IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S 243 OF 1999

BETWEEN	EDWARD SEAGA	CLAIMANT
AND	WESTERN BROADCASTING SERVICE LIMITED ET AL	1ST DEFENDANT
AND	THE BREAKFAST CLUB LTD	2ND DEFENDANT
AND	ANTHONY ABRAHAMS	3RD DEFENDANT
AND	LAURIE GUNST	4TH DEFENDANT
AND	JEFF STEIN	5TH DEFENDANT

Mr. John Vassell QC & Mr. Kent Gammon instructed by Dunn Cox for the claimant
Mr. David Wong Ken instructed by Wong Ken & Company for defendants

Heard: October 9, 2006, November 8, 15, 22, 2006 and December 15, 2006

Campbell J.

(1) This is as an application by the 2nd and 3rd defendant for relief from sanctions imposed by an Order of James J. striking out their defence for non-attendance at an adjourned Case Management Conference. The claim is for damages for the publication of an alleged libel contained in a radio broadcast, brought by the Rt. Honourable Edward Seaga. P.C. a former Prime Minister of Jamaica, who at the time the alleged defamatory remarks were published was then the Leader of the Opposition, Member of Parliament and Leader of the Jamaica Labour Party. He presently occupies the Chair of Distinguished Fellow at the University of the West Indies.

The libel was claimed to have been published on three separate dates in September 1999. The defendants were the owners of the station, the programme on which it was aired, a co-host on the programme and two guests on the show, respectively.

Courts duty to actively manage the case – Rule 25.1

(2) On the 20th September 2004, Justice Norma McIntosh had ruled that there was a binding Settlement Agreement between the claimant and the 1st defendant. That decision

of the learned judge has been upheld by the Court of Appeal, (see Western Broadcasting Services Ltd. v Edward Seaga, SCCA 88 /03 Delivered on 20th December 2004.) The Court in keeping with its duty to actively manage the case, did on the adjournment of submissions in the defendants application for relief, and before resumed date, caused the following note to be sent to Counsel.

" The parties are asked to assist the Court as to the relevance of Section 3 (1) (b) of the Law Reform (Tortfeasors) Act 1946 which it appears restricts the aggregate sum to the amount awarded in the action and disentitles the claimants right to an award of costs unless there is reasonable ground for such action. Has the claimant demonstrated any new cause of action or right that was open to him to be pursued in the assessment that was made pursuant to the settlement agreement with the 1st defendant?"

(3) The Court was of the view that the determination of that issue was important in properly managing the case. If Section 3 (1) (b) restricts any future award to the claimant to the sum in the Settlement Agreement, satisfaction of such a sum would discharge the tort and prevent further recovery from the 2nd and 3rd defendants. In those circumstances, what would be the purpose of allowing the claimant to proceed in respect of the 2nd and 3rd defendants?

(4) Some of the relevant powers of the Court, in this regard are contained in **Rule 25.1** of the Civil Procedure Rules, 2002, which provides;

> The court must further the overriding objective by actively managing cases, this may include – (inter alia)
>
> (a) identifying the issues at an early stage
>
> (b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others.
>
> (c) deciding the order in which issues are to be resolved.
>
> (i) dealing with as many aspects of the case as is practicable on the same occasion.

Both counsel agreed that such a determination was important, however Mr. Vassell Q.C., was of the view it was inappropriate to make that determination at this juncture.

Effect of Settlement Agreement, as found to exist between the claimant and the 1st defendant, on the 2nd and 3rd defendants' application for relief from sanctions.

(5) Mr. Wong Ken submitted that the liability which is in issue in this case as it relates to the 1st, 2nd and 3rd defendants respectively are the same, and indivisible. He

further submitted that "no distinction can be made as to the acts that led to the complained of harm, ...any duty owed to the claimant was a common duty owed by all 1st, 2nd and 3rd defendants."

(6) Mr. Wong Ken further submitted that the negotiated settlement made by the claimant with the 1st defendant, which has been entered as a judgment extinguishes the claimant's right to damages from the 2nd and 3rd defendants.' Counsel relied upon **Jameson and Another v Central Electricity Generating Board and Others** (2000) 1 AC 455. HL [1999] 1 ALL ER 193

(7) Mr. John Vassell Q.C. contended that all S. 3 (1) (b) means is that if and when damages are assessed in favour of the claimant, the amount of the settlement with the 1st defendant, if in fact paid to the claimant, may have to be brought into account to reduce the amount recoverable under the judgment since the purpose of S. 3(1) (b) is to ensure that the claimant is not overcompensated for his loss. Only when damages have been assessed will it be possible to make comparison between the settlement figure and the assessed damages for the purposes of determining the sum recoverable by the claimant and the proper order for costs as contemplated in S. 3(1) (b)

Analysis

(8) The tort of defamation consists of breach, damage and loss. If the loss has been satisfied there is no cause of action. The claimant is unable to recover twice for the same claim. **In Jameson v Central Electricity Generating Board (2000) 1 AC 455 (Supra).** a decision of the House of Lords , which deals with a full and final settlement , in respect of several tortfeasors and the effect of that settlement, in respect of another tortfeasor. Lord Hope of Craighead at page 202 (Letter b), said;

> "But the existence of damages is an essential part of the cause of action in any claim for damages. It would seem to follow, as a matter of principle, that once the plaintiffs claim has been satisfied by one of several tortfeasors, his cause of action is extinguished against all of them. As Lord Atkin said in **Clark v Urquhart(1930) A.C.** 28, AT 66 :
> Damage is an essential part of the cause of action and if already satisfied by one of the alleged tortfeasors, the cause of action is destroyed"

(9) In **Phillip Ward (administrator of the Estate of Damion Philip Ward, deceased) Christine Gabbidon (administrator of the Estate of Damion Phillip Ward, deceased) v Jamaica Public Service Company and Kaiser Jamaica Bauxite Company et al** Suit No. C.L 2000/W006, delivered 27th October 2004, the Court held at pg 6;

> The common law position was that a judgment against one joint-tortfeasor was a bar to subsequent action against the others or even the

continuance of the same action if the damages remained unsatisfied. Further the release of one was the release of all; this was the result of the action being regarded as one an indivisible. These effects did not apply to "several tortfeasors".

The Law Reform (Tortfeasors) Act. 1946 abolished the first rule and provide the applicable principle in relation to the conduct of litigation against multiple tortfeasors. The claimants are provided by Section 3 (1) (a) with the right to claim against as many defendants as maybe culpable either in one or several actions provides;

> Judgment recovered against any tortfeasor liable in respect of such damage to an action against any other person who would if sued have been liable as a joint tortfeasor in respect of the same damage.
>
> Section 3 (1) (b), however, restricts the aggregate sum to be recovered to the amount awarded in the first action and disentitles the claimants right to an award of costs unless there is reasonable ground for bringing such action.
>
> > "If more than one action is bought in respect of such damage by or on behalf of the person by whom it was suffered or for the benefit of the estate ... against tortfeasors liable in respect of the damage (whether as joint tortfeasor or otherwise) the sums recoverable under the judgments given in these actions shall not In the aggregate exceed the amount of the damages awarded the judgment first given ; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action"
>
> Clearly, although the law does not prevent a subsequent action against the other tortfeasors, it discourages multiplicity of actions based on the same cause of action where one such action would suffice.

(10) The burden on the Court would be intolerable, were it not for settlement agreements between parties. They are effective in saving expense and ensuring that the matters are dealt with expeditiously and fairly. Lord Hope of Craighead judgment in Jameson (Supra) acknowledges this, at page 204 (letter B) he says:

> "There is a strong element of public interest in facilitating the disposition of cases in this way,"

and cautions at page 205, letter J.

> "What the judge may not do is allow the plaintiff to open up the question whether the amount which he agreed to accept from the first concurrent tortfeasor or under the settlement represents full value for what has been claimed."

(11) Whether the damages were fixed by a judgment of the court or through negotiation is immaterial. The Claim is for an illiquid sum once determined fixes the amount of damages. The settlement brings to an end the plaintiff cause of action and fixes the damage as a judgment does. Lord Hope says at page 203 (Letter a).

> And it is clear that an agreement reached between the plaintiff and one concurrent tortfeasor cannot extinguish the plaintiff's claim against the other concurrent tortfeasor if his claim for damages has still not been satisfied. **The critical question, as Auld L. J. was right to point out at p. 342B is whether the claim has in fact been satisfied. I think that the answer to it will be found by examining the terms of the agreement and comparing it with what has been claimed. The significance of the agreement is to be found in the effect which the parties intended to give it.** The fact that it has been entered into by way of a compromise in order to conclude a settlement forms part of the background. But the extent of the element of compromise will vary from case to case. The scope for litigation may have been reduced by agreement, for example in the question of liability. There may be little room for dispute as to the amount which a judge would award as damages, so one cannot assume that the figure which the parties are willing to accept is simply their assessment of the risks of litigation. The essential point is that the meaning which is to be given to the agreement will determine its effect. (Emphasis mine)

(12) It is ordered that the claimant's action in relation to the 2nd and 3rd defendants be stayed, until the claimant obtains the court's determination of the issue as to whether the Settlement Agreement between the claimant and the 1st defendant was for the whole amount of loss for which the 2nd and 3rd defendants as tortfeasors (whether joint or otherwise) are liable to him in damages. That such a declaration should properly await the determination or discontinuance of the appeal being pursued by the 1st defendant in respect of the Settlement Agreement.

2nd and 3rd defendants' application for relief from sanctions – Rule 26 .8

(13) On the 13th January 2005, James J, at Case Management Conference, ordered that;

> (1) Judgment be entered against the 4th and 5th defendants in default of Acknowledgement of Service and Defence with

damages to be assessed and costs to be agreed or taxed at a date to be fixed by the Registrar;

(2) In accordance with he provisions of the Rule 27.8 of the Civil Procedure Rules, 2002 the defences of the 2nd and 3rd defendants struck out and judgment in default of their attendance at Case Management Conference herein entered against them with damages to be assessed and costs to be agreed or taxed at a date to be fixed by the Registrar.

(14) Some four days later, the 2nd and 3rd defendants applied to set aside these Orders. In his affidavit in support of the application, Mr. Wong Ken claims to have attended at a case management conference (CMC) on the 22nd September 2003, which was adjourned to the 26th September, 2003. There was a further adjournment to the 30th September, 2003. On which date, according to Mr. Wong Ken's affidavit, the case management conference was adjourned to a date to be set by the Registrar. However, Kent Gammons affidavit, in response, states that the notes of proceedings expressed that the Case Management was adjourned to 11th December 2003 at 11 am.

(15) Mr. Emile George had argued before James J, (on the occasion of the 2nd and 3rd defendants case being struck out) that the defendants were aware of the of the Case Management Conference on the 11th December 2003 and had they or their representative been present on that date they would have known of the subsequent dates for the continuation of the case management conference, they had therefore deprived themselves of the opportunity of knowing.

(16) The defendants application to set aide James J. Order was made pursuant to Part 26.8 of the Civil Procedure Rules. It was contended on behalf of the applicants that Rule 13.1, was not relevant to this application, as those rules concern the 'procedure for setting aside or varying a default judgment obtained under Part 12. That the judgment entered against the 2nd and 3rd defendants was not a default judgment as contemplated by Rule 12.

(17) The applicants contend that the Order of James J., is an interlocutory Judgment in default of attendance. The relief from sanctions is therefore obtained pursuant to 26.4, which provides for the application of Rule 26.8.

S26. 8(1) provides;

(1) an application for relief from any sanction imposed for failure to comply with any rule, order or direction must be –
(a) made promptly; and
(b) supported by evidence on affidavit .

(2) The court may grant relief only if it is satisfied that-

(a) the failure to comply was not intentional:
(b) there is a good explanation for the failure ; and
(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(18) The applicant submits that the criteria set out in part 26.8 have been satisfied. That application was made promptly, that is, within four days of the Order. Mr. Wong Ken claims to have been under a misapprehension or failed to recollect that the 11th of December 2003, had been fixed as a date for continuation of the case management conference. However the conduct of the applicant in the prosecution of the case would support his contention that his noncompliance was not intentional. The Defence had been filed within 14 days of the service of the Statement of Claim, on the 22nd and 26th September 2003. The applicants had two Attorneys-at-law present at Case Management Conference, Sharon Usim of Chancellor and Co., who was still on the record and Mr. Wong Ken, who gave an undertaking to file a Notice of Change of Attorney. This undertaking was honoured. Judgment was reserved to the 30th September 2003, Mr. Wong Ken was present, and CMC adjourned to the next hearing date of 11th December 2003. There were further adjourned hearing dates of 23rd June 2004 and the 13th January 2005, pending the hearing of the "Settlement Agreement" appeal. The decision in that appeal was delivered on the 20th December 2004. Mr. Wong Ken attended on Mr. Justice James in Chambers on he same date of the Order striking out the case of the 2nd and 3rd defendants. The explanation tendered by the applicant is credible. It is clear that apart from the absences occasioned by the misapprehension of the date 11 December 2003, all other orders have been complied with.

(19) Section 26.8 (3)

In considering whether to grant relief the court must have regard to-

The interests of the administration of justice

Justice requires that matters be dealt with expeditiously, and in a cost effective manner. That the diligent party who complies with orders and directives of the court and thereby secure judgments ought not to be unduly separated from the fruits of a judgment so secured. Justice must strive to impose sanctions that are proportionate to the breach and must recognize that the defaulter as well as the aggrieved are equally entitled to be dealt with justly. It could not be considered just for a party to be rewarded the entire prize because his adversary committed an innocent breach, which causes him no prejudice. It may not be consistent with the overriding objective that the initial approach, in the circumstances is to strike out the statement of case. Proportionality is perhaps more recognized in the field of administrative law and in sentencing in criminal matters than in civil procedural matters. It means nothing more than the sanction/punishment must fit the breach/offence. Lord Woolf, alluded to this by emphasizing that the draconian measure of "striking out is not always appropriate", where he said in **Biguzzi v Rank Leisure PLC**- CA- (CCRTI 1999/0700/2) - July 1999,

'The advantages of the Civil Procedure Rules over the previous rules are that the courts powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the dracionian step of striking the case out".

(20) **Whether the failure to comply was due to the party or the parties' lawyer**. The Order of Justice James was directed at the parties, the 2nd and 3rd defendants. The 3rd defendant states that "neither the 2nd defendant nor I had been notified of a date for the continuation of the Case Management Conference, subsequent to 30th September 2003". It is safe to assume that the misapprehension of the date by Mr. Wong Ken, contributed to the absence of the defendants. It would be less than just to visit upon the defendants, in these circumstances, an assessment of damages in a matter of this nature, arose through the inadvertence of their attorney-at-law.

(21) **Whether the failure to comply has been or can be remedied within a reasonable time**. The failure to attend has had the effect so far of delaying the resolution of the matter. The matter was set for assessment of damages on the 9th, 10th and 11th May 2005. However those dates were vacated as a result of the application to set aside the Order of Justice James set for hearing on the 1st June 2005. Should the applicant succeed there may well be the need for further case management orders to be made. There may be the need for a pre-trial review.

(22) Whether the trial date or any likely trial date can still be met if relief is granted. There was no trial date set because the Court did not proceed to case management. Had the defendants been present on the 13th January 2005 a trial date would have been secured within 18 months of that date. The matter would have been tried by this date, as it stands now a trial of this magnitude will likely get a trial date in late 2008 or the early months of 2009.

(23) **The effect which the granting of relief or not would have on each party**. The claimant of course would lose a judgment it had gained through the defendants default, and will now be required to have the matter determined on the facts. Avoidable expenses would have been incurred. If relief is refused, the only remaining issue would be an assessment of damages. The defendant would have an opportunity, if relief is granted, of proving its assertions that it has conducted itself responsibly and is therefore not liable in damage to the claimant.

Analysis

(24) The Court of Appeal in the matter **of Keith O' Connor vs Paul Haufman Percival Piccott and Eugene Adolphus Piccott**, CA 33/2002, delivered on the 7th April 2006. In examining the procedure for setting aside default judgment, pursuant to Section 13.3 C.P.R. (prior to its amendment) McCalla J.A. said;

> The requirements of the above-mentioned section are cumulative and in the circumstances outlined above, have not been satisfied. The CPR confers wide powers that enable the court to **adopt a flexible approach** depending on the circumstances of a particular case. Rule 1.2 states; (emphasis mine)
>
> 'The court must seek to give effect to the overriding objective when it –
>
> (a) exercises any discretion given to it by the Rules ; or
> (b) interprets any rule"

(25) It should be noted that Rule 28 (2) uses language which is not contextually dissimilar to the language of Rule 13.3 (1), the unamended Rule 13.3(1) (like Rule 28(2)) was to be read cumulatively, and provided for the exercise of the Courts powers "only if" certain conditions were observed. It is clear from the passage quoted from the judgment of Justice McCalla, that the words "only if" did not impose a fetter on the exercise of the courts discretion. The court is enjoined to adopt a flexible approach to suit the particular facts with which it is confronted.

(26) The judgment aptly demonstrates the range of this flexibility. The appellant had deliberately ignored the procedural requirements, having taken a decision not to defend the matter. He had been aware of the Order granting specific performance to the Respondents, but took no steps in a timely manner to set aside the order. The court, in the event, refused to exercise its discretion to assist the appellant to avoid the consequences of his deliberate inaction. However, The language of the judgment is clear that even where the applicant had failed to satisfy the conditions enumerated in Rule 13.3(1), (and therefore by a parity of reasoning Rule 26 (8)), it was still open to the Court, in the exercise of its discretion, to assist such an applicant, if it is in accordance with the overriding objective of the CPR, which enables the court to deal with cases justly.

Requirement for a Real Prospect of Success

(27) The claimant's further submission in opposition to the application to set aside Justice James' Order was to the effect that rule 26.8 impliedly imports the need to show that the defendant has a real prospect of successfully defending the claim. I disagree with Mr. Wong Ken's submission, that "an application for relief from sanction, ought not to be one that becomes a fight over the merits of a defence. "What is the purpose of restoring a claim that is destined to fail? These concerns were expressed by Justice Sykes in **Gloria Findlay v Gladstone Francis** suit no. F045 of 1994, which dealt with an application for relief from sanction under Rule 26.8, where at para. 32 of the written judgment, the learned judge said;

> "I did indicate that the conditions stated in rule 26.8(3) were not exhaustive. I have looked at the defence filed in this matter

> and it raises issues of facts and law that would make summary judgment in favour of the claimant unlikely. I say this to say, that if the defence did not disclose a case that had a reasonable prospect of success then there would be no point in exercising my discretion to set aside the judgment. If I were to grant relief in circumstances where the defence had no reasonable prospect of success I would be failing in my duty to deal with the case in a manner that would be cost effective"

(28) The court had similar concerns in **Jasper Bernard v The Jamaica Observer**, suit no. CL. 2002/B-048, delivered 27th January 2006, where in a claim for damages for libel published in the defendants' newspaper an application was made to strike out paragraphs 8 and 9 of the defence on the grounds (a) It contained no reasonable defence and it was frivolous and vexatious in that it carried no particulars of justification in support of the plea. (b) That it contained no reasonable defence, and that it was an abuse of the court. In that they were not capable of supporting any qualified privilege, respectively.

(29) It was submitted on behalf of the defendants that if the Court finds that the defence of qualified privilege and justification were insufficiently pleaded the court should require or permit the defendant to amend to fully particularize those aspects of the defence. At paragraph 12, of the written judgment, the court held;

> "If qualified privilege, as a matter of law, is not available to "the Daily Observer" what would be the purpose of allowing time to amend to particularize the defence, other than to further prejudice the claimant's right to a fair trial of his case within a reasonable time as guaranteed to him pursuant to s 20 (2) of the Jamaican Constitution."

The Applicants' Case

(30) Mr. Wong Ken submitted, inter alia, that in regard the broadcast on the 3rd September 1999, and the 6th September, those broadcast concerned a discussion of a book written by the 4th defendant "Born fi dead" and the factual presentation of an article written by the 5th defendant, respectively.

(31) It was further submitted that qualified privilege was being relied on, and that the matters referred to were matters of public interest, and that the words complained of related to the claimant in his capacity as an elected official in the various high public offices he has held and were relevant in causing the electors to decide; whether they should cast a vote at any future election, and,

(32) That the Reynolds test of responsible journalism was not applicable to the applicant's broadcast of the 3rd and 6th September 1999, because they were cases of

"reportage", in which the public interest lies simply in the fact that the statement was made and it was clear that the publisher did not subscribe to any belief in its truth.

(33) In relation to the "Tisona" libel, of the 6th and 14th September 1999, the 3rd defendant relied upon information from officials of the Israeli government. The claimant was afforded the opportunity to refute the allegations, it therefore, could not be said that the publication was casual cavalier, slipshod or careless. Mr. Vassell conceded that in respect of the "Tisona libel" the publishers satisfied the test of responsible journalism.

The claimant's opposition

(34) **Mr. John Vassell Q.C.** Submitted, that the lines of defence filed are fourfold; meaning, fair comment, qualified privilege and a novel defence never before upheld in English or Jamaican common law and which perhaps owes its inspiration to U.S. jurisprudence.

He further submitted that the meaning to be ascribed to the words were outlined in **Bonnick v Morris** (203) 1AC at paragraph 9.

(35) In respect of the fair comment defence, reliance was placed on principle enunciated in **Gatley on Libel and Slander 10th Ed, 2004**, which states that if the comments are defamatory, the defendant must plead justification or privilege in relation to them, fair comment will be no defence. If they are not defamatory they must be shown to be true. A writer may not suggest or invent facts, and then comment on them as if they were true. In order to give rise to the plea of fair comment the facts must be truly stated.

i. The words spoken were allegations off facts, not comment. Secondly, and in any event, it was not suggested that the alleged facts were true. The defence fails, therefore, without reaching the third question which is whether the comment is fair. The applicant do not allege and have no reasonable hope of establishing that the words on which the claimant has sued are comment on true facts.

ii. Once the public interest is established, the defendant must then establish responsible journalism. The facts supportive of or warranting the protection of, privilege do not exist in this case, even to a triable issue standard.

Analysis

(36) The first question to be decided is whether the alleged defamatory words were privileged. It is the material that must be examined to ascertain whether it is in fact privileged. Lord Heffman, in Jameel and others at page 18, examining "Reynolds privilege" agreed with the opinion expressed in the Court of Appeal in **Loutchansky v Times Newspaper Ltd. (20020 QB 783, at 806 where it was said** of Reynolds privilege.

> "A different jurisprudential creature from the traditional form of privilege from which it sprang." It might more appropriately be called the Reynolds public interest defence matter than privilege."

(37) As a defence Qualified Privilege proceeds on the basis that the defamatory remarks are untrue. Did the defamatory material which was described as cruel journalism by learned Queens Counsel capable of sustaining the public interest requirement which is a vital perquisite for establishing the finding of the existence of such a privilege. This is a question of law for the judge and it appears to me that relevant considerations are enumerated by Lord Loreburn in **James v Baird 1916 SC (HL) 158** (see also **Jasper Bernard (Supra)** at paras 16 and 17)

> (38) **"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, and 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 the considerations of questions of public policy"**

(39) As already noted the claimant has had a long and distinguished public career. The Breakfast Club is an early morning talk show that discusses international and domestic issues covering a broad range of issues, it is described as "a popular morning radio programme including interviews and commentaries broadcast to all Jamaica." The co host of the programme was a Mrs. Anderson- Manley, who was married to the late Mr. Michael Manley, a former Prime Minister of Jamaica and Leader of the Peoples National Party. The 3rd defendant, a host on the programme, was a former Minister in The Jamaica Labour Party, whilst the claimant was its leader.

(40) The Court must take notice of the following; several commentators have maintained that there is a link between organised crime and politics in Jamaica. There has not been much in the way of evidence to support this. This lack of evidence is not conclusive, because the entire justice system is plagued with the unavailability of witnesses. A witness is regarded as an informer. There are several communities described as "garrison constituencies" by the local media which consistently and overwhelmingly support one party to the virtual exclusion of the other. These exist on both sides of the political divide. The claimant represented one such "constituency". The crime rate is alarmingly high, and constitutes an on-going concern to a large number of Jamaicans.

(41) On one hand, it is alleged that the persons to whom the Broadcast was made are Jamaican electors, who were entitled to exercise a fully informed choice in casting his or her vote for members of the House of Representative. The statements were being made

in a book and in articles about a person who was standing as a candidate in up coming elections. He was a sitting M. P. and a former Prime Minister. The material they argue constitute maters in which the public has an interest in the mere fact that statements were being made.

(42) On the other hand it is contended that the claimant has been gravely injured in his credit and reputation as a Member of Parliament and Leader of Opposition and has been lowered in the estimation of right thinking members of society generally. It is question for the Judge, as to whether the public interest requirement has been carried out. it concerns the balancing of competing rights. The guaranteed right to freedom of expression and the individuals right to protection of his reputation.

(43) It is clear that the judgment in Reynolds proceeds on the basis that this crucial balance is tilted in favour of the freedom of expression, at page 205 of the judgment Lord Nichols says;

> "Above all, the court should have particular regard to the freedom of expression. The press has vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and therefore the public had no right to know, especially when the information is in the field of politics discussion. Any lingering doubt should be resolved in favour of publication" (See **Jasper Bernard v The Daily Observer**, (supra) at para 32.

(44) and **Baroness Hale of Richmond** at para. 146 in discussing Reynolds privilege says,

> **"It springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information."**

(45) The decision whether the material considered as a whole constitutes a matter of the public interest is a decision for the judge. Has the defendants satisfied the court by making out a case that has some prospect of success in relation to the argument that the publication was a matter of public interest? Journalism in this country if it has any duty at all, that duty must be to report on all aspects of crime. This is more so when what is being reported is a link between crime and politics. The authors interviewed had produced works tending to demonstrate these links at the very highest level of political life in this country. I find that the publications were matters of public interest.

(46) The further question is, was the defendants' actions compatible with responsible journalism. Mr. Vassell Q.C. is of the view that it was not and the obvious reason, according to Mr. Vassell, is that the affidavit of merit alleges no facts from which a court

could so hold. The defendants' answer is that the alleged publication falls within that special category of cases referred to as "reportage " in which according to Lord Hoffman at paragraph 62 of **Jameel and others v Wall Street Journal Europe Sprl (2006) UKHL 44**. ..." There are cases ("reportage") in which public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth" (150).

(47) **Baroness Hale** paragraph 149, in addressing the issue of what constitutes responsible journalism notes that such steps that the publisher must take will vary dependent upon the material. Says of the reportage cases;

> "The requirement in reportage cases, where the publisher is simply reporting what others have said, may be rather different but the publisher does not himself believe the information to be true, he would be well-advised to make this clear. In any case the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on."

(48) It is a question for the arbiter of fact as to whether certain passages of the transcript to which we were directed convey an occasion of serious reporting .What is the format of this Breakfast Club, is it prone to sensationalism that is prepared to besmirch a man's character or is it a serious programme given to serious discussion on relevant national and international issues. Because if it is the latter then **Baroness Hales'** comments in respect of the Wall Street Journal may well be applicable to the Breakfast Club.

> "We need more such serious journalism in this country and our defamation law should encourage rather than discourage it"

(49) The answers to these questions are not plain and obvious. These are questions the Court need not answer on this application. The onus on the 2nd and 3rd defendants at this stage is to make out that their defence presents an arguable case that contains within it a reasonable prospect of success. This the Court find they have done, I would therefore set aside my brother, James J. Order of the 13th January 2003 striking out the 2nd and 3rd defendants defences. The 2nd and 3rd defendants to pay the claimant costs to be agreed or taxed and the sum agreed or taxed paid within 14 days of determination of that sum.