PRACTICE AND PROCEDURE (Civil) Default Judgment — Setting aside — whether judge's discretion exercised correctly — whether arguable case which ought to have been heard and determined at trial — APPEAL from order of Edwards J refusing to set aside default judgment allowed. Application granted to allow defence within 14 days. Case referred to (See Cont'd)

JAMAICA

IN THE COURT OF APPEAL

CIVIL PROCEDURE

SUPREME COURT CIVIL APPEAL NO. 80/88

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (AG.)

BETWEEN	THE GLEANER COMPANY LIMITED	1ST DEFENDANT/ APPELLANT
	DUDLEY STOKES	2ND DEFENDANT/ APPELLANT
AND	ERIC ANTHONY ABRAHAMS	PLAINTIFF/ RESPONDENT

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

Winston Spaulding, Q.C. & Abe Dabdoub instructed by A.J. Dabdoub & Co. for the Respondent

11th, 12th November & 11th December, 1991

DOWNER, J.A.

The issue to be resolved on this interlocutory appeal was whether Edwards, J., exercised his discretion correctly in refusing to set aside the default judgment obtained in the Supreme Court by the respondent Abrahams against the Gleaner Company Ltd. and its editor Dudley Stokes.

The respondent Abrahams is a former member of the House of Representatives and Minister of Tourism. The endorsement on his writ claims compensatory and exemplary damages for three articles published over the period 17th, 18th and 19th September, 1987, in the "Star" and "The Daily Gleaner." The allegation was that the articles have gravely injured the respondent's character credit and reputation and the further claim is made that the articles were published with knowledge that they were libellous and with reckless disregard. The writ and statement of claim were filed on 24th September, 1987 and appearance entered on 2nd October, 1987.

On 23rd October, the respondent obtained an interlocutory judgment in default of defence against the appellants which gave the respondent an entitlement to have damages assessed unless that judgment was set aside.

In applying to set aside the default judgment, the appellants explained their delay in filing a defence. In an affidavit by Donna Smith an in-house attorney-at-law, it was stated that most of their informants lived in the United States and consequently it took some time to secure the information they required to draft a defence. Dudley Stokes, the editor of the "Gleaner" and the second appellant raised two defences on his affidavit, namely, justification and qualified privilege. This privilege is a defence where the defendant has a legal, social, or moral duty to communicate to the general public in which the public have a legitimate interest: see **London Artists Ltd. v. Littler** [1960] 1 All E.R. 1075 at 1085 and **Blackshaw v. Lord & Anor.** [1983] 2 All E.R. 311 at 327; **The Gleaner Company Ltd. v. Trevor Munroe** (unreported) C.A. 67/88 delivered 5th April, 1990.

There was no contention by the respondent that the delay in filing the defence was prolonged. What was seriously contested was whether there was an arguable case for trial based on the proposed defences of justification and qualified privilege. The burden on the appellants in this case then, is to establish that they have an arguable case which ought to be heard and determined at a trial.

It is appropriate at this stage to set out the gist of the libel complained of in the statement of claim. The respondent Abrahams complains that serious allegations of misconduct have been made against him. Here is an example of what was published:

> " KEY FIGURE
>
> 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 businessmen for the multi-million-dollar tourism contracts.

> "Sources close to a federal grand jury have said Abrahams is a key figure in the investigation, the newspaper said. Abrahams, however, has not testified before the grand jury empanelled in New Haven, the Advocate reported.
>
> The newspaper said efforts to reach Abrahams and his successor, Hugh Hart, during the past two weeks were unsuccessfull, and Hart didn't return telephone calls to his office on Monday."

This was from the "Star" newspaper. As the "Gleaner" published matters complained of, it is appropriate to cite an extract from that paper also:

> " 'AUTHOR Robin Moore says his personal diary and files contributed to federal authorities suspicions that New York business executives paid kickbacks to Jamaican officials for lucrative tourism promotion contracts. '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.' "

In addition to the joint affidavit of Dudley Stokes, the editor and Donna Smith, the in-house attorney-at-law of the appellants, a draft defence was presented and this ought to be examined to determine whether on that basis there is an arguable case.

Paragraphs 4 & 7 of the draft defence read:

> "4. The words set out in paragraphs 3 and 4 of the Statement of Claim were received by the Defendants in the ordinary and regular course of business from associated Press of 50 Rockefeller Plaza, New York, United States of America which, pursuant to an agreement between it and the First Defendant has supplied the First Defendant with material suitable for publication over a number of years.
>
> ...
>
> 7. All of the occasions of alleged publication were occasions of qualified privilege."

Passages from two of the cited cases show that the concept of qualified privilege is not always easy to define and even when correctly defined, it has to be applied to facts and circumstances of the particular case. In London Artists Ltd. v. Littler (supra) at page 1081 Cantley, J., said:

> " In the Court of Appeal in the case of Adam v. Ward (1915) 31 T.L.R. 299 at p. 304, Buckley, L.J., said this:
>
> > " In Cox v. Feeney (1863) 4 F.& F. 13 at p. 18 a dictum of Tenterden, C.J. is quoted in the following terms: 'A man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know.'
>
> With great respect, I doubt whether there is contained in those words an accurate statement of the circumstances in which a privileged occasion arises for the publication of matter interesting to the public. I am not prepared to hold that the publication even by a public body of its proceedings or conclusion in a matter of public interest is on that account and without more privileged. Purcell v. Sowler ((1877) 2 C.P.D. 215 is, I think, an authority to the contrary. I doubt whether in Mangena v Wright (1909) 2 K.B. 958 at p. 978 Phillimore, J., was right in saying, that, 'where the communication is made by a public servant as to a matter within his province, it may be the subject of privilege in him ' if those words are intended to convey that those facts without more will create a privileged occasion. More, I think, is wanted. But the following proposition, I think, is true—that if the matter is matter of public interest and the party who publishes it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as matter of law, but, to quote Lindley, L.J.'s words in Stuart v. Bell (1891) 2 Q.B. 341 at p. 35 'a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal'."

The other passage comes from Blackshaw v. Lord & Anor. [1983] 2 All E.R. 311 at 327 per Stephenson, L.J.:

> " The subject matter must be of public interest: its publication must be in the public interest. That nature of the matter published and its source and the position or status of the publisher distributing the information must be such as to create the duty to publish the information to the intended recipients, in this case the readers of the Daily Telegraph. Where 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 e g Cox v. Feeney (1863) 4 F&F 13, 176 ER 445, Perera v. Peiris (1949) AC and Dunford Publicity Studios Ltd. v News Media Ownership Ltd. (1971) NZLR 961), provided the public interest is wide enough (Chapman v Lord Ellesmere (1932) 2 KB 431, (1932) All ER 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 (1915) 31 TLR 299; affd (1917) AC 308, (1916-17) All ER Rep 157), there can be no duty to report them to the public."

Since the defence adumbrated refers to grand jury investigations in the United States of America, and states in paragraph 7 (ii) of the Particulars:

> "7.(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."

it is helpful to cite an earlier paragraph also on page 327:

> " The question here is, assuming Mr. Lord recorded Mr. Smith's conversation with him fairly and accurately, did Mr. Lord (and his newspaper) publish his report of that conversation in pursuance of a duty, legal, social or moral, to persons who had a corresponding duty or interest to receive it? That, in my respectful opinion, correct summary of the relevant authorities is taken from the Report of the Faulks Committee, p 47, para 184 (a), repeated in Duncan and Neill p 98, para 14.01. I cannot

> "extract from any of those authorities any relaxation of the requirements incorporated in that question. No privilege attaches yet to a statement on a matter of public interest believed by the publisher to be true in relation to which he has exercised reasonable care. That needed statutory enactment which the Faulks Committee refused to recommend (see pp 53-55 para 211-215). 'Fair information on a matter of public interest' is not enough without a duty to publish it and I do not understand Pearson J's ruling in Webb v Times Publishing Co Ltd (1960) 2 All ER 789, (1960) 2 QB 535, that a plea of a fair and accurate report of foreign judicial proceedings was not demurrable, was intended to convey that it was enough. Public interest and public benefit are necessary (cf s 7 (3) of the 1952 Act), but not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication; and a section of the public is not enough."

So considered it is clear that the appellants must succeed in obtaining leave to file a defence as they have raised an arguable case which involves a difficult point of law of great public importance.

The second defence raised is justification and on this there is the affidavit evidence of John Gentles:

> "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.
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> 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.
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> 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.
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> 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."

This is the evidential basis for the plea of justification. The relevant pleading in the defence reads as follows:

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

Excerpts from paragraphs 3 and 4 of the statement of claim have been adverted to above and if leave is granted, it is for a trial court to decide in the first instance whether the draft defence is in compliance with rules for pleading justification. In any event, the case cited by Mr. Spaulding - **Wooton v. Sievier** [1913] 3 K.B. 499 acknowledges that the fulness and precision which is required is debatable. Here is how Kennedy, L.J., speaking for the Court of Appeal puts the matter at the outset of his judgment at page 503:

> " The degree of fulness and precision which ought to be required in an action for libel from a defendant, who has pleaded a justification and has been ordered to give particulars under that plea, is not infrequently a matter which admits of reasonable debate."

Mr. George cited two passages from **Evans v. Bartlam** [1937] A.C. 473 which illustrates the principle which judges ought to take into account when there is an application to set aside a default judgment. The first comes from Lord Atkin at page 480. It reads:

> "... The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

The second statement is from Lord Wright. He said at page 489:

> "... The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

In applying the principle established in this case, the Court of Appeal in Vann & Anor. v. Awford & Ors. The Times 23rd April, 1986 set aside a judgment in default even where it was established that the defendant deliberately misled the Court. That was an extreme case but it illustrates how far the courts have gone when there is a triable issue. Dillon, L.J., said:

> "The major consideration was whether there was a defence on the merits. That transcended any reason given by a defendant for his delay."

Why then did the learned trial judge err by refusing to set aside the default judgment? He treated the draft pleading of justification as if he had to decide its adequacy. This is what he said at page 14 of his judgment:

> "...it is not enough to say simply that the words are true in substance and in fact. They must go beyond that and give particulars of the facts on which the statement or belief is grounded."

Then on page 15 he concluded thus:

> "... In my judgment the plea of justification has not been established on the basis of the facts put before me."

As regards the plea of qualified privilege provided by the course of the common law, the learned judge was equally emphatic in treating the application to set aside the default judgment as if it were a hearing on the merits. At page 16 of the judgment the learned judge said:

> " The qualified privilege which is claimed is therefore based on an investigation which both at the time of publication of the articles and at the time of the application for leave to defend was still being undertaken in Connecticut, United States of America.

> "No evidence has been given of when the investigation started, when it ended, if it ended, or what was the outcome of the investigation. It is that unfinished investigation which forms the basis for the qualified privilege which is claimed."

One aspect of the law of libel is that it will protect the good name of any servant of the state. The other aspect is reflected in the defence of qualified privilege. That privilege both by statute and at common law approves the publication without malice of misconduct on the part of those who hold high office. Such publication is in the public interest as the public have a right to be informed. The law strikes a balance between the private right to a good reputation and the right of the public to be informed of misconduct in government. The law of libel provides the necessary limitation on expression so as to restrain the publication of libels which damage good reputation. Such an important constitutional function by the courts as an adjudication on qualified privilege cannot be decided against the "Gleaner" and its editor in chambers, because they have failed to comply with a procedural rule. Such a decision must be made in open court, after a hearing of the evidence and application of legal principles.

It is against this background that this Court has allowed the appeal and set aside the order of Edwards, J. Also the appellants have been granted leave to file a defence within fourteen days. As to costs, the respondent is entitled to the costs thrown away including the hearing before the learned judge. The costs of the appeal are to the appellants. Costs are to be agreed or taxed.

WRIGHT, J.A.

I agree.

BINGHAM, J.A. (AG.)

Since preparing a judgment in this matter, I have had the benefit of reading in draft the judgment prepared by Downer, J.A. in which he

has addressed the questions posed with admirable clarity, throughness and precision.

I am in complete agreement with the reasoning and conclusion he has arrived at that the appeal be allowed with the orders as to costs as proposed by him.