JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 80/88

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	DR. DUDLEY STOKES	FIRST DEFENDANT/APPELLANT
A N D	GLEANER COMPANY LIMITED	SECOND DEFENDANT/APPELLANT
A N D	ERIC ANTHONY ABRAHAMS	PLAINTIFF/RESPONDENT

Winston Spaulding Q.C., Enos Grant and Miss Susan Richardson instructed by Clough, Long & CO. for Plaintiff/Respondent

Emile George Q.C. and Richard Ashenheim instructed by Milholland, Ashenheim and Stone for Appellants

February 17, 18 and March 26, 1992

ROWE P.:

On February 18 the motion for conditional leave to appeal to Her Majesty in Council brought by the plaintiff/respondent (hereinafter "the respondent") was refused for the reasons contained herein.

The respondent brought an action against Dr. Stokes and the Gleaner Company Ltd. (together hereinafter called "the appellants") for compensatory and exemplary damages for libels published in the appellants' newspaper in September 1987. A Statement of Claim was filed and served. No defence was filed or delivered and on October 23, 1987 Interlocutory Judgment in default of defence was filed. This judgment was entered on December 1, 1987. By summons dated 4th February 1988 the appellants applied to set aside the default judgment and sought leave to file a defence out of time. The summons was supported by affidavits and a draft defence for the appellants was exhibited thereto. The

respondent indicated that the applications would be opposed and filed an affidavit in reply. A further affidavit was filed on behalf of the appellants.

After a five day hearing Edwards J. dismissed the summons to set aside the judgment and for leave to enter defence. It appears that Edwards J. based his decision on the absence of particulars in the affidavit and draft defence in support of the defence of justification and of qualified privilege, and consequently that there was no arguable case to be heard and determined at trial. The Court of Appeal examined the pleadings as they related to qualified privilege and concluded that it was clear that the appellants had raised an arguable case which involved a point of law of great public importance. On the question of justification this Court said that Edwards J. was in error in treating the draft pleading as if it were his function to decide its adequacy. The Court said finally:

> "Such an important constitutional function by the courts as an adjudication on qualified privilege cannot be decided against the 'Gleaner' and its editor in Chambers, because they have failed to comply with a procedural rule. Such a decision must be made in open court, after a hearing of the evidence and application of legal principles."

Leave to appeal to Her Majesty in Council was sought under the provisions of section 110(2)(a) of the Constitution which provides that:

> "where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; ..."

The provision in section 110(2)(a) of the Constitution is not new. It is substantially the same as Rule 2(b) of the Privy Council Appeal Rules made by Order in Council dated February 15, 1909 which provided that an appeal shall lie:

> "(b) at the discretion of the Court, from any other judgment whether final or interlocutory if, in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision."

MacGregor J. in delivering the judgment of the Court of Appeal in Vick Chemical Company v. Cecil DeCordova and Others [1948] 5 J.L.R. 106 at 109 said:

> "The principles which should guide the Court have been set out in a number of cases the latest of which is Khan Chinna v. Markanda Kothan and Another [1921] W.N. 353. Lord Buckmaster delivering the judgment of the Board said:
>
> > 'It was not enough that a difficult question of law arose, it must be an important question of law. Further, the question must be one not merely affecting the rights of the particular litigants, but one the decision of which would guide and bind others in their commercial and domestic relations.' "

Mr. Spaulding referred to section 408 of the Judicature (Civil Procedure Code) Act, which stipulates that affidavits shall be confined to such facts as the witness is able to prove of his own knowledge except that in certain interlocutory proceedings an affidavit may contain statements of information and belief, with the sources and grounds thereof. Section 408 is clearly procedural and so far as I am aware no application was made to strike out as irrelevant or oppressive any portion of the affidavits filed by the appellants.

Eight questions which were said to involve questions of great general importance were filed, viz.;

"(1) Whether, in seeking to establish a defence on the merits, a Defendant newspaper and Editor seeking to rely on a Defence of Qualified Privilege on the basis of fair information on a matter of public interest must in their application to set aside a Default Judgment regularly obtained set out in their Affidavit of Merit sufficient information and circumstances on which the Defence intends to rely in order that the Judge may assess whether the particulars and circumstances are sufficient to disclose the likelihood of a meritorious Defence. And whether the Affidavit of Merit filed in support of the application contained sufficient particulars and information on which the Judge could properly conclude that the Defendant has raised a Defence on the merits based on qualified privilege, and on that basis set aside a regularly obtained default judgment.

(2) Whether, where a proposed Defence of justification is raised to set aside a regularly obtained Judgment in Default of Defence, the Affidavit of Merit, or the proposed Defence exhibited thereto, must contain the particulars of the facts on which the Defence intends to rely to prove justification, in order to enable the Court to assess the merit of the application to set aside the Judgment in default of Defence regularly obtained. And whether the extent of particularity and information contained in the Affidavit of Merit is a sufficient basis for the exercise of discretion in the setting aside of a Default Judgment regularly obtained.

(3) Whether the Affidavit of Merit complies with provisions of Section 408 of the Judicature Civil Procedure Code. And whether an Affidavit of Merit which does not comply with the provisions of the said Section 408 can constitute a proper basis for an Affidavit Merit in an application to set aside a regularly obtained default Judgment.

"(4) Whether or not the requirement that a plea of justification in a libel action must contain particulars which support the alleged plea is a matter of mere procedure or a substantive right in a Plaintiff to know precisely the case that he has to meet at a trial.

(5) Whether or not the same is true in the case of a Defence of Qualified Privilege in respect of precise facts in the impugned words, or article or other document.

(6) Whether or not on an application to set aside a Default Judgment in a libel action, a judge is entitled to refuse such an application where the admissible facts could not, in law, support a plea of justification.

(7) Whether or not in an application to set aside a default judgment, a judge is entitled to determine as a matter of law upon the facts admissible in law and or contained in an Affidavit of Merit, such facts, in law, could amount to a plea of qualified privilege.

(8) If the answer to Questions 4, 6 and 7 are in the affirmative, whether or not it is right for such judge to reject an application to set aside a default judgment."

As to the issues raised in questions 1 and 2, the gravamen of the complaint is as to the sufficiency of the particulars supplied and the duty of the judge in Chambers who is called upon to exercise his discretion whether or not to set aside the default judgment. This Court held as did Kennedy L.J. in Wootton v. Sievier [1913] 3 K.B. 499 that those questions can give rise to reasonable debate and can only therefore be resolved at trial.

Questions 4 and 5 refer to the nature of particulars in the defence of qualified privilege and of justification. It is always open to a plaintiff to request further and better particulars of the defence pleaded and if they are not supplied voluntarily or upon the order of the Court the action may be dismissed or struck out.

Mr. Spaulding relied upon a passage from Halsbury's Laws, Vol. 28 of the 4th Ed. at paras. 185 and 189 for his submission that particulars of justification and qualified privilege must be pleaded as a matter of substantive right in a plaintiff to know precisely the case he has to meet at trial. I think he is using the term "substantive right" to mean as a matter of "substantive law" and not a mere procedural rule. However, the very passage at para. 185, supra, upon which he relies puts the matter beyond a peradventure that the question is one of procedure. The learned authors of Halsbury's Laws say:

> "Justification, like fraud, should not be pleaded unless there is clear and sufficient evidence to support it. The modern practice as to pleading justification is that the defendant who justifies either an isolated or a general charge must make perfectly clear what he is justifying and what case the plaintiff has to meet."
>
> [Emphasis added]

It is self-evident that "a practice" which has not hardened into a rule of law remains a matter of procedure only. On that basis absolutely no issue of general or public importance is raised in the 4th and 5th questions in this application.

Questions 6 and 7 raise issues as to the effect of the affidavit evidence adduced by the defendant. If there is a controversy as to whether the facts sworn to in the affidavit of merits are admissible or not, that cannot be an issue for final determination at the stage of application to set aside the judgment. If it were the case that the plaintiff admitted all the facts sworn to by the defendant but argued that those facts could not in law raise a particular defence, only in the very clearest cases could the judge exercise his discretion not to set aside the default judgment. In the instant application, the posture of the respondent is that the pleaded facts are inadmissible in law for technical reasons. As I said earlier, a request for particulars could cure any defect in the

pleadings and consequently I am of the view that no question of general or public importance is raised in questions 6 and 7.

Question 8 is dependent upon the answers to questions 4, 6, and 7 and does not raise any substantive issue for determination.

I agree with the arguments for the appellants that the respondent has failed to show that a decision on any of the eight questions raised in the application for leave to appeal to Her Majesty in Council would be a guide to anyone in the future and that, as this Court has found, the issues raised are all procedural and are not part of the substantive law of the land.

Mr. George submitted that the application for leave was filed out of time and that this Court has no power to extend time for seeking conditional leave to appeal to Her Majesty in Council. Rule 3 of the Jamaica (Procedure in Appeals to the Privy Council) Order in Council 1962, provides that applications to this Court for leave to appeal shall be made within twenty-one days of the date of the judgment. This Court decided in Chas E. Ramson Limited et al vs. Harbour Cold Stores Ltd. S.C.C.A. 57/78 delivered on 27/4/82 that it has no power to extend that period of twenty-one days.

Mr. George submitted, correctly in our view, that the 1962 Order in Council is not interpretable by the Jamaican Interpretation Act but by the Interpretation Act 1889 (52 and 53 Vic. C. 63) - see section 2(2) of the Jamaica (Procedure in Appeals to the Privy Council) Order in Council 1962. There is no provision in the Interpretation Act of 1889 for extending time for doing an act if the last day falls on a Sunday, public holiday or other day when the offices of the Court are not open. In this case the 21st day fell on January 1, a day on which the offices of the Court of Appeal were not open to the public. Was the application filed on January 2, 1991 within time?

Section 8 of the Interpretation Act of Jamaica provides that in computing time for the purpose of any Act, if the last day of the period is a public holiday, the period shall extend to the following working day and section 672 of the Judicature (Civil Procedure Code) Act is to the same effect.

Mr. Spaulding submitted that the weight of authority is that if an act can only be done with the concurrence of the Court and its offices are not open on the last day on which such act ought to have been done, then the act may lawfully be done on the next day that the Court's offices are open. At para. 1135 of Vol. 45 of the 4th Ed. of Halsbury's Laws, it is stated under the rubric "Last day of period" that:

> "Subject to certain exceptions, the general rule is that, when an act may be done or a benefit enjoyed during a certain period, the act may be done or the benefit enjoyed up to the last moment of the last day of that period. ... However, where an act is required by rules of court or by any judgment, order or direction of the court to be done within or not less than a specified period before a specified date, the period ends immediately before that date."

There is a series of cases which decide that Sundays or public holidays were not excluded days because the activity which was to be performed could be done whether or not the offices of the Court were open. Viney v. Gilbert [1877] IV Ch. D. 794 (a case governed by the Bankruptcy Rules 1870). Ex parte Saffery - In re Lambert [1877] V Ch. D. 365 decided that in Bankruptcy proceedings under rules 143 and 144 of the Bankruptcy Rules 1870, the meaning of appealing was giving notice to one's adversary of one's intention to appeal by serving upon that other person a notice of appeal and unless that was done in twenty-one days the appeal was too late. It was held in Swainston v. Hetton Victory Club Ltd. [1983] 1 All E.R. 1179 by the Court of Appeal in an appeal under the Employment (Consolidation) Act, 1978 that:

> "Since presentation of a complaint to an industrial tribunal for the purposes of s. 67(2) of the 1978 Act did not require any action on the part of the tribunal a complaint could be 'presented' within s. 67(2) if it was communicated to the tribunal through a channel of communication held out by the tribunal as being an acceptable means of communication and

> "receipt of a complaint. Accordingly, a complaint could be 'presented' to the tribunal if it was posted through a letter box in the door of the tribunal's office, and since the complainant could have presented his complaint to the tribunal in that manner on Sunday, 6 December 1981, he was out of time when he presented it on the following Monday."

In Jamaica the governing rule is rule 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 which provides that:

> "Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the judgment to be appealed from, and the applicant shall give all other parties concerned notice of his intended application."

An application for leave to appeal must of necessity be filed in the Court which is being asked to exercise a discretion albeit a judicial one, whether or not to grant the application.

It is my view that, unlike the cases cited above which relate to the Bankruptcy Rules of 1870 and the Employment Tribunal Rules of 1978, it is essential for the commencement of an appeal which is governed by the Privy Council Rules, supra, that the notice of appeal should be filed in the Registry of the Court of Appeal. Service of the Notice of Appeal upon the respondent would be insufficient to institute the appeal.

In Mumford v. Hitchcocks [1863] 14 C.B.N.S. 324, 143 E.R. 485, the last day for entering an appearance to a specially endorsed writ fell on Good Friday. In holding that the defendant was not bound to enter an appearance until the following Wednesday when the offices of the Court were next open, Erle C.J. said:

> "By the terms of the 27th section of the Common Law Procedure Act, 1852, a defendant served with a specially indorsed writ is bound to appear thereto within eight days, and in default of his so doing final judgment may be signed against him. The question raised by

> "this rule is, whether, where the last of the eight days falls on one of the days when the office is closed for the Easter Holidays, the party has until the next day after the holidays to appear. I am of opinion that he has. The appearance to the writ of summons is the combined act of the court and of the party; it cannot be done by the party unless the office is open and the officer ready to receive it."

Erle C.J. went on to say that because the statute and rules of Court provide for the office of the Court to be closed on those holidays, the intervening days should be taken as being equivalent to Sundays and as days when the combined act of the Court and of the party could not take place.

In Hughes and Another v. Griffiths [1862] 13 C.B.N.S. 324; 143 E.R. 129; it was held that in the computation of time for purposes of the absconding Debtors Act 1857, where the last day fell on a Sunday or a holiday for the issuing of a capias, the act is to be done on the next practicable day.

A modern case which is of the highest persuasive authority is that of Pritam Kaur (administratrix of Bikar Singh (deceased)) v. S. Russell & Sons Ltd. [1973] 1 All E.R. 617. There the plaintiff's husband was killed at work on September 5, 1967. She issued a writ on September 7, 1970, the 5th and 6th of September being a Saturday and a Sunday. On the defendant's contention that the action was statute barred by virtue of the Limitation Act 1939, the Court of Appeal held that:

> "Where a statute prescribed a period within which an act was to be done and the act was one which could only be done on a day on which the court offices were open, the period would be extended, if the court office was closed for the whole of the last day of the prescribed period, until the next day on which the court offices were open."

Chas E. Ramson Ltd. v. Harbour Cold Stores Ltd. (supra) was not concerned with the method of computation of the prescribed twenty-one days. In the instant case the applicant is not asking for an extension of the prescribed period but is contending that that period did not expire until January 2, 1992. I would apply the principle that a person has the very last moment of the very last day of any prescribed period to do an act which he is required to do on that day, and I would apply the further principle that time is to be extended where an act, which is to be done with the concurrence of the Court and a party, cannot be done on the last prescribed day on account of the closure of the Court offices, to the instant case and conclude that the notice of application for leave to appeal to her Majesty in Council was properly filed on January 2, 1992.

The application was refused on the basis that in our view no question of general or public importance arose on the issues placed before the Court.

WRIGHT J.A.:

I agree.

GORDON J.A.:

I agree.