

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A196/1987

BETWEEN	ERIC ANTHONY ABRAHAMS	PLAINTIFF
AND	THE GLEANER COMPANY LIMITED	FIRST DEFENDANT
AND	DR. DUDLEY STOKES	SECOND DEFENDANT

Winston Spaulding Q.C., Hugh Small Q.C. and Abe Dabdoub instructed by the firm of A.J. Dabdoub for the Plaintiff.

Richard Ashenheim and Ms. Dawn Smith for Defendants.

Heard: 22nd, February, 7th and 8th March, 31st May, 18th July - 20th July
and 16th December 1988.

EDWARDS J.

This is an action brought by the Gleaner Company Limited (first defendant) and Dudley Stokes the Editor of the Daily Gleaner (second defendant) to set aside Judgment obtained by Eric Anthony Abrahams the plaintiff, in default of defence, in a libel action.

On the 24th September 1987 a writ of summons was filed by the plaintiff against the defendants. The summons was endorsed with a claim for compensatory and exemplary damages for libel contained in three separate articles entitled respectively:

- (a) "Author says his diary sparked kickbacks investigation"
printed and published by the defendants in the Star
Newspaper dated September 17, 1987.
- (b) "Robin Moore: I suspected Jamaican Tourism Minister"
printed and published by the defendants in the Daily
Gleaner dated September 18, 1987.
- (c) "Clarification" printed and published by the defendants
in the issue of the Daily Gleaner dated September, 19, 1987.

A statement of claim amplifying the endorsement to the writ was filed simultaneously with the writ.

The statement of claim showed that the plaintiff is a Tourism and marketing consultant, a member of the House of Representatives of the Parliament of Jamaica, a Company Director and previously he held the post of Minister of Tourism in the Government of Jamaica from November 1980 to

August 1984.

It also stated that the first-named defendant is the proprietor, printer and publisher of the "Daily Gleaner" and "Star" newspapers, the only daily newspapers in Jamaica at the time and both of which had wide circulation throughout Jamaica and also enjoyed circulation in the Caribbean, North America and the United Kingdom. The second defendant is the Editor of both newspapers.

The status of the defendants as described by the plaintiff was admitted by the defendants in the defence which they are seeking leave to file.

The articles which appeared in the star of the 17th September 1987 and the Gleaner of the 18th September were virtually identical - the only difference being that part of one paragraph which appeared in the Star was omitted from the Gleaner.

These articles stated that one Robin Moore, the author of "The French connection" a novel on drug smuggling, who was himself awaiting sentencing for his 1986 conviction for evading taxes, said that his personal diary and files which were seized by I.R.S. agents in June 1983 when he was being investigated for his part in phony literary tax shelters, contributed to Federal authorities suspicions that New York business executives paid kickbacks to Jamaican officials for lucrative tourism promotion contracts. In the words of the article:

"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 Standford in a copyright story published Tuesday, "call it a bribe, call it anything you want" said Moore.

The article then went on to say that:

"The Advocate reported Sunday that Federal authorities in Connecticut are investigating public relations and advertising executives suspected of paying Jamaican officials one million dollars for contracts worth \$40 million from 1981 - 1985".

"The Advocate, quoting anonymous sources close to the probe has said five or six executives of the public relations firm Ruder, Finn and Rotman and the advertising firm Young and Rubican are the focus of the investigation, Officials of both firms

have denied any wrong doing and said they are co-operating with investigators.

KEY FIGURE

"Moore said 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 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 empannelled in New Haven the Advocate reported."

"The newspaper said efforts to reach Abrahams and his successor, Hugh Hart, during the past two weeks were unsuccessful, and Hart did not return telephone calls to his office on Monday."

"Moore 61 said the notes in his diary are impressions of what was going on between Abrahams and the United States companies. The subjects also appeared in letters between him and friends in Jamaica."

"I have no definite proof that this ever happened - it was just a suspicion of mine", Moore said

"People were talking. There were certain things everybody knew. There was no secret about the situation with the (former) Minister of Tourism."
The words underlined appeared in the Star but were not reproduced in the Gleaner article.

The articles went on to state that Moore had lived in Jamaica periodically for the past 27 years and that in 1981 he volunteered his services to the Jamaica Government to find advertising and public relations companies, that would help the country's tourist trade
"..... I did indeed help introduce the advertising agent of Young and Rubican to Jamaica, but I certainly had nothing to do with any kickbacks, if indeed they did happen.

The article closed by stating that United States Attorney Stanley Tawdry Jnr. has refused to confirm or deny the existence of the kickbacks investigation.

On the 19th September 1987 that is the day following the publication of the Gleaner article a "clarification" was issued in the Gleaner to make it clear that the article did not refer to the current Minister of Tourism, Mr. Hugh Hart, whose name appeared in the articles. Under the heading "Clarification" the article stated:

"Absolutely no reference was made or intended to be made to the current Minister of Tourism in the headline: "Robin Moore: I suspected Jamaica Tourism Minister" in the second paragraph of the Associated Press (AP) story, "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....." which was published on page 2 of yesterday's Gleaner September 18, 1987."

The articles which appeared in the Star and Gleaner of the 17th and 18th September 1987 respectively mentioned two Tourism Ministers only Anthony Abrahams, Jamaica's former Tourism Minister ... "and his successor, Hugh Hart." The clarification therefore made it clear that the articles were not intended to refer to Hugh Hart - the clear inference being that they referred to Anthony Abrahams the former Tourism Minister.

The statement of claim alleges that on September 17 after publication of the article in the Star of that day, the plaintiff spoke to the second defendant and at the second defendant's request sent him a statement denying the allegations. The statement was not published by the defendants but instead the article which appeared in the "Star" was repeated in the Gleaner of the following day - the 18th September 1987.

The plaintiff in paragraph 7 of his statement of claim said the words in the articles "in their natural and ordinary meaning meant or were reasonably understood to mean that the plaintiff had committed criminal offences:-

1. "Contrary to the Corruption Prevention Act, and
2. Contrary to Common Law

and by so doing was not a fit and proper person to hold public office."

In paragraph 9 (iii) of the statement of claim the plaintiff said the court will be asked to infer that the defendants published the words complained of in the articles,

"With the knowledge that they were libellous and or with reckless disregard as to whether or not they were libellous."

The defendants entered appearance on the 2nd October 1987 but did not file a defence.

On the 22nd of October 1987 the plaintiff obtained Judgment in

default of defence. More than 3 months later, on the 4th February 1988, the defendants took out a summons to set aside the default Judgment and sought leave to file a Defence. Notice was also given that they would rely on the affidavit of John Gentles sworn to on the 14th January 1988 and the joint affidavit of the second defendant and Donna Smith an employee of the first defendant. The hearing of the application was set for Monday the 22nd February, 1988.

The joint affidavit sworn to by the second defendant and Donna Smith in effect admitted the publication of the articles which they said were received by them from the Associated Press of New York. They further stated that they were advised by John Gentles a former Director of Tourism in Jamaica and a former chairman of the Tourist Board that the words set out in the articles are true in substance and in fact and that they had a good defence.

On the 16th February 1988 the plaintiff issued a notice requiring John Gentles to attend the hearing for cross examination in respect of allegations contained in his affidavit. This notice was renewed on the 24th February 1988 with the additional instruction that the plaintiff would also rely on his own affidavit sworn to on the 19th February 1988.

In paragraph 5 of their affidavit the defendants denied that the words in the articles in their natural and ordinary meaning meant or were understood to bear any of the meanings alleged by the plaintiff in paragraph 7 of the statement of claim.

The defence which the defendants proposed to file if leave was granted was exhibited as an attachment to the joint affidavit.

Paragraph 5 of the defence reiterates that the words set out in paragraph 3 and 4 of the statement of claim i.e. the articles in the Star and Gleaner of the 17th and 18th September 1987, respectively are true in substance and in fact.

It also states that the defendants will rely on section 7 of the Defamation Act, and that all of the occasions of alleged publication were occasions of qualified privilege and it listed particulars.

At the hearing on the 22nd February 1988 Mr. Hugh Small Q.C. appeared for the plaintiff and Mr. Richard Ashenheim for the defendants.

Mr. Small brought to the attention of the court the fact that a notice had been served requiring Mr. Gentles to be present at the hearing to be cross-examined and he was not. He said that Mr. Gentles was in Jamaica on Saturday the 20th February 1988 two days before the hearing, to attend the funeral of his mother, and this was advertised in the newspaper owned by the first defendant. He said that the defendants are seeking to upset the Judgment substantially on the basis of what Mr. Gentles had said and they should be able to test the basis of the allegations made by Gentles. Mr. Ashenheim in reply said he had no instructions that Mr. Gentles was in Jamaica. He pointed out that sec. 406 of the Civil Procedure Code sets out the proper procedure to be adopted to secure the attendance of a witness who had given evidence on affidavit. The section provides that "the court or a Judge may on the application of either party order the attendance for cross-examination of the person making any.....affidavit....." Mr. Small said he was not disputing the meaning of the section but he was relying on the practice which was followed in Jamaica when notice is served in the manner which had been done. Mr. Ashenheim said he was not aware of the practice, and that no application is before the court or Judge to secure the attendance of Gentles and the court should disregard the notice.

Mr. Small requested an adjournment to facilitate the taking out of a summons to secure the attendance of Mr. Gentles in keeping with sec. 406. The matter was adjourned until the 7th March with costs to the defendants.

At the hearing on the 7th March 1988 Mr. Winston Spaulding Q.C. appeared for the plaintiff in place of Mr. Hugh Small Q.C.

Mr. Ashenheim said that Gentles' affidavit supported only that part of the defence that related to the plea of justification and his affidavit had nothing to do with Qualified Privilege. He said the affidavit of Stokes and Smith adopted the points made in Gentles' affidavit and it was not therefore necessary to bring Gentles to Jamaica at great expense to testify at the hearing in Chambers. Mr. Spaulding said that the application

to have Gentles brought to the hearing to be cross-examined was withdrawn as the pleadings filed by the defence were defective in law and in fact and amounted to no defence. It was not the duty of the plaintiff to attempt to cure that defect by bringing Gentles here.

The hearing thereafter proceeded without any further request for the attendance of Gentles.

A preliminary objection was taken to the validity of the affidavits sworn to by Gentles, on the ground that it offended sec. 418 of the Judicature (Civil Procedure) Code which provides that "no affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself."

Gentles' affidavit was sworn to before Mr. Christopher S. Roberts a Justice of the Peace who is also an employee of the Gleaner Company. After hearing arguments the court ruled that Gentles' affidavit did not offend sec. 418. In his affidavit which was sworn to on the 14th January 1988 Gentles averred that he was Director of Tourism in Jamaica from December 1980 until February 1983 and in April 1981 he was appointed Chairman of the Jamaica Tourist Board. He said he had read paragraphs 3, 4 and 5 of the Statement of Claim. These are the paragraphs which reproduced the articles which appeared in the Star and the Daily Gleaner and that:

"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 and received by the plaintiff and further negotiated by him

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.

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.

I am aware that the plaintiff is a key figure in the Federal Grand Jury's investigation."

On the 29th January 1988 the second defendant and Donna Smith swore to a joint affidavit which stated that the words set out in paragraph 3, 4 and 5 of the statement of claim were received by the first and second defendants from Associated Press of 50 Rockefeller Plaza New York, United States of America and that they were informed by Gentles that the words set out in paragraphs 3, 4 and 5 of the statement of claim are true in substance and fact. They further stated that it is true that United States Federal authorities in Connecticut are investigating public relations and advertising executives suspected of making payments to Jamaican citizens and Government officials for the award of contracts by Jamaica Government agencies and that "the matters involved are currently being investigated by a Federal Grand Jury in Connecticut aforesaid and the plaintiff is a key figure in those investigations. Accordingly all Jamaica had an interest in knowing what is the nature of the allegations being made in the said investigation and what allegations involve various Jamaica Government agencies and officials, including the plaintiff as a member of the House of Representatives and a former Minister of Tourism in the Jamaica Government." They maintained that "the occasions of the publication of the words set out in paragraphs 3, 4 and 5 of the statement of claim were occasions of qualified privilege."

On the 19th February 1988 the plaintiff swore to an affidavitⁱⁿ which he categorically denied receiving any payment from any New York business executive for lucrative tourism contracts or any contract whatsoever. His affidavit states that during the period when he was Minister of Tourism, Tourism advertising and promotional contracts were awarded by the Jamaica Tourist Board and Gentles was Director and Chairman of that Board and was "the person directly responsible for the award of the said contracts."

He says he is not a key figure in the Federal Grand Jury's investigation and that the offending articles were said to be reprints of an article published in the Stamford Advocate of Tuesday, 15th September, 1987. He has read the Stamford Advocate newspaper of that week and the article which referred to him was published on the 16th September, 1987. He exhibited a photostat copy of the article published in the Stamford Advocate of Wednesday, September 16, 1987 with a picture of Robin Moore in it, and bearing the title "Writer: Diary led to kick back probe". The article was written by Lisa Marie Peterson a staff writer and is marked "Copyright 1987, The Advocate."

He also exhibited as an attachment to his affidavit a letter dated December 4, 1987 from Donna Smith to his Attorney-at-law in which she states "We understand that the writer of the Stamford Advocate article from which the Associated Press dispatch was written was Lisa Marie Peterson".

It is observed that the article exhibited by the plaintiff appeared in Stamford Advocate on Wednesday, September, 16, 1987 and the article in the ^{appeared} Star, the day after, on Thursday, September 17, 1987 and the article in the Gleaner on Friday, September 18, 1987 with the "correction" in the Gleaner of Saturday, September 19, 1987.

The article in the Stamford Advocate of Wednesday, September 16, 1987 by Lisa Marie Peterson paints a completely different picture of the plaintiff from that which appears in the Star and the Gleaner of the same week.

For example: The Stamford Advocate states:

"But Moore said in an interview with the Advocate that the information gleaned from the papers - seized during an unrelated federal tax evasion probe in 1983 - offered no proof of corruption in the Jamaica Government or of pay-offs by U.S. businessmen."

"I have no definite proof that this ever happened" Moore said, "It was just a suspicion of mine".

Again:

"Anthony Abrahams, Jamaica Minister of Tourism from 1981 to 1984, the period under investigation by U.S. authorities, said in a telephone interview from Kingston, Jamaica, yesterday that he was not aware of any kick backs nor had he been involved.

"I have never, ever accepted any kick backs and I defy anybody to make that accusation", Abrahams said, "I was Minister of Tourism. I was not on any tourist board and I had nothing to do with spending money. I didn't award contracts and any suggestion that I have anything to do with any kick backs is highly preposterous."

After mentioning that Gentles had testified in New Haven and has denied personal involvement in any kick back scheme the article went on to say:-

"Abrahams who was Gentles Supervisor said he was aware of an investigation being conducted in Connecticut, but said he had not been contacted by investigators from the United States or his Government."

"I heard there was one but I thought it was over".

Abrahams said...."

Again: "The kick backs are suspected of having been paid during Abrahams term in office, a source close to the investigation said, but Abrahams is not the subject of the investigation."

Also "Moore said the notes in his diary are impressions of what was going on between (a certain Jamaican official) and the U.S. Companies. The subject also appeared in letters between him and friends in Jamaica."

Also "Sources have said Moore is believed to have opened his home in Westport and his apartment in New York City for parties and meetings between officials of the Jamaican Government and United States advertising and public relations companies.

But Moore said he had only one large-scale party at his Westport home in 1981, when Abrahams became Tourism Minister. He also let an occasional Jamaican friend stay at his New York apartment.

"I doubt very much there was ever a meeting at my house in Westport". Moore said. "I am not saying it didn't happen, but I certainly didn't know about it."

I have been asked to set aside the Judgment which was obtained in default of defence and to grant leave to defend.

Order 19 r. 2 gives the court the power to set aside or vary any judgment entered in default of defence. This power is clearly discretionary. In order to invoke the exercise of this discretion the defendants have submitted a defence supported by affidavits in support of their application. The judgment which they are seeking to set aside though obtained in default of defence is nonetheless a regular judgment which was obtained some three months after the defendants had entered appearance. Where there is a regular judgment it is almost an inflexible rule that the application to set it aside must be supported by an affidavit of merits. FARDEN V RICHTER (1889) 23 Q.B.D. 124.

"At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason" per Huddleston B at p. 129.

For the purpose of setting aside a default judgment under O13/9/4 which deals with failure to give notice of intention to defend, the defence on the merits which the defendant is required to show need only disclose an arguable or triable issue under O. 13/9/4. This however is not a case of failure to give notice of intention to defend, but failure to file a defence. I adopt the words of Lord Wright in Evans v Bartlam 1937 (2) who K.B.D./when speaking of the discretion to set aside a Judgment said:

"In a case like the present, there is a judgment, which though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. 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 pass a judgment on which there has been no proper adjudication."

Are there merits in the defence which has been filed in the case now under consideration.

The defence admits publishing the articles complained of by the plaintiff. They say (a) the words contained in the articles were received by them from Associated Press of 50 Rockefeller Plaza, New York, United States of America in the ordinary course of business under an agreement

pursuant to which, associated press has supplied them over the years with material suitable for publication.

- (b) The words contained in the articles are true in substance and in fact.
- (c) They will rely on section 7 of the Defamation Act which allows a defence of justification.
- (d) All the occasions of publication were occasions of qualified privilege.

No details are given. The New York business executives who are alleged to have paid kickbacks to Jamaican officials for lucrative tourism promotion contracts remain nameless. Included among those payments says Mr. Gentles are cheques either made payable to the plaintiff or negotiated to the plaintiff and received by the plaintiff and further negotiated by him. No particulars of the cheques are given. The amounts are not stated. The banks upon which they are alleged to be drawn have not been identified.

Mr. Gentles stated in January 1988 when he swore to his affidavit that he gave evidence before a Federal Grand Jury in Connecticut which was at the time he swore to his affidavit currently investigating public relations and advertising executives suspected of making payments to Jamaican officials for the award of contracts by Jamaican Government agencies to the firms of those executives. He said he was asked to identify a number of documents and the signature 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, and he identified the plaintiff's signature on these cheques. Again no names are given, no particulars.

He says the plaintiff is a key figure in the investigations - but the fact is that the plaintiff has not been asked by the Grand Jury to testify. The article by Lisa Marie Peterson which appeared in the Advocate of Stamford Connecticut on September 16, 1987 stated that "Abrahams is not the subject of the investigation."

It is clear from Gentles' affidavit that up to the time that he swore it on the 14th January 1938, that is nearly four months after and publication of the articles in the Star/Gleaner, that the Federal Grand Jury had not concluded its hearings and its findings were not known. The basis for Mr. Gentles assertion and conclusion as a ^{mere} witness before the Grand Jury is therefore not clear.

The charge which the defendants are seeking to justify is general in nature. "But when the charge is general in its nature it is "no justification to plead simply that the alleged libel is true. That is not justification, but is merely repeating the libel" per Kay L.J. in *Zierenberg v Labouchere* [1893] 2 Q.B. (C.A.). This is emphasised in a number of cases.

"It is a perfectly well established rule in cases of libel or slander, that where the charge is general in its nature the defendant in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff [per Parke B in *Hickinbotham v Leach* 1842 10 MVW 361] in order that the plaintiff may know the case he has to meet, and what acts it is alleged have been committed which justify the general charge against him" per Kay L.J. in *Zierenberg v Labouchere* supra at page 190. "For the plaintiff cannot come to the trial prepared to justify his whole life" [*Anson v Stuart* 1787] 1 TR at p 752."

"In every case in which the defence raises an imputation of misconduct a plaintiff ought to be enabled to go to the trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged he has committed and upon which the defendant intends to rely as justifying the imputation. Wootton v Slevier [1913] 3 K.B. at p. 508."

"The plea ought to state the charge with the same precision as an indictment" Hickinbotham v Leach (1842) 10 MVW at p. 363.

"The modern practice ... demands the same precision of statement and proof as was required in times gone by" per Lord Halsbury L.C. in Wernther, Beit v Markham (1902) 18 T.L.R. at p. 764.

In Cohen v Mirror Newspapers (1965) 83 W.M. (Pt. 1) (N.S.W.) 369 it was suggested that the rule may not be so strict where the plaintiff has pleaded an article as a whole. Nonetheless it is clear from the cases and from the authorities - see for example Gatley on Libel and Slander 8th

edition paragraph 1117, that in order to support a defence of justification 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.

In the instant case these are lacking. It was suggested that the functions of the Judge in a matter of this nature is simply to find whether the words are capable of bearing a defamatory meaning and it was for the Jury to decide whether they did in fact bear that meaning.

It was also argued that the defendant can employ one of three methods in dealing with his defence:

- (i) He can plead justification and give particulars in his defence.
- (ii) He can plead justification and give particulars at a later stage.
- (iii) He can plead justification and not deliver particulars at all - leaving it for the plaintiff to seek particulars from him.

While this argument may be tenable in the ordinary case where the defendant has filed his defence in time, in a case such as the one now under consideration where the defendant having entered appearance, has neglected to file a defence within the prescribed time; where the plaintiff has a judgment regularly obtained and where the defendants are asking the court to exercise its discretion in their favour to set aside the judgment and grant leave to appeal, it behoves the defendants to put all the available facts before the court to facilitate the proper exercise of that discretion.

In so far as the defence of justification is concerned they have neglected to do so.

"When setting up a plea of justification a defendant must plead his case with sufficient particulars to enable the plaintiff to know clearly what is the case, what is the possible defamatory meaning of the words complained of, which the defendant is seeking to justify. As Ackner L.J. said in..... Lucas-Box v News Group Newspapers Ltd. [1986] 1 A. E.R. 177 at 183."

"Whatever may have been the practice to date, in future a defendant who is relying on a plea of justification must make it clear to the Plaintiff what is the case which he is setting up. The particulars themselves may make this clear, but if they are ambiguous then the situation must be made unequivocal" per Nicholls L.J. in Prager v Times Newspapers Limited 1988 1 A.E.R. 310."

"The essence of the decision in the Lucas - Box case (and here it may have broken new ground) is that the justification must be pleaded so as to inform the plaintiff and the court precisely what meaning the defendant will seek to justify per Mustill L.J. in Viscount De L' Isle v Times Newspapers Ltd. [1987] 3 A.E.R.499 at 507."

Counsel for the defendants made no application for leave to amend his pleadings so the court was left to determine the matter by exercising its discretion on the basis of the pleadings as they stand. In my judgment the plea of justification has not been established on the basis of the facts put before me.

As regards (c) of the defence that is that the defence will rely on sec. 7 of the Defamation Act.

This section provides that:

"In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of Justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

The defence has asserted as true all the words contained in the article, objected to by the plaintiff. These articles contain damaging allegations against the plaintiff the truth of which has not been established. These words in the article materially injure the plaintiff's reputation and sec. 7 is of no assistance to the defendant.

As regard the Defence of Qualified Privilege sec. 9 of the Defamation Act gives qualified privilege to newspapers in respect of certain reports and other matters which are mentioned in the schedule to the Act. The publication of the articles complained of does not fall within the protected category and this was conceded by counsel for the Defendants. The defence of **qualified** privilege it would seem rests on a common law

right to inform.

Paragraph 4 of the joint affidavit of the second defendant and Donna Smith states that all Jamaicans had an interest in knowing what is the nature of the allegations being made and what allegations involve various Jamaica Government agencies and officials, including the plaintiff as a member of the House of Representatives and a former Minister of Tourism in the Jamaica Government. Further the first and second defendants had a corresponding interest and duty to inform Jamaicans and people living in and doing business with Jamaica, and the occasions of the publication were occasions of qualified privilege.

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.

"When damaging facts have been ascertained to be true, or been made the subject of a report, there may be a duty to report them provided the public interest is wide enough but where damaging allegations or charges have been made and are still under investigation (Purcell v. Solwar) (1877 2 CPD 215) or have been authoritatively reputed (Adam v. War) [1917] A.C. 308, there can be no duty to report them to the public. Per Stephenson L.J. in Blackshaw v. Lord 1983 2 A.E.R. 327."

In the instant case where the investigations before the Grand Jury were still underway and the outcome was unknown at the time of publication there could be no duty on the part of the defendants to report the articles complained of, to the public. The defence of qualified

privilege must therefore fail.

As in Goldschmidt v Constable and Company 1937 (4) A.E.R. 294

I can only say that the particulars of justification which are set out in the defence are too vague. They are not specific and except for item (vi) which states that the plaintiff is a key figure in the investigations, they do not relate to the plaintiff personally.

"In a libel action the party who alleges that the defamatory statements are true must make out his case on the information which he had in possession at the time when the defence was delivered." Per Greer L.J. at p. 294."

I am not satisfied on the basis of the facts which have been presented to me as grounds for the exercise of my discretion, that my discretion can justifiably be exercised in favour of granting the application to set aside the judgment obtained by the plaintiff.

The allegations were published in respect of the plaintiff who as his lawyer Mr. Spaulding Q.C. told the court, is a Rhodes Scholar and a former Minister of the Government of Jamaica and a member of the House of Representatives of Jamaica. No evidence was given that the Grand Jury Investigations found that the plaintiff acted with impropriety in any way. Robin Moore the author of the damaging allegations which were published, admitted that they were mere suspicions of his. This is clear from the following extracts from the articles. "All I can say is I suspected the Minister of Tourism was exacting a toll." "I have no definitive proof that this ever happened it was just a suspicion of mine."

"I certainly had nothing to do with any kick backs, if indeed they did happen."

Reservations such as those, ought to have put the defendants on inquiry, but no doubt - and perhaps understandably so in implicit reliance on the report which they say they received from Associated Press with whom they had had a history of reliable dealings, they published the story. This was unfortunate as such reliance affords no grounds for relief in law if the story turns out to be defamatory.

The matter was compounded by the defendants refusal to publish

the plaintiffs response to the article and it was further aggravated by their "Clarification" which only served to point the accusing finger inexorably at the plaintiff.

In all the circumstances the application by the first defendant and the second defendant to set aside the Judgment entered against them in default of defence is refused and the application for leave to file a defence is also refused.

In concluding, I would like to commend Mr. Winston Spaulding Q.C. and Mr. Richard Ashenheim for the great industry displayed by them in researching the legal issues involved and making available to the court in very clear form their findings which included the latest relevant decisions.

Costs have been awarded to the plaintiff to be agreed or taxed.
Certificate for Counsel.

Leave to appeal granted.