NMIS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 2002/B-048

BETWEEN	JASPER BERNARD	CLAIMANT
AND	THE JAMAICA OBSERVER	DEFENDANT

John Sinclair and Lawrence Phillpotts Brown instructed by Lawrence Phillpotts-Brown & Co. for claimant.

Charles Piper instructed by Piper and Samuda for defendant.

Heard: 19th January 2005 and 27th January 2006

Campbell J

1. On the 2nd April 2002, Jasper Bernard filed a Writ of Summons and Statement of Claim seeking damages for libel contained in an article entitled **Two face Court for Counterfeit $1,000.00 Bills** printed and carried by the defendant on the 4th day of July 2000. Paragraph 3 of his statement of claim recites the articles of which complaint is made. Paragraph 8 recites another article, carried the following day 5th July and which purports to give an account by the claimant himself. The claimant makes no complaint of the latter article.

2. The defendant is a limited liability company that publishes "The Daily Observer" which is circulated internationally and locally. The defendant

admits publication of the article of the 4th July 2000, however denies that the article was published either falsely or maliciously; and pleads at paragraph 8 of its defence that both articles are, "if not full truth, then substantial truth and to that extent the defendant will rely on the defence of justification at the trial of this action." The defendant also alleges at paragraph 9 of its defence that itself/and the police, had a moral, social, and/or legal duty to receive/and to communicate, respectively, the information which form the basis of the articles, and relies on the defence of qualified privilege.

3. On the 26th July 2002, the claimant filed a notice of application for Court Orders seeking to strike out paragraph 8 and paragraph 9 of the defendant's defence. On the grounds that paragraph 8 disclosed no reasonable defence and/or as being frivolous and vexatious/or as being prejudicial to the fair trial of this action in that the defendant has failed to state any particulars of justification in support of the plea of justification.

In respect of paragraph 9, that it disclosed no reasonable defence, and it is an abuse of the process of the court in that they are not capable of supporting any alleged defence of qualified privilege.

4. The plaintiff was employed to a printery and is described as a motor vehicle designer, businessman and information technology practitioner. As a result of the publication, he claims to have been injured in his character,

credit and reputation in all the above-mentioned areas of his life. He further complains that he has been brought into public scandal, odium and contempt.

5. Paragraph 3 of the Statement of Claim recites the publication in The Daily Observer of 4th July 2000;

> "Nicholas Ferron, 26, of Halls Avenue in Port Antonio and Jasper Bernard, 29, of Norwich District, Portland are to face the Port Antonio Resident Magistrate Court today on charge of possession of five counterfeit $1,000 bills.
>
> The men were held last Tuesday and were charged for possession of five counterfeit $1,000 bills, which had serial #AA729813. Both were given station bail in the sum of $100,000.00.
>
> The Port Antonio CIB, who are carrying out investigations, said they were given the notes and were asked to put in the "Doctor Bird" – a security featured in the new bill which was introduced by the central bank in April. The notes tendered in the Castle and Windsor areas of the eastern section of the parish. The police were alerted and following investigations the men were held"

6. The following day, The Daily Observer of the 5th July, carried this article; entitled **Two fined for counterfeit $1000.00 bills;**

> "Two men - Nicholas Ferron, 26, and Paul Lewis, 27, were fined yesterday by Resident Magistrate Andrea Collins in Port Antonio after pleading guilty to possession of counterfeit $1,000.00 bills.
>
> Lewis, who was found with four $1,000.00 bills, was fined $3,000.00 or three months in prison, while Ferron,

who had one bill, was fined $1,000.00 or 30 days at hard labour.

Attorney-at-law for both accused, Carl McDonald, told the Court that this was the men's first offence and although they were found with the counterfeit currency and both worked at a printery, they were not manufacturing the currency, and there was no attempt by the men to recover goods with the notes. He added that the police checked with the printery that the men worked and the machines were not used to manufacture the notes.

Another man, Jasper Bernard, 20, who was held by the police at the time of Lewis and Ferron's arrest, was not charged.

Bernard told the Observer yesterday that he, along with Lewis and Ferron, his co-workers at Realistic Printing, were at the printery last Tuesday when the police came to search the place. Although the counterfeits were found only on Lewis and Ferron, Bernard said he was taken to the police station with the other men. However, he was not questioned, as the police realized that he was not involved in the crime. He was later released.

7. The claimant said that the words in the article of The Daily Observer dated 4th July 2000, in their natural and ordinary meaning meant and were reasonably understood to mean that the plaintiff had committed criminal offences

a contrary to the Forgery Act
b contrary to the 11(1) of the Currency Law
c contrary to Common Law,

and by so doing the plaintiff was not a fit and proper person to enjoy contracts with local or multi-national corporations or to be employed in a printing establishment.

8. The plaintiff further contended that the words also meant;

(a) That the Plaintiff was suspected or guilty of fraud

(b) That the Plaintiff was not a responsible businessman or employee

The defendant denies that the natural and ordinary meaning of the published words were capable of having the meaning attributed to them by the applicant.

The meaning of the impugned words

9. Was the report in the article of 4th July 2000 defamatory?

The defendant contends that the meaning ascribed to the article is incapable of the meaning attributed to it. The defendant has not advanced any meaning. The test to determine the meaning of the impugned words is to be determined on the standards of the reasonable reader of The Daily Observer. In **Bonnick v Morris and Others (2002) 61 WIR 35**6 Lord Nichols of Birkenhead, sitting in the Judicial Committee of the Privy Council, said the approach to be taken in relation to determining the meaning of the impugned words were not in doubt, and referred to the principles enunciated in **Skuse v Granada Television Ltd. 1996 EMLR 278,** where Sir Thomas Bingham M.R. at page 285 said;

> **"In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the Sunday Gleaner, reading the article once. The ordinary, reasonable reader is not naive; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning, where other non-defamatory meanings are available. The Court must read the article as a whole and eschew over-elaborate analysis and also too literal an approach. The intention of the publisher is not relevant."**

10. The article is clear and unambiguous. It states facts, not opinions. It names Jasper Bernard, one of the two men who are to face the Port Antonio Resident Magistrate Court. The sting of the article is that the claimant, according to the report, has been charged with possession of counterfeit $1000.00. The reasonable reader being not naive would gather from that, that the men would have been arrested. They were granted bail. The reader would also surmise that the case against the claimant was "water-tight" because he had admitted that he had received the notes with the intention of putting in the security feature. The article does not lend itself to any non-defamatory meaning. I find that the article would be understood by the ordinary Daily Observer reader as stating that the claimant was guilty of fraud, and was not a responsible employee or businessman. That reader

would have thought that the claimant had committed act contrary to the Currency Law and the Forgery Act.

Justification

11. Justification is the plea that the defamatory words are true. Truth is a complete defence. To sustain such a plea, it is necessary to prove to the jury that the words were "**true in substance and in fact**." Proof of the defendant's belief in the truth is not sufficient. In **Blackman and Another v Nation Publishing Company Ltd and Another (1997) 55WIR** 43, where the plaintiffs were schoolteachers who had been the subject of an eye-witness report, of having participated in the making of blue movies of school girls involved in oral sexual encounters with male students. The report was carried by the defendant's newspaper. In examining the issue of justification, Payne J, in the High Court of Barbados, said;

> **"Where the libel charges a criminal offence, as in this case, the defendants to succeed in a plea of justification need only establish the commission of the offence charged on a balance of probabilities. In Re Dellows Will Trust (1964) 1 WLR 45**1, Un-Goed Thomas J said;
>
> **'The gravity of the issue becomes part of the circumstance which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation is more cogent the evidence required to overcome the likelihood of what is alleged and thus to prove it.'"**

Lord Denning put it this way in **Hornal v Neubeugher 1 QBD 247**

> "The more serious the allegation the higher the degree of probability that is required but it need not, in any civil case, reach the very high standard required by the criminal law."

12. In the instant case, there is not one scintilla of evidence to support the plea that the words are "true in substance and in fact." The claimant has filed an affidavit Joan Maxine Barrett, Clerk of Courts, for Port Antonio Resident Magistrate Court, denying that the claimant was before the Court on the 4th July 2000, as alleged in the article of the 4th July 2000. Barrett's assertion has not been traversed. This being a situation highlighted by Lord Denning, where the allegations are most serious and are quite likely to be most damaging, particularly in a small society as Jamaica is, it is incumbent for evidence that is cogent to be produced.

13. The Court must first ascertain whether there is evidence before it on which it can make a determination as to the viability of the defence that is proposed. The defendant has submitted that if the Court finds that its pleadings in respect of particulars of justification and qualified privilege are insufficient, the Court should permit or require the defendant to amend to fully particularize those aspects of its defence.

Qualified Privilege

14. If qualified privilege, as a matter of law, is not available to "The Daily Observer," what would be the purpose of allowing time to amend to particularize the defence other than to further delay and prejudice the claimant's right to a fair trial of his case within a reasonable time as guaranteed to him pursuant to s.20 (2) of the Jamaica Constitution.

15. The question of availability of qualified privilege as a defence arose in the **McDonald Farms Ltd. v Advocate Company Ltd.** 52 WIR. The newspaper had its application for leave to further amend its amended defence to plead qualified privilege denied. The judge at first instant refused the application on the grounds that qualified privilege as a defence was not available to the newspaper. On appeal, the question before the Court was whether the defence of qualified privilege is, in the circumstances, available as a matter of law to "The Advocate". The Court felt, if it were not, it would be pointless to grant leave to the newspaper to plead privilege. The amendment was not allowed; the defendant, having failed to establish a duty to publish, because the damning charges that were made were still under investigation. In those circumstances, there was no duty on the newspaper to publish. Sir William Denys, C.J, who wrote the opinion of the Court of Appeal, referred to **James v Baird** 1916 SC (HL) 158, and quoted with

approval Earl Loreborn as to the manner in which the Court should approach the matter of privilege.

> **"In considering the question whether an occasion was an occasion of privilege the court will regard the alleged libel and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published and will see whether these things establish a relationship between the parties which gives right to a social or moral right or duty and the considerations of these things may involve the considerations of questions of public policy"**

Responsible Journalism

The defendant, having expressly stated that the claimant was to face the Port Antonio Resident Magistrate Court on a charge of possession of counterfeit $1,000 bills, and that he was charged for possession of counterfeit bills, and was granted station bail, and had confessed to having been asked to insert the doctor bird in the note and not having traversed the assertions of the Clerk of Courts that Bernard did not face the Court or offered any evidence to support their defence. Is the defendant, in those circumstances, entitled to a defence of qualified privilege.

16. In **Bonnick** (supra) case, the Privy Council, in examining the issue of qualified privilege opined that **if** the defendants **had expressly stated** the impugned words (as The Daily Observer has done in the instant case),

instead of by the way of implication the **defence of qualified privilege could not be sustained,** there being no inquires made to verify the information that was relied on by the defendants. At paragraph 18 of the judgment, the Privy Council, in making the distinction between cases where the defamatory language is expressly stated as against where it is by way of implication said;

> **"By not making further inquires and omitting Mr. Bonnick's own explanation, the article would have fallen short of the standards to be expected of a responsible journalist. But the article contained no such express statement."**

..and at paragraph 24;

> **"Stated shortly the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between the freedom of expressions on matters of public concern and the reputation of individuals. Maintenance of this standard is in the public's interest and in the interest of those whose reputations are involved. It can be regarded as the price journalist pay in return for the privilege. If they are to have the benefit of the privilege, journalists must exercise due professional skill and care.**"(Emphasis mine)

17. The judgment in **Bonnick** recognizes that the law in Jamaica in relation to qualified privilege is not inconsistent with s.22 (2) of the Jamaica

Constitution. There is therefore no inconsistency between the s.22(1) of The Constitution, which guarantees the freedom of expression and the protection of the individuals rights and reputations as declared by the judgment in Reynolds' case.

18. In determining the issue of privilege, these competing rights must be balanced. On one hand, the role of a newspaper in maintaining democracy must be recognised: on the other hand, the individual's right to the protection of his reputation must be defended.

19. The newspaper's freedom "to hold opinions and to receive and impart ideas without interference," is only relevant if the newspaper acted responsibly. It cannot be in the public's interest and it cannot be a matter of public concern for a newspaper to put in peril a man's reputation without taking reasonable care to verify the express statements containing the defamatory language.

20. In **Kearns v General Council of the Bar (2003) 2 All E.R 534**, the defendant circulated members of the legal profession, informing them not to hire the plaintiffs because the plaintiffs were not solicitors. Two days later, the defendants withdrew the circular. The claimants brought an action. Malice was not pleaded. The Bar Council applied for summary judgment, which was granted. The plaintiff appealed. In dismissing the appeal, the

Court held that the Reynolds privilege was only applicable in media cases and would only be relevant if the journalist acted responsibly. In determining whether the journalist acted responsibly, the Court is to determine what steps were taken to verify the information. A failure to make the necessary inquires to verify the truth of a publication would more than likely result in the privilege being denied.

21. Lord Nichols, in **Reynolds v Times Newspaper Ltd.** [1999] 4 All ER 609, opined that in deciding on privilege, certain matters ought to be taken into account. His list which was non–exhaustive included ten matters. First, the **seriousness of the allegation**, the charge of possession of counterfeit currency is in fact quite serious, particularly in light of the fact that new security measures were being introduced to prevent the very offence for which the article claims Bernard was being charged. Lord Nichols indicate that the more serious the offence the greater the harm to the public if the assertions are not true.

22. Second, the **nature of the information, and the extent to which the subject-matter is of public concern**. The public would have a right to know of the presence of counterfeit currency. The offence would have serious implications for the society at large. There would also be the need for the names of persons who breach such an act to be published.

23. Third, **the source of the information** appears to be the police. The reliability of the source is to be determined at the time by the defendant, on an objective basis. It is recognized that newspapers are reluctant to name their source. In this case we are unable to say whether the source is the investigating officer or someone from the police station who provided the information. Some sources may have no direct knowledge of the information they are passing on. However, it is unlikely, that police would have an axe grind.

24. Fourth, **there is the question what steps were taken to verify the information**. A check with the Court's office would have indicated that the Claimant was not listed to appear the following day. Such a check would place no hardship or difficulty on the defendant; courthouses in this country are built in very close proximity to the police stations. A copy of the bail papers could have been examined, that would have alerted the defendant that Bernard was not arrested. There is nothing in the article, of the 4th July, to indicate that steps were taken to verify the report prior to publication.

25. Fifth is what Lord Nichols calls **"the status of the information,"** the article says that the Port Antonio CIB is carrying out investigations. In the event, no prosecution was levied against the Claimant, in fact, he was not even questioned by the police, and would have been released the same

evening. Is it fair to assume that if the newspaper had investigated the information, this important bit of information would have been unearthed.

26. The sixth matter is the **one of urgency**. What was the urgency that would have caused a rush to print before the investigation had been completed. It was important that the matter be published but was there any justification for the undue haste. In this case there was no imminent danger to the public. In **Loutchansky v Times Newspaper**, the court recognized that news was a perishable commodity and the scoop was important. The Court there recognised that evaluation as to the nature and quality of the information warranted the publication as a matter of urgency. This evaluation of necessity should include the gravity of the allegations whether named individuals had been afforded the opportunity to comment.

27. Seventh, it was **necessary to consider whether comment was sought from the claimant**. It is not always necessary to solicit a comment. Where the allegations are serious and the investigations of them are continuing, there would be a need for a comment from the claimant. The later report of 5th July carried the following day, reported two names as being persons who pleaded guilty. It is good sense and fair to hear the other side.

28. The eight is similar to the seventh, **did the claimant give his side of the story**. The claimant was not afforded the opportunity to report until the

harm had been done. Port Antonio is a small town. The claimant in all likelihood could have been located with the minimum of difficulty.

29. Ninth, of Lord Nichols criteria, is **the tone of the article**. There was not much scope for opinion, it was meant to be a factual report.

30. Tenth, the sweep-up provision, **the circumstances of the publication, including the timing.** The fact that the defendant managed to carry the correct report of the arrest of two men the following day, leads to the conclusion that the name of the claimant was wrongly substituted for the man who had been arrested. Any simple check would have revealed this error. A look at the copy of the bail bonds, a look at the court sheet, a talk with a member of the court staff, a comment from the claimant, the opportunity to tell his side, any number of inquiries, would have prevented this error. A talk with either of the persons charged would have involved very little work, but would have prevented the sullying of the claimant's reputation.

31. The court has to objectively look at all the circumstances and say whether the right to know test has been satisfied. Lord Nichols cautioned at page 205 of Reynolds (supra).

> "Above all, the court should have particular regard to the freedom of expression. The press has vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a

> publication was not in the public interest and therefore the public had no right to know, especially when the information is in the field of politics discussion. Any lingering doubt should be resolved in favour of publication."

32. Having given the matter that due regard, I cannot see that the defendant had a right to publish the name of the claimant, whilst the investigations were ongoing and without affording the claimant a comment, or the ability of stating his side of the story. The lack of the requisite care and responsibility in the defendant has denied the defendant the privilege.

Striking out of the defence

33. Civil Procedure Rules 2001 s26.3 (1) (b), permits the court to strike out a Statement of Case or part of a Statement of Case if it appears that the statement of or part to be struck out discloses no reasonable grounds for bringing or defending a claim.

That paragraph 8 of the defendant's defence be struck out for disclosing no reasonable defence. Paragraph 9 be struck out for not disclosing any reasonable defence. The claimant is granted leave to enter Interlocutory Judgment. With damages to be assessed and costs to be agreed or taxed from the date of this Order.