Privy Council Appeal No 90 of 2006

Edward Seaga *Appellant*

v.

Leslie Harper *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 30th January 2008

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Present at the hearing:-

Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Carswell
Lord Neuberger of Abbotsbury
Sir Henry Brooke

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*[Delivered by **Lord Carswell**]*

1. The appellant Edward Seaga is an experienced Jamaican politician, who at the material time was Leader of the Jamaica Labour Party ("JLP") and Leader of the Opposition. As such he was well acquainted with making statements for public consumption and using the media for obtaining the necessary publicity to give such statements wide circulation. On 2 October 1996 he made a statement at a meeting about the respondent Leslie Harper, one of the Deputy Commissioners of Police, which was widely reported by representatives of the media who were present at the meeting. The respondent issued these proceedings for

slander. The trial judge Brooks J, who heard the action without a jury, held (Record, p 145) that the words complained of were defamatory of the respondent in his office of Deputy Commissioner of Police, and this finding has not been in issue before the Board. The words spoken have not been justified nor is there a plea of fair comment. The sole defence put forward is that they were spoken on an occasion of qualified privilege. There is no plea of malice. The judge held that the appellant was not protected by qualified privilege and made an award of damages of $3,500,000. On appeal the Court of Appeal (Harrison P, Smith JA and McCalla JA(Ag)) dismissed the appellant's appeal on the issue of privilege but reduced the award of damages to $1,500,000. The appellant has appealed to the Privy Council, with the leave of the Court of Appeal, on the issue of liability.

2. The JLP organised a meeting, open to the public, to be held on 6 March 1996 at the Wyndham Hotel, Kingston. Representatives of the press and broadcasting media were present. They regularly attended such meetings and the appellant accepted in cross-examination that his party would have alerted them to the holding of this meeting. One of the topics on which the appellant spoke was the impending appointment of a Commissioner of Police in succession to the retiring Commissioner, which appointment would be made by the party in government, the People's National Party ("PNP"). In the course of his speech he said:

> "Part of the strategy is to get rid of the present Commissioner of Police, and to put in place someone whose credentials as a PNP activist are impeccable, reliable, solidly supported - a distinguished supporter of the PNP. The only difference being that he is in uniform.
>
> Mr. Harper who is considered to be the person to replace Trevor McMillan is someone who we cannot and never will be able to support, because it is re-creating the conditions of 1993 when a similar type of Commissioner was in the post who did everything to turn a blind eye in that election."

The speech was published widely throughout Jamaica in the press and on television and radio. As the appellant accepted in his answer to the 13th interrogatory administered to him, he knew when he made the speech that the media representatives were present. In his answer to the 11th interrogatory he said that it was his duty as Leader of the Parliamentary Opposition "to communicate directly with the people of this island" his party's objection to the respondent becoming Commissioner of Police. In the course of his evidence the appellant said (Record, p 115) that his

intention was to perform his duty as Leader of the Opposition and "to inform the country of the danger of appointing Mr Harper as Commissioner of Police."

3. The appellant gave the following particulars in support of the plea of qualified privilege in his defence:

> "The integrity, impartiality and independence from political influence of the police force, particularly its leadership and the conduct of the Plaintiff, a senior police officer and one of its leaders as also the importance to the holding of free and fair elections under the Constitution of vigilant and impartial enforcement of the law by the leadership of the police force including the Plaintiff, are matters of general public interest upon which the Defendant, as a Member of Parliament, Leader of the Opposition and Leader of the Jamaica Labour Party, had an interest or duty in making communication to the general public and on which members of the public had a corresponding interest in receiving communication."

In addition to his answer to the eleventh interrogatory, the appellant said in paragraph 9 of his written witness statement:

> "As Leader of the Opposition I considered it my duty to tell the people of Jamaica of my fears in that regard [viz that the respondent was a strong supporter of the PNP], and I had every reason to believe that the people of this country were interested in receiving that information."

He repeated this averment in his oral evidence, when he said in cross-examination (Record, p 115):

> "My intention was to perform my duty of Leader of the Opposition and to inform the country of the danger of appointing Mr Harper as Commissioner of Police …"

It is in their Lordships' view clear that the appellant knew and intended at the time of publication that his words should receive such wide publicity.

4. The appellant was cross-examined in some detail about the inquiries he had made before making the statement to ascertain the correctness of his facts. He said that he had received information from senior members of his party, and that many people had telephoned him to

warn him that the respondent was biased towards the PNP. He accepted their word and did not seek to question them about the foundation of their information. He declined to name his informants, as he said that the information was given to him in confidence. He did not attempt to go beyond their findings. He did not ask the Commissioner Colonel McMillan, as that would have been inappropriate, nor did he contact the respondent himself. He did not report his concerns to the Police Services Commission, as he and his party had no faith in it.

5. The defence of qualified privilege, like so many other doctrines of the common law, developed over a period of time, commencing in the 19th century, and is still in the process of development. The history is conveniently summarised in the judgment of Dunn LJ in *Blackshaw v Lord* [1984] QB 1, 33-4, drawing on the argument of Sir Valentine Holmes KC in *Pereira v Peiris* [1949] AC 1, 9. By the time of the decision of the Court of Appeal in *Purcell v Sowler* (1877) 2 CPD 215 it was assuming its recognisable modern form. It is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part of the maker to communicate them to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory, so long as they are made without malice, that is to say, honestly and without any indirect or improper motive. It is the occasion on which the statement is made which carries the privilege, and under the traditional common law doctrine there must be a reciprocity of duty and interest: *Adam v Ward* [1917] AC 309, 334, per Lord Atkinson. The development of the law is accurately and conveniently expressed in *Duncan and Neill on Defamation,* 2nd ed (1983), para 14.04:

> "From the broad general principle that certain communications should be protected by qualified privilege 'in the general interest of society', the courts have developed the concept that there must exist between the publisher and the publishee some duty or interest in the making of the communication."

6. The law has been slow to accept that a communication to the world at large, such as in a newspaper, is protected by qualified privilege. It has traditionally been held either that there is no duty on the part of the maker to publish it so widely or that the breadth of the class of recipients is too wide for them all to have an interest in receiving it: see, eg, *Chapman v Lord Ellesmere* [1932] 2 KB 431; and cf Gatley on Libel and Slander, 10th ed (2004) paras 14.6, 14.81. The submission has been advanced from time to time that the law should recognise the existence of a species

of qualified privilege founded upon a duty on the part of the maker of the statement to publish it to the world at large. This received some support from Pearson J in *Webb v Times Publishing Co Ltd* [1960] 1 QB 535, 568 and from Cantley J in *London Artists Ltd v Littler* [1968] 1 WLR 607, 619, but in *Blackshaw v Lord* [1984] QB 1 the Court of Appeal was cautious about accepting it as a general rule, while being prepared to acknowledge the existence of occasional exceptions (the examples usually given are *Cox v Feeney* (1863) 4 F & F 18, *Allbutt v General Medical Council* (1889) 23 QBD 400 and *Webb v Times Publishing Co Ltd, supra*). The germ of the idea of a privilege for reports to a wide range of readers or listeners where the circumstances warrant a finding of sufficient general public interest may, however, be seen in *Blackshaw v Lord,* a decision which merits more attention than it has hitherto received. To recognise such a defence in some form would be consonant with the principle underlying the defence of privilege, that it is in the public interest that such statements should be made, notwithstanding the risk that they may be defamatory of the subjects of the statements. Nevertheless, although attempts were made to move the law in this direction, it could not be said until the decision of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 that a defence on these lines was available to those who published defamatory statements to the world at large.

7. The plaintiff Mr Albert Reynolds is a former Irish Taoiseach, concerning whom a report was published in the British mainland edition of the Sunday Times containing allegations which the jury held were untrue. He was awarded nominal damages, and the judge held after legal submissions that the defence of qualified privilege failed. The Court of Appeal allowed Mr Reynolds' appeal and ordered a new trial. They also held that the defendants would not be able to rely on the defence of qualified privilege. The publishers appealed to the House of Lords, where their counsel argued in favour of a new category of qualified privilege, applicable to occasions of dissemination of political information (a term and a category of privilege accepted by the High Court of Australia in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520). The House rejected this submission, but unanimously agreed that the traditional ambit of qualified privilege should be extended somewhat. The basis on which their Lordships did so and the extent of the change in the law have been the subject of some debate since the decision was given, but these matters have become rather more clear since the House returned to the subject in *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 AC 359.

8. Lord Nicholls of Birkenhead, who gave the main speech, considered the essential factors of freedom of expression, the importance

of the role of the media in the expression and communication of information and comment on political matters, and the reputation of individuals as an integral and important part of their dignity. He concluded that the necessary balance between these factors could be achieved, while liberating the law to some extent from the traditional duty-interest concept of qualified privilege. He considered that the established common law approach remained essentially sound. What he proposed, with which the other members of the Appellate Committee agreed, was a degree of elasticity, adapting the common law test to afford some protection to what he described as "responsible journalism". The court is to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public.

9. Lord Nicholls set out at page 205 a number of matters to be taken into account in coming to that decision. He made it clear that the list was not exhaustive, but was illustrative only, and the weight to be given to those and other relevant factors would vary from case to case. They were to include the following:

> "(1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
>
> (2) The nature of the information, and the extent to which the subject matter is a matter of public concern.
>
> (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
>
> (4) The steps taken to verify the information.
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> (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect.
>
> (6) The urgency of the matter. News is often a perishable commodity.
>
> (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
>
> (8) Whether the article contained the gist of the plaintiff's side of the story.
>
> (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

> (10) The circumstances of the publication, including the timing."

10. Several matters have been the subject of debate since the decision in *Reynolds* was given, but the issues have to a large extent been resolved, particularly since the decision in *Jameel.* The first is the juridical status of the extension of privilege effected in *Reynolds.* Some have described it as "a different jurisprudential creature from the traditional form of privilege from which it sprang": *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2001] EWCA Civ 1805, [2002] QB 783, 806, para 35, per Lord Phillips of Worth Matravers MR, with whom Lord Hoffmann agreed in *Jameel* (para 46). Both Lord Phillips in *Loutchansky (Nos 2-5)* at para 33 and Lord Hoffmann in *Jameel* at para 46 adopted the view that the privilege in such cases attaches to the publication itself rather than, as in traditional privilege cases, to the occasion on which it is published. Others take the view that the *Reynolds* privilege is built upon the foundation of the duty-interest privilege, an opinion adopted by Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Scott of Foscote in *Jameel.* For the purposes of the present appeal the precise jurisprudential status of the *Reynolds* privilege is immaterial. What is significant is that it is plain in their Lordships' opinion that the *Reynolds* decision was based, as Lord Bingham of Cornhill said in *Jameel* at para 35, on a "liberalising intention". It was intended to give, and in their Lordships' view has given, a wider ambit of qualified privilege to certain types of communication to the public in general than would have been afforded by the traditional rules of law.

11. The second disputed matter, which is germane to the present appeal, is whether the *Reynolds* defence is available only to the press and broadcasting media, or whether it is of wider ambit. In *Kearns v General Council of the Bar* [2003] EWCA 331, [2003] 1 WLR 1357 the Court of Appeal expressed the view that it was confined to media publications. That was not, however, necessary to the decision and their Lordships are unable to accept that it is correct in principle. They can see no valid reason why it should not extend to publications made by any person who publishes material of public interest in any medium, so long as the conditions framed by Lord Nicholls as being applicable to "responsible journalism" are satisfied. Lord Hoffmann so stated categorically in *Jameel* at para 54, and his opinion was supported by Lord Scott of Foscote at para 118 and, by inference at least, by Baroness Hale of Richmond at para 146.

12. The third matter debated since *Reynolds*, and now specifically dealt with by the House of Lords in *Jameel*, is how the factors set out by Lord Nicholls in describing responsible journalism in *Reynolds* are to be

handled. They are not like a statute, nor are they a series of conditions each of which has to be satisfied or tests which the publication has to pass. As Lord Hoffmann said in *Jameel* at para 56, in the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defence may fail. That is not the proper approach. The standard of conduct required of the publisher of the material must be applied in a practical manner and have regard to practical realities: *ibid*. The material should, as Lord Hope of Craighead said at paras 107-8, be looked at as a whole, not dissected or assessed piece by piece, without regard to the whole context.

13. The trial judge in the present case held that it was governed by the *Reynolds* principles. He stated (Record, pp 151-2):

> "The scenario in which Mr. Seaga made his comments, that is, at a hotel, at a meeting open to the public and attended by the news media raises the question of the type of publication that it was. It is my view that in this context the publication is to the world at large. The national coverage afforded by media with island-wide circulation takes the occasion of this communication out of the realm of communication between persons in a specific relationship.
>
> Mr. Seaga was no longer speaking just to members of his party or to members of the public who had attended the meeting; he was addressing through the media, at least an island-wide audience.
>
> In this context it may be that a special approach is required (see *Kearns & others v General Council of the Bar* [2003] 2 All ER 534. This approach is outlined in the case of *Reynolds vs. Times Newspaper Ltd.* [1999] 4 All ER 609.
>
> The *Reynolds* case dealt with a publication by a newspaper. In the *Kearns* case Simon Brown L.J. at p 536 asserted that the *Reynolds* case applies only to media publications. I find however, that the *Reynolds* case does apply to the instant case bearing in mind the presence in the audience of the media and Mr. Seaga's realized expectation that his utterances were more than likely to be quoted to the public by the media."

In the Court of Appeal Harrison P and Smith JA held that the *Reynolds* principles could only apply to publications by the media. McCalla JA held that the judge was not correct in applying those principles, because publication by the media ought not to have been attributed to him. For the reasons which they have given, their Lordships consider that the *Reynolds* approach did apply to the present case, and that the judge was right and the Court of Appeal incorrect in this respect.

14. The judge went on to examine the publication in the light of the guidelines set out by Lord Nicholls in *Reynolds.* He considered the evidence in detail under all ten heads and concluded that in the circumstances Mr Seaga's publication of the words was not protected by qualified privilege. He was of opinion in particular as follows:

> (a) the information brought to him did not rise above mere rumour;
> (b) as he was unaware of the sources of the information the court was prevented by that lack of knowledge from determining whether or not they were reliable sources;
> (c) merely to rely on the conclusions of the thought processes of other people without demonstrating the validity of those conclusions was "inadequate at best";
> (d) the matter was not so urgent that it could not await a sitting of the House of Representatives, since Mr Seaga was unhappy with the other official channels.

The Court of Appeal agreed with the judge that Mr Seaga had not shown the requisite care to found qualified privilege. They so held on the basis that the *Reynolds* principles did not apply, but that the quality of the information was such that the appellant did not have a duty to report it to the public.

15. Mr Henriques QC argued on behalf of the appellant before the Board that the case did not fall within the *Reynolds* principles but was governed by the doctrines of traditional qualified privilege. Their Lordships consider that this was a misconceived argument. The *Reynolds* test is more easily satisfied, being a liberalisation of the traditional rules, and it is more difficult to bring a case within the latter. They are satisfied that the publication was not covered by traditional qualified privilege, for the element of reciprocity of duty and interest was lacking when the appellant knowingly made it to the public at large via the attendant media. If privilege was to be successfully claimed, it could only be under the *Reynolds* principles and, as they have said, those principles applied to the case. For the reasons given by the judge, however, with which their Lordships agree, the appellant failed to take sufficient care to check the

reliability of the information which he disseminated and is unable to rely on the defence.

16. In agreement with the conclusions reached by the judge on liability, rather than those of the Court of Appeal, their Lordships consider that the appeal must fail. They will humbly advise Her Majesty that it should be dismissed with costs and the award of damages, as reduced by the Court of Appeal to $1,500,000, affirmed.