

IN THE SPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L B 166/00

BETWEEN	ALTON BROWN	PLAINTIFF
AND	THE GLEANER CO. LTD.	1ST DEFENDANT
AND	KEN ALLEN	2ND DEFENDANT
AND	MICHAEL SURRIDGE	3RD DEFENDANT

SUIT NO. C.L. B 249/00

BETWEEN	ALTON BROWN	PLAINTIFF
AND	THE JAMAICA HERALD LTD.	1ST DEFENDANT
AND	NEVILLE BLYTHE	2ND DEFENDANT
AND	CHRISTINE KING	3RD DEFENDANT
AND	MICHAEL SURRIDGE	4TH DEFENDANT

Mr. Terrence Ballantyne instructed by Ballantyne Beswick & Co. for the Plaintiff.
Mrs.Susan Reid-Jones instructed by the Director of State Proceedings for the
Defendant Michael Surridge.

Heard: November 27, 28, 2001

HARRISON J.

The matter before me concerns an application by the defendant Michael Surridge, for extension of time to file his defence in the suits referred to above. It is proposed to consolidate both actions in due course.

The sole issue raised by the plaintiff's Attorney at Law is whether or not the affidavit in support is indeed an affidavit of merit. Counsel submitted that he is in

agreement with Counsel for the applicant regarding her submissions on the law, but he disagrees that there is merit in the affidavit filed.

Counsel for the applicant submitted on the other hand, that there is a defence of merit and it raises issues which can only be resolved by a trial. Furthermore, she submitted that the affidavit exhibits a defence which is good, has merit and is likely to succeed.

The affidavits relied upon are those sworn to by the defendant Michael Surridge on the 21st day of July 2001. Both affidavits are more or less identical in terms of their contents. They speak to service of the writ of summons and statement of claim, the delay for not entering an appearance and filing a defence, the efforts to join the Attorney General as a defendant in the actions and why the affiant believes he has a good defence on the merits. At paragraphs 16, 17 and 18 respectively, he deposes as follows:

“16. That any allegations against the Plaintiff which were referred to in the allegedly libelous article would have come to my attention as a result of my role as head of the Revenue Protection Division and not in my personal or private capacity.

17. That I am advised by the Director of State Proceedings and do verily believe that any comments that I made in relation to the allegedly libelous article were made as fair comment on a matter of public interest. Alternatively, that my statement was made on an occasion of qualified privilege.

18. That in the circumstances, I do verily believe that I have a good defence on the merits of this suit. I exhibit a copy of the draft Proposed Defence marked “MS 1” for identification.”

I will now have to decide whether the affidavit of Michael Surridge constitutes an affidavit of merit and whether the Court should exercise its discretion in allowing him time to file his defence.

Although this is not a matter concerning the setting aside of a default judgment, the principles regarding an affidavit of merit derived from those cases ought to be borne in mind. See for instance, the cases of Farden v Ritcher ((1889), 23 QBD 124, 58 LJQB 244, 60 LT 304, and Evans v Bartlam [1937] 2 All ER 646,[1937] AC 473.

For the proper exercise of my discretion I will therefore have to consider whether the affidavit stated facts which disclose a substantial ground of defence

Counsel for the plaintiff submitted that the contents of the proposed defence have not been incorporated in the affidavit and although the defendant has deposed to certain facts at paragraphs 16 – 18 (supra) there is really no affidavit on the merits of the defence. In other words, Counsel has argued that the facts pleaded in the proposed defence ought to be set out and deposed to in the affidavits in support.

Let me say at the very outset, that although Counsel for the plaintiff made no submissions on the issue of delay, the affidavits in support have deposed satisfactorily to my mind, to facts explanatory of the delay in filing the defence.

How should one then, deal with the facts set out in paragraphs 16 – 18 (supra) and the issue of merit? The affiant has deposed that he has been advised by his Attorney at Law and verily believes that any comments made by him in relation to the allegedly libelous article were made as fair comment on a matter of public interest and alternatively, that the statement was made on an occasion of qualified privilege. He further deposes that he does verily believe that he has a

good defence on the merits of this suit and that he has exhibited a copy of the draft Proposed Defence marked "MS 1" for identification."

The draft of the proposed defence which is exhibited to the affidavit, prima facie shows, consistently with the affidavit, that the defences are fair comment on a matter of public interest namely, the conduct of the plaintiff and allegations against him in respect of the collection and /or evasion of custom duties and in the alternative, that "the occasion of the publication was an occasion of qualified privilege".

In The Jamaica Record Limited et al v Western Storage Limited case reported at 27 JLR 55, the affidavit in relation to the actual defence stated in paragraph 7 was as follows:

"7. That the defendants have a good defence to the action in that in so far as the said words complained of consist of allegations of fact they are true in substance and in fact, in so far as they consist of expressions of opinion, they are fair comment made in good faith and without malice upon the said facts which are matters of public interest."

Campbell J.A in delivering the judgment of the Court stated inter alia, "... in our view there was sufficient evidence in the affidavit of Earle Wright explanatory of the delay which we do not consider in any case inordinate, and showing a prima facie defence of the merit.

In Re Hinchliffe [1895] 1 Ch 117 A L Smith LJ (at 120) stated :

'When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense.

Therefore any person who is entitled to see the affidavit is equally entitled to see the document referred to therein”.

It is my considered view and I so hold, that based on the authorities referred to above, the affidavits sworn to Michael Surridge in support of his application, do constitute prima facie, a good defence on the merits and he ought to be given leave to file his defence.

Order

Order in terms of paragraphs 1 and 2 of the respective summonses filed on the 31st July 2001. It is further ordered that the Costs of this application be Costs to the Plaintiff to be taxed if not agreed.