

## IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2001/S-051

BETWEEN	REV. KENROY SALTER	CLAIMANT
AND	WESTERN PUBLISHERS LTD	1 <sup>ST</sup> DEFENDANT
AND	LLOYD B. SMITH	2 <sup>ND</sup> DEFENDANT

Mrs. Ingrid Lee Clarke-Bennett instructed by Pollard, Lee Clarke and Associates for the claimant.

Mr. H. Charles Johnson for the defendant.

**Heard: 8<sup>th</sup>, 9<sup>th</sup> and 13<sup>th</sup> November 2007 and 29<sup>th</sup> May 2009**

**Campbell, J.**

(1) On the 8<sup>th</sup> May 1999, the Western Mirror, a bi-weekly tabloid, published from 82 Barnett Street, Montego Bay, carried on page one, a story headlined, ‘Pastor Facing Multi–Million Dollar Charges’ in which it was reported, inter alia:

“There are unconfirmed reports suggesting that portions of these monies taken to invest on behalf of individuals or companies were used to construct Praise Chapel, located in Catherine Mount of which he is the Pastor and a reliable source has told the Western Mirror that the headquarters of the Church was hoping to purchase the property from him as he would be asked to stop preaching.”

(2) The pastor referred to in that report was the Reverend Kenroy Salter, an ordained pastor, lay magistrate and businessman. He is described in his Statement of Claim as “a popular and highly esteemed member of the Montego Bay community.”

(3) On the 17<sup>th</sup> April 2001, the Rev. Salter filed a Writ of Summons, seeking damages for libel, against the newspaper and its Editor-in-Chief, Mr. Lloyd B Smith, that they falsely and maliciously printed, published and distributed or

caused to be printed, published and distributed certain words in one of its bi-weekly editions, and as a result, the claimant has suffered damage and incurred loss.

(4) The claimant particularized his complaint in paragraph 5 of his Statement of Claim as follows;

“In their natural and ordinary meaning, the said words meant and were understood to mean: (a) That the claimant was responsible for the Praise Chapel in Montego Bay, St. James. (b) That the claimant allegedly acquired money for the said construction fraudulently, dishonestly or through other unlawful means. (c) That the claimant was somehow in disrepute with his Church and because of this even his vocation as a Pastor was threatened. The claimant denied that he was responsible for the construction of the chapel, or had ever used fraud in the conduct of his business or that his church organization had ever asked him to stop preaching.

(5) On the 28<sup>th</sup> August 2001, the registry entered an interlocutory judgment in default of appearance to the Writ and adjudged that the claimant recover damages to be assessed.

The claimant filed an Affidavit of Service of James Marshall, dated 10<sup>th</sup> September 2001 in which at paragraph 3, he attests

“That on the 9<sup>th</sup> July 2001 at 2:30 pm, I attended at 82 Barnett Street, Montego Bay in the parish of St. James where I duly served a sealed copy of the Writ of Summons and Statement of Claim ... on the second defendant.”

He further alleged that he had gone to that address because he knew that the 2<sup>nd</sup> defendant worked there and he had known him for 15 years and had known him to be a director of the Western Bureau. He alleged that at the time of service, he informed the 2<sup>nd</sup> defendant of the contents of the documents and he accepted service. An affidavit of posting dated 30<sup>th</sup> April 2001, made by Chrisroy Sutherland, an employee of the law firm, appearing for the claimant, attested that on the 23<sup>rd</sup> day of April 2001, he had sent by registered mail at Half Way Tree Post Office, a sealed Writ and Statement of Claim to the address of the 1<sup>st</sup> defendant, and exhibited a certificate of posting.

(6) On the 28<sup>th</sup> August 2001, the claimant filed a summons to proceed to assessment of damages. Mr. James Marshall, the process server had filed further and supplemental affidavits on the 10<sup>th</sup> September 2001, that service had been effected personally on the 2<sup>nd</sup> defendant. A supplemental affidavit of service filed on the 2<sup>nd</sup> September 2002, alleged that service took place on the 9<sup>th</sup> July 2001 at 2:30 p.m. This necessitated a further supplemental affidavit in which it was pointed out that the earlier affidavit had incorrectly stated the time as being 2:30p.m.

(7) On the 4<sup>th</sup> June 2004 the claimant filed Notice of Assessment of Damages. The defendants filed a notice that the claimants be prevented from assessing damages, and to set aside the default judgment and the defendants be allowed to present a defence to the action. On the 21<sup>st</sup> June 2004, the matter was adjourned before Mr. Justice Sykes, both parties being represented. Mr. H. Charles Johnson, entered an appearance on behalf of the defendants that same day. On the 25<sup>th</sup> January 2005, Mr. James Marshall swore a supplemental affidavit in which he detailed the circumstances of the service on the 2<sup>nd</sup> defendant. In paragraph 4, he states;

“When I saw the 2<sup>nd</sup> defendant at the time of serving him at the office, ... he was wearing a short sleeve dress shirt and a pair of reading glasses, I was unable to see his garment below his waist as the 2<sup>nd</sup> defendant sat behind the square wooden desk, and remained seated when I approached him.

On greeting me, the 2<sup>nd</sup> defendant shook my hand; I then informed him of why I was there and of the contents of the documents and served him with same. He accepted service of same which I handed to him.”

When the summons to set aside came up on the 11<sup>th</sup> April 2005 the Court ordered that the 2<sup>nd</sup> defendant be available for cross-examination.

(8) On the 14<sup>th</sup> March 2006, the defendants filed an amended notice, adding the grounds that the defendants had applied to the court as soon as was reasonably practicable that the defendant had a good explanation, that they were not served, and that the defendants have a real prospect of successfully defending the claim.

(9) Lloyd B. Smith was called in support of the application to set aside. He was cross-examined and confirmed that in April 2001, his office was situated at 82

Barnett Street. He testified that he was managing director of the Western Bureau in April 2001. He then outlined the functions of his office. He testified that the company had a policy of collecting mail twice per week from the post box, which would then be delivered to the secretary. He said that a matter of a legal nature would be sent to him. He said he cannot say with one hundred percent certainty whether the mail came into the office.

(10) Mr. Smith was unable to recall what he was doing on 17<sup>th</sup> April 2001; neither could he remember a Mr. James Marshall. He could not say if he knew him, and added that if he were to see him, he would perhaps recognize him. Mr. Smith said people who he knew he could recognize them. Mr. James Marshall was not available on the date Mr. Smith gave evidence. He said he was unable to recall whether Marshall came to his office on the 17<sup>th</sup> April, he doesn't recall such service. He said he has a wide wooden desk and said it is possible for someone to put objects on the desks and he would not notice it. The affidavit of the process server was to the effect that he had handed the documents to the 2<sup>nd</sup> defendant personally. He said he was a director of the company. He testified that Montego Bay is a small community, "everybody knows everybody." This comment is important if one accepts his testimony on this point, to say whether the 2<sup>nd</sup> defendant would have known the process server, a man that had been stationed in Montego Bay. As it transpires, the date suggested to Mr. Smith was incorrect. The dates of service being the 9<sup>th</sup> July 2001 and not 17<sup>th</sup> April 2001. Neither side addressed this error before me. However, it does not detract from the fact that Mr. Smith testified he had no recall of such service.

(11) Mr. James Marshall, 73, pensioner. He said he was also called Sherrif or Marshie. It is unfortunate that those monikers were not put to Mr. Smith, as so many Jamaicans are known by "nicknames," other than their registered names. Marshall says he has known Mr. Smith for 10-15 years, however, he cannot say whether Mr. Smith knows him. The suggestion, by Mr. Johnson, that Mr. Smith was travelling in another parish was put to the witness who denied it. He testified that he had never served a summons intimately. It was suggested to Marshall that he was not speaking the truth. I view this as an untenable suggestion when Smith's testimony taken at its highest was to the effect that he cannot recall if he had been served.

(12) Whereas Mr. Smith was unable to recall the events of the service upon him, Mr. Marshall was able to give details, he testified that he said to Smith, "I get a summons to give you," and the 2<sup>nd</sup> defendant took the summons from him. He said that he had asked the secretary outside to speak with Mr. Smith, having been asked

who he wished to see. Mr. Smith's recall of the circumstances surrounding the publication of the impugned story of the 8<sup>th</sup> May 1999 is detailed and exhaustive. However the same cannot be said of his recall of the more recent events of the service of the process. Of the earlier event, he remembers that he relied on the reporter's account and that the reporter had investigated the case and had gone into the area. He also remembers that he had spoken to the police, and that there had been a public outcry. He was able to say that the information contained in the story had come from persons who were close to the claimant. The more recent event concerning the same story he was neither able to confirm nor deny. Mr. Marshall was frank and forthright. I accept his evidence that he had served Smith. I find that the letter was posted to the newspaper's offices. I find that there was not a good explanation given for the failure to file an acknowledgment of service or defence, as required by CPR 13.3(1)(b)

**Would the defendants have a real prospect of successfully defending the case?**

(13) The defendants have claimed a moral and social duty as news agents to print the words and that they are entitled to qualified privilege that the words printed constituted a fair comment on a matter of public interest. The defendant also alleged that the printed words did not have the meaning ascribed to them by the claimant and contend what they meant was:

“But that he was asked to stop preaching not because of the charges for which he was arrested, but simply that he would be asked to stop preaching – which request could have been made for any of a variety of reasons. That it was a question of fact as to whether or not the moneys or portions therefore used to build Praise Chapel were the moneys for which the claimant was arrested on fraud charges.”

It was submitted on behalf of the defendants that it was a question of fact whether the claimant was the person responsible for the construction of Praise Chapel. That the drawing of such inferences was within the defendant's right to fair comment and qualified privilege as news agent.

(14) The Privy Council in **Bonnick v Morris and Others (2002) 61 WIR 356** approved Sir Thomas Bingham M.R. statement in **Skuse v Granada Television Ltd. 1996 EMLR 278**, where the learned judge opined that the court should give the impugned article the natural and ordinary meaning it would convey to the ordinary reasonable reader of the Western Mirror. The court was cautioned to

eschew over-elaborate analysis. The article is clear and unambiguous. The meaning urged is strained and untenable.

(15) In respect of the defence of qualified privilege, it proceeds on the grounds that the defamatory report is not true. In this case it was accepted by Smith that the claimant had been acquitted of the charges which provided the basis of the report. Earl Loreburn in the case of **James v Baird 1916 SC (HL) 158**, indicates 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, when, why, 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 questions of public policy.”

(16) **In Bonnick v Morris and Others** (supra), the Privy Council made a distinction between the impugned words where these have been expressly stated and where what is relied on is by ways of implication. In the former case the defence cannot be relied on in the absence of inquiries being made to verify the information. In this case these are express statements that have not been verified. The 2<sup>nd</sup> defendant has admitted they had not complied with the paper's own standard of cross-checking in order to verify information. The judgment in **Bonnick** states at paragraph 18:

“By not making further inquiries and omitting Mr. Bonnick's own explanation, the article would have fallen short of the standards to be expected of a responsible journalist.”

This article would not therefore be afforded the “Reynolds privilege”... which “provide a proper degree of protection for responsible journalism when reporting matters of public concern.”

(17) The 2<sup>nd</sup> defendant has testified that as Editor-in-Chief, he decided that it was necessary to publish the story because the Western Mirror was a local paper and other media was carrying the story. He also admitted that he felt obliged to publish at the time he did because others were going to be publishing. In cross-examination he says the story required urgent publication because several persons

were involved and cited the financial meltdown as being operative in his mind. He said;

“We were not the only media house that carried the story, as the local media we felt obliged to carry the story. We felt that in the public interest we ought to carry the story.

Sometimes given the time constraints we go with what we have if we are sufficiently convinced of the truth of the material.”

(18) What was there about this story that made the defendants consider that it was necessary to publish it so urgently? The story is based on unconfirmed reports. Mr. Smith says that those are reports that have not been validated. The practice in his company was to validate by cross-checking the various sources. In this case, this was not done because of time constraints. This resulted in the paper being unable to later verify the allegations that the monies were used to construct Praise Chapel. Mr. Smith admitted that most of the story was from one “Mr. Daley,” a source whose authenticity he later came to question. As, according to Mr. Smith, this “Mr. Daley” back-tracked and he, Smith, felt victimized as the paper had surmised that the report it received was accurate.

(19) I find that there is no reasonable prospect of the defendant succeeding. The application to set aside the default judgment is dismissed. The matter will proceed on the 27<sup>th</sup> October 2009 for damages to be assessed.

Costs to the claimant to be agreed or taxed.