JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 70/97

BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**EDWARD SEAGA**	**DEFENDANT/APPELLANT**
AND	**LESLIE HARPER**	**PLAINTIFF/RESPONDENT**

Emil George Q.C, and **Tania Pinnock** instructed by **Dunn Cox**, **Orrett** and **Ashenheim** for the appellant.

Lord Gifford, Q.C. instructed by **Gifford, Thompson** and **Bright** for the respondent

July 19, 20 and December 10, 1999

BINGHAM, J.A.:

Having read in draft the judgment of Panton,J.A., I entirely agree with his reasoning and conclusion and there is nothing further I could usefully add.

WALKER, J.A.:

I have had the advantage of reading in draft the judgment of Panton, J.A. and I agree with it.

The appellant's defence of qualified privilege was wrongly struck out and should be restored. In my opinion, the defence was sufficiently pleaded and the appellant ought to be allowed to have his day in court. Of course, whether or not

the defence can be sustained is quite another matter. Ultimately, the question whether an occasion of publication is protected by qualified privilege is a question of law to be determined by the trial judge who, in the process of doing so, must take into account any findings of fact upon which the answer to the question may depend: see ***Adam v. Ward*** (1917) A.C. 309.

PANTON, J.A.

The appellant is Leader of the Opposition, Member of Parliament for Western Kingston and Leader of the Jamaica Labour Party. The respondent is an attorney-at-law, who, at the time of the filing of the Statement of Claim herein, was a Deputy Commissioner of Police in the Jamaica Constabulary Force.

On June 12, 1996, the respondent filed a writ endorsed with a claim against the appellant for "damages for slander published by the defendant (appellant) on March 6, 1996, in a speech delivered at the Wyndham Hotel, Kingston, in the parish of St. Andrew." A statement of claim was duly served on the appellant on June 21, 1996. In the claim, the respondent alleges that the appellant falsely and maliciously spoke and published the words complained of. In brief, the words attribute partisan political behaviour to the respondent.

The appellant filed a defence on October 2, 1996. In paragraph 3 thereof, the appellant admits use of the words complained of. In paragraph 5, the nub of the defence is put thus:

> "The defendant states that the said words were spoken on an occasion of qualified prvilege.
>
> PARTICULARS
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> The integrity, impartiality and independence from political influence of the police force, particularly its leadership and the conduct of the plaintiff, a senior police officer and one of its leaders as also the importance to the holding of free and fair elections under the Constitution of vigilant and impartial enforcement of the law by the

> leadership of the police force including the plaintiff, are matters of general public interest upon which the defendant, as a Member of Parliament, Leader of the Opposition and Leader of the Jamaica Labour Party, had an interest or duty in making communication to the general public and on which members of the public had a corresponding interest in receiving communication."

The respondent challenged the right of the appellant to rely on this defence and on November 19, 1996, applied for an order to strike out the paragraph "on the ground that the occasion on which the words complained of were spoken was not an occasion of qualified privilege." This application was heard on May 29, 1997, by Chester Orr, J. who granted the respondent's request. The order of Chester Orr, J. which is now on appeal before us, was filed in November, 1997, and the **note of his judgment** was filed in the Civil Registry of the Supreme Court on April 23, 1999, that is, seventeen months after the filing of the order. The record of appeal was filed in the Court of Appeal on May 18, 1999, and the matter was set down for hearing in July 1999.

Chester Orr, J., in holding that the words were not spoken on an occasion of qualified privilege, said that the appellant's "allegation should have been made to the Police Services Commission who had jurisdiction over the plaintiff". He relied on paragraphs 488 and 492 of the 7th edition of **Gatley on Libel and Slander.**

Paragraph 488:

> " It is the duty of everyone, in the interests of public efficiency and good order, to bring any misconduct or neglect of duty on the part of a

> public officer or employee, or any public abuse, to the notice of the proper authority for investigation. Any complaint or information as to such misconduct, neglect of duty, or abuse, though volunteered, is privileged, provided it is made in good faith to the person or body who has the power or duty to remove, punish or reprimand the offender, or merely to inquire into the subject matter of the complaint. Any citizen who bona fide believes that wrong has been done has the right and duty to bring the alleged fact before the proper authority for investigation. In doing so he exercises an undoubted privilege which it is not in the public interest to penalise. The lack of any direct power to discipline or punish the person complained of is not conclusive if the official receiving the complaint has some more general interest in it. The question is whether the official has an interest, social or moral, in the complaint; "there are ... no rigid or closed categories of interest."

Paragraph 492:

> "But no privilege will attach to any such complaint or information if addressed to a person or body having no jurisdiction or control over the person whose conduct is impugned, nor any power or duty to grant redress for, or inquire into, the abuse complained of. 'No protection can be afforded to a person who wrongly assumes the facts which constitute a privileged occasion'."

The grounds of appeal are:

"1. The learned judge erred in finding that the defendant/appellant should have made his complaints in relation to the plaintiff/respondent to the proper authorities such as the Police Complaints Commission rather than to the public and that no qualified privilege applied in this regard.

2. The learned trial judge erred in deciding that the case of the **Gleaner Company Limited and Eric Sibblies vs Rainford Smart SCCA Nos. 32A**

> **and 32B of 1979** did not apply to the instant case."

Mr. Emil George, Q.C., for the appellant, said that he was not challenging the contents of the passage in **Gatley's**. However, he submitted that the learned judge, in relying on these passages, fell into error as the instant case is different from those on which the quoted passages are based. The appellant, he said, was not making a complaint against the respondent in his job as Deputy Commissioner of Police. Nor was the appellant seeking to have any disciplinary action taken against the respondent. He was trying to prevent the respondent's advancement to the top position for which he felt he was unsuitable. Mr. George submitted further that the appellant has a constitutional role to play in a matter such as the appointment of the Commissioner of Police, and that his utterance was to be seen in that light as he had a duty to communicate his knowledge and his views to the members of the public who have an interest in such an appointment, and consequently an interest in receiving the communicaton.

The contention of the respondent was that qualified privilege being a matter of law, if the facts as pleaded do not support the plea, the defence should be struck out. Further, it was submitted that the statement of the appellant was unsubstantiated and gratuitous.

According to Lord Gifford, Q.C. the appellant's pleading has not gotten off the ground as there has not been raised even a foundation for his belief. The appellant, he said, must allege and plead matters he intends to call evidence to prove.

Lord Gifford (like Mr. George) cited the recent case **Reynolds v. Times Newspapers Ltd. (1998) 3 All E.R. 961**, a decision of the English Court of Appeal. In that case, as indicated in the headnote, it was held:

> "When determining whether an article was published on an occasion of qualified privilege, the court had to consider:
>
> (1) whether the publisher was under a legal, moral or social duty to those to whom the material was published (the duty test);
>
> (2) whether those to whom the material was published had an interest to receive the material (the interest test); and
>
> (3) whether the nature, status and source of the material, and the circumstances of the publication, were such that the publication should in the public interest be protected in the absence of proof of express malice (the circumstantial test)."

Lord Gifford submitted that the instant case failed so far as the question of qualified privilege was concerned. In respect of the "duty" test, he submitted that the appellant had a duty to publish, but not to the public at large. As regards the "interest" test, he accepted that the suitability of the respondent for the office of Commissioner of Police was a matter in which the public have a legitimate interest. On the question of the "circumstantial" test, he submitted that the publication "manifestly" failed that test.

To determine whether Chester Orr, J. was right in striking out paragraph 5 of the defence, it is of course necessary to look at the relevant law.

STRIKING OUT PLEADINGS

Sections 191 and 238 of the Judicature (Civil Procedure Code) Law make provisions for the striking out of pleadings.

Section 191 reads thus:

> "The Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action, and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client."

Section 238 reads:

> "The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

These sections of the Judicature (Civil Procedure Code) Law correspond with the Supreme Court Practice of England , Order 18 rule 19. The decisions of the English Courts in respect of this rule are therefore relevant and persuasive. For more than a century, the position in England has been this: "The powers conferred by this rule will only be exercised where the case is clear beyond doubt" - **Kellaway v Bury (1892) 66 L.T. 599 at 602 (per Lindley, L.J.)**.

The rule is aimed at cases where the claim or defence is on the face of it "obviously unsustainable": **Attorney-General of the Duchy of Lancaster v. London and North-Western Railway Co. (1892) 3 Ch. 274.**

> "It is only in plain and obvious cases that recourse should be had to the summary process under this rule" - **per Lindley, M.R. in Hubbuck v. Wilkinson (1899) 1 Q.B. 86 at 91.**

This was affirmed fifty years later in **Kemsley v Foot** (1952) A.C. 345 (H.L.)

In **Waters v Sunday Pictorial Newspapers** (1961) 2 All E.R. 758, Willmer, L.J. had this to say at page 761:

> "It is well-established that the drastic remedy of striking out a pleading, or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed it has been conceded before us that the rule is applicable only in plain and obvious cases."

He was followed by Dankwerts, L.J. who said at page 763:

> "This jurisdiction should only be exercised in cases where it is clear that the defence(s) ... put forward cannot really succeed, so that it may be proper to strike (it) out at such an early stage in the action. Unless that is reasonably plain, it is a jurisdiction which in practice is not exercised, and it is a jurisdiction which is exercised only with the greatest care."

The rule came under the scrutiny of the House of Lords in **Morgan v Odhams Press Ltd. and Another (1971) 2 All E.R. 1156**. Lord Reid at page **1159 e-f**, said:

> "I understand that your Lordships are agreed that this procedure is only intended to apply to cases where it is plain and obvious that the plaintiff has no case. Whether that is plain and obvious or only arguable can depend on little more than first impression."

And so, over the past ten decades, the position in England has been that this procedure is only invoked when the matter is plain and obvious, or clear beyond doubt.

QUALIFIED PRIVILEGE

The occasions of qualified privilege include statements made in the performance of a legal, moral or social duty to a person with a corresponding interest in receiving the statements. In such a situation, proof of express malice on the part of the maker is required for the success of a claim. In the instant case there is a concession by the respondent that the appellant had a duty to publish albeit, he contends, not to the public at large. There is also a concession by the respondent that the question of his suitability to hold the office of Commissioner of Police is a matter in which the public have a legitimate interest. So far as the "circumstantial test" is concerned, the respondent, as said before, is contending that the appellant has manifestly failed it. Since the hearing of this appeal, the House of Lords has delivered its decision on the appeal from the judgment of the Court of Appeal in the **Reynolds** case. In dismissing the appeal, the majority opinion seems to have decided that there was no "circumstantial test". This is what Lord Nicholls said:

> "In its valuable and forward-looking analysis of the common law the Court of Appeal in the present case highlighted that in deciding whether an occasion is privileged the court considers, among other matters, the nature, status and source of the material published and the circumstances of the publication. In stressing the importance of these factors

In the circumstances, I would allow the appeal and set aside the order of Chester Orr, J. thereby dismissing the summons dated 19th November, 1996, and restoring paragraph 5 of the defence. Costs to the appellant are to be agreed or taxed.