IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CLB 257 OF 2001

BETWEEN	KENNETH BLACK	PLAINTIFF
A N D	THE RIGHT HON. MR. EDWARD SEAGA	DEFENDANT

Mr. Gordon Robinson and Mr. Bert Samuels for Plaintiff, instructed by Knight, Pickersgill, Dowding and Samuels

Mr. R.N.A. Henriques, Q.C. and Mr., Raymond Clough for Defendant, instructed by Clough Long and Co.

HEARD: 12th November, 2002 and 15th November, 2002

COR: MCINTOSH, D. J

In this action the plaintiff filed a writ of summons against the defendant claiming damages for Slander/Libel, the defendant having falsely and maliciously published that the plaintiff was, inter alia, an illiterate who cannot read and write.

The defendant In his defence pleaded Justification, Fair Comment and Qualified Privilege.

The plaintiff now applies to this court for an order that:

1. Defendant's defence be struck out for disclosing no reasonable defence or being frivolous or vexatious.
2. The defendants defence be struck out as an abuse of the process of the court.

The grounds on which the plaintiff relies are that:

a) The defence as pleaded disclosed no reasonable cause of defence.

b) The defence filed is not bona fide.

SUBMISSIONS - PLAINTIFF

The plaintiff argued that paragraphs 1 and 7 of the defence in so far as they related to paragraph 1 of the Statement of Claim are in conflict. Paragraph 1 of the defence puts the plaintiff to proof while paragraph 7 of the same defence admits the pleadings at paragraph 1 of the plaintiff's Statement of Claim.

Further, no evidence is needed to establish that the words pleaded are defamatory. They are disparaging to the Plaintiff and were clearly intended to so disparage him as they were uttered on a political platform [admitted in paragraph 3 of the defence] with a view to bringing the Plaintiff into scandal.

The Defendant pleads Justification. For this defence to be maintained, particulars of the facts and matters relied on in support of the allegation of truth must be given. The particulars pleaded, even if established at trial do not support a finding that the words are true.

Mere appearance and reputation does not prove the fact. That would be at best hearsay. Past events cannot establish truth.

Like a man grasping at straws the Defendant asserts that the Plaintiff has never been known to attend any educational institution and never known to read and write, thereby casting in the negative something which has to be proved in the positive.

The particulars as pleaded do not support the plea of Justification but merely show malice towards the Plaintiff.

Defamation cases are unlike any other case. Whenever a claim is filed it is almost up to the Defendant to prove a defence. The Defendant must prove, from stage of filing defence.

Our Court of Appeal has laid down a test which admittedly is more stringent than the current test in England. The shift in stringency in England came after. Under either test the defence fails.

In:

Eric Anthony Abrahams vs. Gleaner Company and Dudley Stokes
S S C A 98/92 Justification and Repetition of Libel
are dealt with at pages 3 and 2 respectively.

In:

McDonalds Co op vs. Steele – 3 A E R – 615
is laid down the clear and sufficient evidence test.

The Plaintiff's plea of Justification in this case cannot be supported by the pleadings. It is intended to embarrass the Plaintiff and to delay trial of the matter. The Defendant admitted the words were spoken at a political meeting. The Defendant knows the proper place for such allegations to be made.

Fair Comment must be words spoken as a comment on some fact. It must start with foundation of fact and then give comment. The words complained of cannot amount to a comment of that nature.

See – LONDON ARTIST vs. LITTLER: 1969 – A E R - 693

If Justification goes, all the other pleas must go. They would merely be express malice as in:

Warwick vs. Faulkes 1864 – 12 M and W – 507 at page 1299.

Qualified Privilege can only be applicable if there is a matter of Public Interest which makes it the Defendant's duty to bring it to the nations attention and it is a matter in which the public should have an interest.

SUBMISSIONS - DEFENCE

In reply the Defence submitted that the striking out of a Defence is a Draconion step which the court should rarely exercise.

The Plaintiff's application is made pursuant to Section 238 of the Civil Procedure Code similar to Order 18 Rule 19 of the United Kingdom Rule.

There are two jurisdictions under which the Court deals with the application, (a) under provisions of the rule; or (b) under its inherent jurisdiction. The rules really require the application to state what order is being sought. In this case it is specifically stated that the Defence be struck out. Where the Court exercises its jurisdiction under the rules, it will only grant the application in cases where it is plain and obvious that the Defence, on the face of it, is obviously unsustainable, that is, the Court will only exercise its jurisdiction where the case is clear beyond doubt. The Court must be satisfied that there is no reasonable defence in that the defence raised is unarguable.

The Court will not exercise its jurisdiction under this rule involving serious investigation into law, where an application to strike out pleadings involves prolonged and serious argument. The Court as a rule, declines to proceed with

the argument unless it is satisfied a Defence disclosed no reasonable defence and ought to be struck out.

The Courts will not likely exercise its draconian power u less it is absolutely satisfied that there is no reasonable cause of defence.

In this case it is to be appreciated that the Defendant has been brought to Court in an action instituted by the Plaintiff and has to answer the allegations raised in the Statement of Claim.

In this matter, the Defendant raises a number of issues which on a proper analysis clearly show that there is a meritorious and arguable Defence and that same ought not to be struck out, as there are good and arguable issues to be tried.

The Defendant has denied in paragraph 5 of the Defence that the words are capable of bearing the defamatory meaning alleged by the Plaintiff.

Whether or not the words are defamatory or capable of bearing the meaning alleged by the Plaintiff, is a matter for the determination of the trial judge who will have to determine whether the words in fact are defamatory or capable of bearing the meanings alleged by the Plaintiff. It has to be appreciated that it is the Plaintiff who alleges that the words bear the defamatory meaning specified in the Statement of Claim and hence it is for the Plaintiff to establish that the words bear the meanings pleaded.

The Defence therefore cannot be struck out on the basis that the words are prima facie defamatory as this is a matter which the trial judge will have to determine and consequently an issue for adjudication. **See CADAM vs.**

BEAVERBROOK NEWSPAPERS LTD. (1959) 1 A.E.R. 453. It is clear that the test to be applied to determine whether the Defence ought to be struck out, is that, it is only done in plain and obvious cases. It is not applicable to a case where the question of whether the words published bore defamatory meaning, which is for determination by the Court. **See also DRUMMOND-JACKSON vs BRITISH MEDICAL ASSOCIATIION (1970) 1 W.I.R. 688.** That it is well established that the power to strike out should be used only in plain and obvious cases, and that reasonable cause of action means, a cause of action with some chance of success in the light of the pleadings. **See also CLANCY vs ROWLAND (1923) 2 D.L.R. 288.**

The Defendant at paragraph 7 of the Defence pleads justification. It is well established that where a Defence pleads justification it ought to state the facts on which same is based.

In this case, the Defence at paragraph 7 contains particulars of justificatioin. It is of paramount importance to appreciate what is stated at paragraph 7(ii) that the Defendant when handed a document had it upside down and appeared not to be able to understand it. This is one of the facts on which the Defendant pleads to support justification. It is trite law that the Defendant is entitled to seek to justify the meaning which he seeks to say the words in question have. The test when it is sought to strike out the pleading is whether the facts are arguable and capable of supporting the plea. **See ASPRO TRAVEL LIMITED vs OWNERS ABROAD GROUP PLC (1996) 1 W.L.R. 132.** It is for the judge to determine whether or not the inference can be drawn from the fact

pleaded in the particulars, that the Plaintiff could not read. It is not necessary for the Defendant to establish a plea of justification to do so by direct evidence. The Defendant is entitled to plead such particulars from which the Court can determine whether or not the reasonable inference therefrom supports the plea of justification. Accordingly, it is clear that this is an arguable case; that the natural and obvious inference to be drawn from them is capable of supporting the plea of justification and same cannot be struck out as being unarguable. **See waters VS SUNDAY PICTORIAL NEWSPAPER LIMITED (1961) 1 W.I.R. 967.**

A pleas of justification to a libel action was not required to be supported by clear and sufficient evidence before being properly placed on the record, since the threshold test, if applied literally, would impose an unfair and unrealistic burden on a Defendant whose plea was properly particularised, but who was entitled to seek support for his case from documents revealed in the course of discovery, provided that the Defendant before pleading should (i) believe that the words complained of were true, (ii) have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence to prove the allegations would be available at trial. Further, that the Court would only strike out a pleading which was incurably bad. The power to strike out was a draconian remedy, where it is possible to say at an interlocutory stage and before full discovery that a particular allegation was incapable of being proved. **See also McDONALD CORPORATION vs STEELE (1995) 3 A.E.R. 615.**

The Defence also pleads fair comment at paragraph 8 and contains particulars in support thereof. It is well established law that the Defence does not have to state all the facts on which the comment is based. There is a substratum of facts stated which is sufficient to form the basis of the comment. Further, the Defendant is entitled to rely on information contained in newspapers as sufficient indication of facts on which the comment is based.

There can be no doubt that the particulars stated in support of paragraph 8 is a matter of evidence and whether the comment thereon is fair is a matter for the Court.

It follows therefore that there is no ground for saying that the Defence has not raised a defence with a prospect of success and which is clearly arguable. **See KEMSLEY vs foot and others (1952) A. E. R. 501.**

The Defence also raises the issue of qualified privilege at paragraph 9 and sets out particulars in support of the plea. The modern law in relation to qualified privilege was recently stated by the House of Lords in the case of **REYNOLDS vs TIMES NEWSPAPER LTD. (1999) 3 W. L. R. 1010.** which held that qualified privilege was available in respect of political information upon application of the common law test of whether there had been a duty to publish the material to the intended recipients and whether they had had an interest in receiving it, taking into account all the circumstances of the publication including the nature, status and source of the material. The Court has had to consider the

question of qualified privilege in other jurisdictions. In particular, see the case of **LANGE vs Atkinson (2000) 1 N.Z.L.R 257.** The Courts have also in considering qualified privilege had to consider the question of freedom of expression as set out in the fundamental rights and freedom section of the Constitution. It appears that in considering the question of qualified privilege the question of freedom of speech is also relevant.. This is to be seen by the most recent case of **LOUTCHANSKY vs TIMES NEWSPAPERS LTD. (2002) 1 A.E.R. 652.** In this case, the Court sets out the test to determine qualified privilege and that is, that qualified privilege fell to be adjudged as a preliminary issue before the truth or falsity of communication was established, which was whether it was in the public's interest to publish the article true or false. It must be remembered that the defence of qualified privilege tolerated factual inaccuracy for two purposes, namely, in order not to deter either the publication sued on or future publications of truthful information.

In this matter it is clear from the facts pleaded that the Defendant in his political capacity as leader of the Opposition had a duty to make the statements he did in the interest of public discharge of such duty and that the public, in particular, the persons at the meeting, a reciprocal interest in the subject matter concerning the awarding of public contracts and the recipients thereof. There can be no doubt that the occasion was one of qualified privilege and the Defendant is entitled to rely on same. The subject matter was one of national public importance. The Defendant was entitled and under a moral obligation and

political obligation to disclose same in the national interest and the public at the meeting was entitled to receive same.

The Plaintiff is contending that the plea of fair comment and qualified privilege are negatived by the Defendant's express malice. In support thereof the Plaintiff contends that the Defence pleaded justification without any facts to support it which is evidence of malice. This contention is clearly unfounded as it has already been demonstrated that on an analysis of the particulars in support of the plea of justification they clearly show that there are facts from which a Court can come to the conclusion that the statement made by the Defendant is true in substance and in fact. It is well established law that where a Defendant wishes to return a plea of qualified privilege or fair comment the burden of establishing malice is on the Plaintiff, and will have to plead same with particulars in support thereof. **See HORROCKS vs LOWE. (1974 2 W.L.R. 284.**

It is therefore submitted that the Plaintiff's application under the rules ought to be dismissed. In so far as the application under the inherent jurisdiction is concerned as being an abuse of the process of the Court, there is no basis on which the Court can exercise the jurisdiction as the Plaintiff has failed to show in any way whatsoever that the Defence in any way abuses the process of the Court.

FINDINGS

It is settled law that the consideration for the Court in a summons to strike out a Defence is not whether the Defence will succeed when it is argued out. It is whether on a view of his pleading, merely reading through the

pleadings, it is one which does not admit to plausible argument and on that ground it ought to be struck out as embarrassing to the real issues.

It is not for this court to decide whether the Defendant has a chance to succeed. Before striking out a Defence, the Court must look to see if its irrelevancy is quite clear and apparent at first glance. If after considerable argument it appears they do not afford a Defence, the court would be under no duty to strike out same.

The questions raised by the Plaintiff, are questions to be dealt with in other proceedings or at a trial and it seems to me that the Defendant should be allowed to establish his defence on the grounds raised by him.

The authority upon which the Plaintiff places most reliance and which he correctly maintains, must be followed by this Court is the case of:

Anthony Abrahams, vs. The Gleaner Company Ltd. and Dudley Stokes S. C. C A 98/92.

It is my humble view that this case does not set out any new standard to be applied in an application to strike out pleadings. The Court of Appeal in handing down their decision on the 24/1/94 dealt with what could be termed contumelious delay on the part of a party to an action in supplying particulars in a case filed almost 5 years before.

At that time the tardy party could give no assurance as to when the requested particulars would be supplied and suggested that at least another year would be necessary to do so. In fact there was reasonable doubt that a year

would suffice. In my view, the court then, quite properly and correctly dealt with the matter, in keeping with their Mission Statement:

"To Deliver Timely Judgment".

The Plaintiff's Attorney conceded that the present English Rules are not now applicable to Jamaica. If they had been applicable, copies of witness statements would have to be served. In our courts evidence is not pleaded, but each party has a right to apply for:

a) Further and Better Particulars and

b) Discovery.

This court is indebted to both counsel for their industry, application and zeal in putting forward their respective arguments. The very nature and complexity of their argument lends itself to one conclusion and that is:

"There is an Arguable Defence".

It would seem that in the eagerness of the Plaintiff, the Court is being asked to "Rush To Judgment", without even offering the Defendant "the Proverbial Rope".

In this matter this court will refuse the Plaintiff's Application.

The summons to strike out the Defence is hereby Dismissed.

Costs will be costs in the Cause.

Leave to Appeal is granted.