

JAMAICA

IN THE COURT OF APPEAL

IN CHAMBERS

SUPREME COURT CIVIL APPEAL NO. 70/96

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.

THE GLEANER COMPANY LIMITED
DUDLEY STOKES

APPLICANTS

ERIC ANTHONY ABRAHAMS

RESPONDENT

Emil George, Q.C., and Garth McBean, instructed
by Dunn, Cox, Orrett & Ashenheim, for the
applicants

Winston Spaulding, Q.C., and Gayle Nelson, instructed
by Raymond Clough of Clough, Long & Co., for
the respondent

July 18, 22 and 23, 1996

DOWNER, J.A.:

Before Smith, J. and a jury the applicants for a stay of execution the Gleaner Company Limited and its editor Dudley Stokes were ordered to pay \$80,700,000 and costs to the respondent Eric Anthony Abrahams. This court had ordered the Gleaner's defence to be struck out so the libel was not in issue. The issue before Smith, J. and the jury was what damages ought to accrue to Abrahams.

It is appropriate to refer directly to the judgment in the court below.

It reads:

"The Plaintiff having on the 24th January 1994 obtained Judgement herein against the Defendants for Damages to be assessed and the said damages having between 6th May 1996 and 17th July 1996 been assessed before the **Honourable Mr. Justice Smith** with a Jury of the parishes of Kingston and St. Andrew and the Jury having found that the Plaintiff is entitled to General Damages in the sum of \$80,700,000 and the said **Mr. Justice Smith** having ordered that the Judgement be entered for the Plaintiff in the sum of \$80,700,000 General Damages and costs to be taxed if not agreed.

NOW THEREFORE IT IS THIS DAY ADJUDGED that there be judgement for the Plaintiff against the Defendants in the sum of \$80,700,000 for General Damages and costs to be taxed if not agreed. Stay of Execution of the Judgement not granted."

Are there arguable grounds of appeal

The Gleaner Company has filed two substantial grounds of appeal.

They are as follows:

"1. That the award of the jury is so manifestly excessive that no jury properly applying their minds to the relevant evidence could reasonably have awarded the same.

...

4. That the award of the jury contravenes Section 22 of the Jamaica Constitution which guarantees to the Defendants/Appellants the right to freedom of expression and the right to hold opinions and to receive and impart ideas without interference."

As to ground (1), even taking all the factors in account, such as that Abrahams at the time of the libel held high office as a Minister of Government, and that he was a former Director of Tourism, it is certainly arguable that an award of \$80,700,000 is manifestly excessive. The highest award previously was \$23,000,000 made to Leymon Strachan - S.C.C.A. 44/95 judgment of May 22, 1995 and 13th June, 1995. That matter is still before the courts. So I have little difficulty in deciding that ground is arguable and that in coming to its decision this court will have to decide issues of law and fact of fundamental importance to the legal system.

As to ground 2, section 22(1) of the Constitution reads:

"22(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication."

To appreciate the extent of this fundamental right and freedom it is necessary to advert to the preamble which demonstrates that the fundamental rights and freedoms must be limited so that the rights of others are not prejudiced and that account is taken of the public interest. These careful checks and balances in the Constitution are spelled out so

as to emphasise that rights must be balanced by responsibilities. It is the courts which are entrusted to carry out this reconciliation between liberty and order which are the essentials of democratic government.

The preamble in section 13, which speaks of this balance, reads:

"13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression and of peaceful assembly and association; and

(c) respect for his private and family life,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

[Emphasis supplied]

The limitation in issue in this case is expressed thus in section 22(2)(a)(ii):

"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) which is reasonably required -

...

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments;"
[Emphasis supplied]

Properly considered, it is arguable that if the jury's award is manifestly excessive, there ought to be provisions to reduce the award or if it is unduly low to increase it. Mr. Spaulding helpfully adverted me to paragraph 19 of the Court of Appeal Rules, 1962. The relevant section reads:

"19. On the hearing of any appeal the Court may, if it things fit, make any such order as could be made in pursuance of an application for a new trial or to set aside a verdict, finding or judgment of the court below."

Then turning to sub-paragraph 3 it reads:

"(3) A new trial may be ordered on any question without interfering with the finding or decision upon any other question; and if it appears to the Court that any such wrong or miscarriage as is mentioned in paragraph (2) of this rule affects part only of the matter in controversy, or one or some only of the parties, the Court may order a new trial as to that part only, or as to that party or those parties, only, and give final judgment as to the remainder."

This sub-paragraph sets the stage for the important sub-paragraph 4 which reads:

"(4) In any case where the Court has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate, the Court may, in lieu of ordering a new trial -

(a) with the consent of all parties concerned, substitute for the sum awarded by the jury such sum as appears to the Court to be proper;

(b) with the consent of the party entitled to receive or liable to pay the damages, as the case may be, reduce or increase the sum awarded by the jury by such amount as appears to the Court to be proper in respect of any distinct head of damages erroneously included in or excluded from the sum so awarded;

but except as aforesaid the Court shall not have power to reduce or increase the damages awarded by a jury."

It will be observed that these rules contemplate that damages may be reduced or increased by this court if consent is obtained from the

appropriate party. These rules are made pursuant to the Judicature (Rules of Court) Act, section 4(2)(a), which reads:

"4(2)(a) Rules of court may make provision for all or any of the following matters -

(a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Court of Appeal and the Supreme Court respectively in all causes and matters whatsoever in or with respect to which those Courts respectively have for the time being jurisdiction (including the procedure and practice to be followed in the offices of the Supreme Court), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications, appeals or references which under any law or enactment may or are to be made to the Court of Appeal or the Supreme Court or any Judge of such respective Court, shall be made;"

So the first arguable issue is whether the Rules Committee had the power to fetter the jurisdiction of the Court of Appeal, a superior court of record, to increase or reduce the jury's award of damages in the manner stipulated in the rules. The rules must be considered in relation to section 10 of the Judicature (Appellate Jurisdiction) Act, which reads:

"10. Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of

"and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

An even more important arguable issue is whether a manifestly excessive award of damages would contravene section 22(1), (2)(a)(ii) of the Constitution. A manifestly excessive award has been held to "hinder the enjoyment of free expression" by the European Court of Human Rights and Chapter III of our Constitution is modelled on the convention which governs the jurisdiction of that court. It is in the light of excessive awards by juries that amendments have been made in the United Kingdom by legislation. What required legislation in the United Kingdom is mandatory by the provisions of our Constitution. That is the basis of the arguable case on this aspect.

If it be found that such decisions are persuasive then it is arguable that this court has the jurisdiction to determine if a manifestly excessive award is "reasonably required" "for the purpose of protecting the reputation, rights and freedoms of other persons", as section 22 of the Constitution ordains. Further, it would certainly be arguable that this court has the authority by virtue of the Constitution to make the appropriate award and give guidance to the Supreme Court and jury how to approach the award of damages in future cases. It is the Supreme Court and Court

of Appeal which is entrenched in the Constitution, not the jury. See **Stone v. The Queen** [1980] 1 W.L.R. 880 or [1980] 3 All E.R. 148.

So I find that Mr. George is correct in his submission that he "has an appeal which has some prospect of success" which is just an alternative phrase for having an arguable ground. See **Linotype-Hall Finance Ltd. v. Baker** [1992] 4 All E.R. 887. I would grant a stay.

**What conditions ought to be imposed
consequent on the grant of a stay of execution**

I would think that in the circumstances of this case, it is just to order the applicants, The Gleaner Company and its Editor Dudley Stokes, to pay \$3.5 million in an interest-bearing account in the names of the attorneys-at-law on the record (they are Dunn, Cox, Orrett & Ashenheim and Clough, Long & Co.,) in a reputable commercial bank pending the direction of this court when the substantive appeal is determined. This amount must be paid within seven days hereof. This is not a pre-estimate of what the Court of Appeal might do. It is a condition precedent for granting a stay until the appeal is determined.

The legal costs must have been a heavy burden on the respondent Abrahams. In the exceptional circumstance of this case where there has been a record number of interlocutory hearings in the court below and in this court, I order the applicants Gleaner Company Limited and its Editor Dudley Stokes to pay over to Clough, Long & Co. the sum of \$2.5 million within fourteen days hereof on condition that Winston Spaulding, Q.C.,

Gayle Nelson, Clough, Long & Co. enter into a written undertaking with the Registrar of the Supreme Court that this sum will be recovered if the decision of the Court of Appeal in the substantive appeal goes in favour of the Gleaner Company Limited and its Editor Dudley Stokes and this court orders costs in favour of the said Gleaner Company Limited and its Editor Dudley Stokes. Again, this is not a pre-estimate of the taxed or agreed costs. It is a recognition that because of the delays in this case some funds ought to be available to meet the costs that Abrahams must have incurred.

The agreed or taxed costs of this application be costs in the cause.