the documents were identified, there may well be an application for discovery of documents or as is the practice in these courts, there is an agreed bundle and further there may even be interrogatories. But the mandatory first step is to provide further and better particulars in the pleaded defence if evidence is to be adduced at the trial on this issue. In this instance, it is permissible to consider whether the plea of justification ought to be struck out as not disclosing a defence as the defence and particulars as drafted, are embarrassing. It was in that context that Mr. George was asked if the court were minded to make a peremptory or "unless order" as in **Zierenberg & Wife v. Labouchere**, what time would be requested. His response was that the respondents had a legal opinion on the matter and that it was difficult to obtain information from the Federal Grand Jury which was secret, and that it would require a year. The circumstances would have to be exceptional to warrant a further delay in these proceedings as they would severely prejudice the appellant Abrahams. He would be debarred from knowing the identity of the documents and therefore from any further necessary interlocutory steps. If the evidence was not available the plea should not have been entered.

I would find that the facts pleaded in paragraphs 1 2 and 3 are not capable of being the basis of a plea of

justification and if allowed to stand, would embarrass the appellant because the documents are not identified by Gentles and the investigations by Federal authorities cannot, by themselves, justify an allegation of bribery, as published. Further, merely to repeat a libel because it was received from a reliable source, could never amount to justification: see **Donovan v. Thwaites** [1824] 3 B C 556 or 107 E R 840 and **McPherson v. Daniels** [1829] 10 B C 263 or 109 E R 448. Although the request was for further and better particulars, consideration ought to be given as to whether a larger order ought to be granted.

Could the facts averred in the alternative ever amount to a plea of qualified privilege?

The failure to establish a plea of justification does not conclude the matter as the respondents have entered in the alternative, a plea of qualified privilege. Perhaps it is necessary to advert to the effect of the pleadings as stated by Morris L J in **Cadam & Others v. Beaverbrook Newspapers Ltd.** [1959] 1 Q B 413 at p. 425. It runs thus:

> "... It is quite clear that in giving particulars of justification the defendants are bound by the particulars that they have given: they cannot go beyond those particulars."

As this is a principle of general applicability, it also applies to qualified privilege. Also the question must be posed, as to whether the fact that Unites States authorities and the Ministry of Tourism in Jamaica were carrying out investigations, that could be the occasion which attracted the protection of qualified privilege. Additionally, the fact that an allegation of fraud against a Minister of the Crown is of great interest to the public of Jamaica, cannot make publication of a libel privileged.

So it is appropriate now to examine paragraph 7 of the defence which reads as follows:

> "7. All of the occasions of alleged publication were occasions of qualified privilege.
>
> PARTICULARS
>
> (i) The United States of America Federal authorities in Connecticut, U.S.A., are investigating public relations and advertising executives who are suspected of making payments to Jamaica Government officials for the award of contracts by Jamaica Government agencies to the firms of those executives.
>
> (ii) A former director of Tourism during the time when the Plaintiff was Minister of Tourism in Jamaica was a witness appearing before the said federal authorities, namely a Grand Jury in Connecticut aforesaid and gave evidence.
>
> (iii) The United states of America Internal Revenue Services, through their agents, were in the process of making investigations into allegations of a similar nature.
>
> (iv) The Jamaican Ministry of Tourism and the Jamaica Tourist Board have made attempts to convene a meeting of all relevant parties who may have knowledge of the facts relevant to each of the said investigations.
>
> (v) The United States of America Internal Revenue Services have made attempts to obtain information and documents relating to the foregoing from companies carrying on business in Cayman Islands.
>
> (vi) The Plaintiff is a key figure in the aforesaid investigations.
>
> ...
>
> (viii) In the premises the Defendants were under a legal and/or moral duty to publish the said words and the public of Jamaica had a like duty and/or interest to receive them."

The essence of these particulars is that there have been investigations both in Jamaica and the United States into allegations that advertising agents and public relation executives in the United States of America have been making payments to officials in Jamaica so as to facilitate the awards of contracts to them. But there is authority on the status of investigations as regards qualified privilege. Here is how Stephenson L J puts it in **Blackshaw v. Lord** [1982] 2 All E R 327:

> "When damaging facts have been ascertained to be true, or been made the subject of a report, there may be a duty to report them (see eg. Cox v Feeny (1863) 47 176 E.R. 445 Perera v. Peiris (1949) 1 A C 1 Dunford Publicity Straios Ltd. v. News Media Ownership Ltd. (1971) N Z L R 961 provided the public interest is wide enough Chapman v. Lord Ellesmere (1932) 2 K B 431; (1932) All E Rep. 221. But where damaging allegations or charges have been made and are still under investigation (Purcell v. Solwer (1877) 2 CPD 215) or have been authoritatively refuted (Adam v. Ward) (1917) A C 308, there can be no duty to report them to the public."

From the pleaded defence, the investigations were commenced before January 1988 and apparently they are still continuing. How could there be a duty to publish libellous statements in this context? The apparently more serious claim for qualified privilege concerns the hearings before the Grand Jury. The relevant particulars in the draft defence to set aside the default judgment, read as follows:

> "...
>
> (ii) A former director of Tourism during the time when the Plaintiff was Minister of Tourism in Jamaica was a witness appearing before the said federal authorities, namely a Grand Jury in Connecticut aforesaid and gave evidence.

(vi) The Plaintiff is a key figure in the aforesaid investigations.

(vii) All members of the public have an interest in knowing and the Defendants had a corresponding interest in informing them of what was happening." [Emphasis supplied]

These particulars must be linked to the affidavit of John Gentles from which it could have been interpreted that the evidence of Gentles before a tribunal, would be available, and that the respondent Abrahams was linked to the Grand Jury enquiry because of cheques made payable to Abrahams as kickbacks.

Here are the relevant paragraphs in the affidavit:

"6. The matters involved are currently being investigated by a Federal Grand Jury in Connecticut aforesaid and I have given evidence before the said Grand Jury. I was asked to identify a number of documents and the signatures therein and these included public relations and advertising contracts and cheques either drawn by or made payable to the Plaintiff or negotiated to the Plaintiff and on which the Plaintiff's signature appeared. I identified the Plaintiff's signature on those cheques.

7. I am aware that the Plaintiff is a key figure in the Federal Grand Jury's investigation."

It was on this basis, bearing in mind the state of the law as stated by Pearson J in **Webb v. Times Publishing** [1960] 2 Q B 535 concerning the privileged status of reports from foreign judicial tribunals, that the respondent received leave to file a defence of qualified privilege. But this Court has now been told by Mr. George that it is virtually impossible to secure the record of the Grand Jury and that the respondents were advised that the hearings were secret. Perhaps it is in recognition of this, that although paragraph (ii) of the Particulars in the draft defence is identical to paragraph (ii) of the pleaded defence, there is a change of emphasis in

paragraph (vii) of the pleaded defence. It reads at p. 54:

> "(vii) An allegation of fraud against a former Minister of Tourism and a Member of Parliament is of great interest to the public of Jamaica."

Then (viii) of the pleaded defence reads:

> "(viii) In the premises the Defendants were under a legal and/or moral duty to publish the said words and the public of Jamaica had a like duty and/or interest to receive them."

There is no longer the claim enunciated in the draft defence of the right to inform the members of the public in Jamaica as to what was happening at the Grand Jury. The presumption being that the hearing before the Grand Jury was open to the public and that its report could be published, no longer stands in view of Mr. George's candid admission, when prompted by the Bench.

Because of this change of stance by the respondents, there is now no basis for the defence of qualified privilege. So it must be considered whether further and better particulars, as requested, is the appropriate order, or a stiffer sanction ought to be the remedy in this case.

What sanctions ought to be imposed where the general pleas of justification and qualified privilege lack essential characteristics required by law?

In fairness to Bingham J, the learned judge below, it ought to be noted that the appellant Abrahams did not seek to invoke section 238 or section 686 of the Civil Procedure Code to have the defence struck out because it did not disclose a defence in law and would therefore embarrass him at a trial. But the court could, in its inherent jurisdiction, invoke this drastic remedy if the circumstances so warrant. This Court (Rowe P, Wright, Gordon)JJA adverted to the principle at p. 5 of its unreported judgment - S C C A 80/88 delivered March 26 1992. So the respondents' counsel who are eminent

libel lawyers were warned. It was again raised by this Bench early in the appellant's submissions, yet the respondents did not seek an amendment to disclose the essentials required by law. What do the authorities say as regards striking out a defence of justification?

It is convenient to commence with those cited by Mr. George for the respondents. **Marks & Another v. William Boyd & Others** [1939] 2 All E R 605 acknowledges the general rule and the headnote is appropriate. At p. 605 - 606 it reads:

> " There is not an absolute rule of practice that, whenever a plea of justification is raised in the common form 'that the words are true in substance and in fact,' an order for full particulars of the facts and matters relied upon in support of the plea must be made. Each case must depend on its particular facts, and, where the charges made are sufficiently specific, no general order for particulars should be made, though an order may be made for particulars of specific matters."

Then Cadam & others v. Beaverbrook Newspapers Ltd. [1959] 1 Q B 413 raised the issue of striking out. Bear in mind that since there is a plea of justification, it is common ground that the words complained of, are libellous. So the following passages are apt. To reiterate at p. 425, Morris L J said:

> " ... It is quite clear that in giving particulars of justification the defendants are bound by the particulars that they have given: they cannot go beyond those particulars."

On the issue of striking out, Hodson L J sums it up thus at p. 423:

> "... As I see it, the position being that the judge had to decide , as a matter of law, whether this defence ought to be allowed to stand or not, it is the same as if the application before him had been an application to strike out the amended plea. The problem is the same and has to be looked at in the same way."

Turning to those authorities referred to by Mr. Spaulding for the appellant ; in **Markham v. Wernher Beit & Co.** [1902] 18 T L R 763 Lord Halsbury said at p. 764:

> "... Then there was an application to strike out those particulars which purported to be a justification on the ground that they constituted no justification. The Court of Appeal pointed out that those matters which they had struck out were irrelevant; and he agreed with their Lordships in the Court below, but he should have been glad to go further and to strike out all the particulars."

Then Lord Macnaghten;

> "quite agreed that the paragraphs were embarrassing to the fair trial of the action."

Lord Brampton concurred and Lord Lindley, in agreement, on the same page shows the effect of what their Lordships had done. He is reported as follows:

> " In agreeing, said he regretted that there was not a larger order made by the Court of Appeal. This was in effect an undefended action. The defendant had no defence unless he produced at the trial evidence that the plaintiffs were thieves and swindlers in the ordinary sense. The particulars furnished no evidence of the kind and so far as he could see all the particulars might have been struck out. There was every reason why the particulars objected to should be struck out, and he was at a loss to know why any of them should have been allowed to stand." [Emphasis supplied]

It should be noted that the particulars which the Court of Appeal allowed to stand were of "fraudulent conduct," and on that issue also Their Lordships expressed the view that, those particulars ought to have been struck out. **Fleming v. Dollar** [1889] 23 Q B D at 380 is a further illustration of the principle of striking out a defence if it is found to be embarrassing. Two passages from Lord Coleridge C J are pertinent. At p. 392 he said:

> "...Lord Campbell C.J., there said in R. v. Newman 1 E. & B. at p. 577, that the plea of justification is one and entire, and raises only one issue, and that unless the whole plea is proved that issue must be found for the plaintiff. That indicates the will of the Court not to allow the plaintiff to be embarrassed, and it put upon the defendant apparently rather hard measure, namely, that if his evidence shewed the truth of nine of the charges made by him against the plaintiff, but did not prove the tenth, his plea was not proved. That is strong ground for saying that upon principle and apart from the words of Order XXII., r.1, the Courts would not tolerate a plea leaving in doubt what the defendant justified and what he did not."

Then towards the end of his judgment, he shows what ought to be done to a plea which the court will not tolerate. At p. 393 he said:

> "... The defendant will not particularise; in effect, therefore, he does not justify. In my opinion Pollock, B., was quite right; therefore, unless the defendant amends his pleading this defence must be struck out."

Consideration was given to making peremptory or "an unless order" in this case, but in view of Mr. George's admission that it would take a year to obtain the relevant information, there would be no point in making such an order. There is further authority of **Hickinbotham v. Leach** 10 M & W 363 or 152 E R 510, whose headnote reads:

> "... To a declaration for words, imputing to the plaintiff, a pawnbroker, that he had committed the unfair and dishonourable practice of duffing, that is, of replenishing or doing up goods, being in his hands in a damaged or worn-out condition, and pledging them with other pawnbrokers, the defendant pleaded, that the plaintiff did replenish and do up divers goods, being in his hands in a damaged or worn-out condition, and pledge them with divers other pawnbrokers. Held bad on special demurrer, as not being sufficiently specific."

It is clear that the plea of justification must be struck out as the respondents are unable to particularise.

As for the plea of qualified privilege, the same principles apply. Once the respondents failed to set out circumstances which were capable of establishing that the libels were published on an occasion which was privileged, the pleading must be struck out. See **Elkington v. London Association for the Protection of Trade** [1911] 27 T L R 329 where the defendant was ordered to plead specifically that the libel was published in circumstances when a response was made to a member of the association, if the defence of qualified privilege was being relied on. As noted earlier, under neither of the claims made under this head, proceedings in secret before a foreign tribunal or, damaging allegations which are still under investigations, is there a duty to publish. So no claim for qualified privilege could be properly made. At this stage, it should be noted that the claim for further and better particulars requested by the appellant in his letter of January 24 1992, was so extensive that the implication must be that there was no proper pleaded defence under this head. When there is no valid plea, the purported plea of qualified privilege must be struck out.

In these circumstances, the appeal must be allowed. The appellant Abrahams must have taxed or agreed costs both here and below. The case must be remitted to the Supreme Court for any further interlocutory steps that may be necessary, as for instance, the summons for directions. The practical effect is that the trial will have to be set down as undefended as regards liability.

This was also the result of the ruling by Edwards J, when he refused to set aside the default judgment obtained by the appellant. As indicated earlier, this Court set aside that default judgment and permitted the respondents to file a defence. Since however, both defences as filed, were found

wanting in law, and the respondents are unable to particularise, then both defences must be struck out. So this Court, by resorting to its inherent jurisdiction, has granted larger orders than that sought in the summons for further and better particulars. The orders are to strike out the pleas of justification and qualified privilege, because the respondents have failed to disclose reasonable answers to the appellant's statement of claim or, to use the words of Lord Esher in **Zierenberg** (supra), the pleas of justification and qualified privilege are bad and the respondent will be precluded from relying on them.

PATTERSON, J.A (AG.)

I have read the draft judgment of Downer J A in which the facts of this case and his conclusions are clearly set out. I will make a few brief comments, although I am in agreement with his conclusions.

The real issue before us is whether the plaintiff is entitled to the further and better particulars sought of the defendants. The defendants have pleaded justification and qualified privilege in their defence. The plea of justification must clearly and unequivocally state the facts relied upon in support thereof, unless the defamatory words can by themselves disclose the issues. The defamatory words complained of by the plaintiff are sufficiently stated in the judgment of Downer J A, and in my view, they are in nature general charges of various instances of gross misconduct by a Minister of Government in the exercise of his functions as such. In those circumstances, the defendants' plea of justification must contain sufficient particulars to inform the plaintiff of the various specific charges against him, and the precise facts on which they will rely to prove the truth of the charges: [**Zierenberg & Wife v. Labouchere** [1893] 2 Q.B. 183].

The defendants have, in their defence, set out what they say are the particulars relevant to their defence. In my view, they have not given specific information that will enlighten the plaintiff of the charges against him. The "particulars" stated in the defence have not taken the matter beyond the realms of general charges in nature, nor is the affidavit of John Gentles of any help in this regard.

As Lord Esher M R stated - **Zierenberg** case (supra): "If the instances are not put into the plea the particulars must be as precise as would be necessary in an indictment." Accordingly, I too agree that the plaintiff was right in requesting further and

better particulars from the defendants. The usual practice is that an application for further and better particulars is not made before the hearing of the summons for directions, but in a case such as this, where the defence lacks the relevant particulars, the court will consider an application for such an order. I think it is true to say that some of the particulars requested are not of such a nature "as would be necessary in an indictment," but others are, and certainly the defendants ought not to have ignored the plaintiff's request. If the defendants cannot supply the information, then they cannot rely on the defence of justification, and that defence will be struck out as embarrassing.

I hold that the learned judge erred in refusing the application of the plaintiff for an order that the defendants deliver further and better particulars of the plea of justification.

The facts and circumstances on which the defendants intend to rely in proof of their plea of qualified privilege, must be particularised in the plea: **[Elkington v London Association for the Protection of Trade** [1911] 27 T L R 329]. Downer J A has set out in his judgment the particulars pleaded by the defendants, and I think it is unnecessary to repeat them. Those particulars are numbered (i) to (viii). The first six "particulars" show that there is in progress in the United States of America, and apparently in Jamaica also, investigations into suspected payments made to Jamaica Government Officials by public relations and advertising executives in the United States of America for the award of contracts by Jamaica Government agencies to the firms of those executives, and that the plaintiff is a key figure in the investigations. So far, those particulars do not go beyond stating the fact of investigations being made, and in my view, they do not state with sufficient particularity, the circumstances and facts

on which the defendants can rely in support of their plea of qualified privilege.

But the seventh particular is the one to which Mr. Spaulding has directed his attention and it is in respect of that particular that he requested further and better particulars. Perhaps for emphasis I should set out that particular. It reads thus:

> "(vii) An allegation of fraud against a former Minister of Tourism and a Member of Parliament is of great interest to the public of Jamaica."

The plea of qualified privilege is open to the defendants when they publish a fair and accurate report of certain proceedings which are of public interest, without malice, and they acted under a sense of duty and it is in the public's interest to receive the report. But if they are to rely on such a defence, then they must give the plaintiff sufficient facts and circumstances so that he will know the case he has to meet and to enable him to reply. The nature of the acts alleged will dictate the degree of certainty and particularity required, and Mr. Spaulding's request for further and better particulars in this regard, emphasises the lack of particularity in the defendant's plea of qualified privilege, and clearly shows the absolute necessity for the particulars to be supplied. What took place before the Grand Jury in the United States of America must be disclosed. It seems quite clear to me that delivery of the further and better particulars requested ought to have been ordered by the learned judge. But Mr. George has frankly expressed doubts as to whether information of the proceedings before the Grand Jury will be available to the defendants, and even if they were, then possibly they could not be obtained within a year.

Having regard to the admissions of counsel for the defendants, and the obvious inability of the defendants to file a defence with sufficient particulars to support pleas of justification and of

qualified privilege, I think it would be ludicrous to order further and better particulars. I too am of the opinion that the proper course for this court to adopt in the circumstances, is to invoke the exercise of its inherent jurisdiction to strike out pleadings that are embarrassing, and accordingly, to strike out those parts of the defence which relate to a plea of justification and qualified privilege. I agree with the order proposed by Wright and Downer JJA.

WRIGHT, J.A.

Appeal allowed, defences of justification and qualified privilege struck out, Order in Court below set aside; appellant to have his costs of appeal and costs below to be taxed if not agreed. Matter remitted to the Supreme Court.

Cases referred to

(1) Mangena v Lloyd (1908) 98 L.T. 642
(2) Associated Leisure Ltd and others v Associated Newspapers Ltd (1970) 2 All ER 754
(3) Marks and Davidson v Wilson Boyd and others (1939) 2 All ER 605
(4) Wootton v Sievier (1913) 3 KB 499
(5) Prager v Times Newspapers Ltd (1988) 1 All ER 310
(6) Zierenberg & Wife v Labouchere (1896) 63 L J 89
(7) Lucas-Box v News Group Newspapers Ltd (1986) 1 W L R 147
(8) Viscount De L'Isle v Times Newspapers Ltd (1987) 3 All ER 499
(9) Donovan v Thwaites (1844) 3 B C 555 (or 107 E R 849)
(10) McPherson v Daniels (1829) 10 B C 263 (or 109 E R 448)
(11) Cadam & Others v Beaverbrook Newspapers Ltd (1959) 1 Q B 413
(12) Blackshaw v Lord (1982) 2 All E R 327
(13) Webb v Times Publishing (1960) 2 Q B 535
(14) Markham v Wernher Beit & Co (1902) 18 T.L.R 763
(15) Fleming v Dollar (1859) 23 (J.P.) 380
(16) Hickinbotham v Leach 10 M & W 363 or 152 E R 510
(17) Elkington v London Association for the Protection of Trade (1911) 27 T.L.R 379
(18)