IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. HCV 0765 OF 2005

BETWEEN	**THE HON. JOHN ISSA**	**CLAIMANT**
AND	**THE JAMAICA OBSERVER LTD**	**1ST DEFENDANT**
AND	**PAGET deFREITAS**	**2ND DEFENDANT**
AND	**TONY ROBINSON**	**3RD DEFENDANT**

IN CHAMBERS
Abraham Dabdoub and Raymond Clough instructed by Clough Long and Company for the claimant
Winston Spaulding Q.C., Charles Piper, Nadine Amos and Yualande Christopher for the defendants

June 22, July 2, 9, 14 and 28, 2009

APPLICATION TO SET ASIDE JUDGMENT – RULES 8.1 (1), 8.2, 9.1, 9.2 (1), 9.6, 12.5, 26.1 (2) (c), 69.2 - WAIVER – DEFAMATION – LIBEL - MEANING OF MALICE – EXPRESS MALICE – WHETHER MALICE MUST BE PLEADED IN LIBEL – WHETHER NECESSARY TO PLEAD "FALSELY AND MALICIOUSLY" - APPLICATION TO STRIKE OUT CLAIM

SYKES J.

1. This is an application by the three defendants to set aside a judgment in default of defence that was entered against them on October 19, 2005. The judgment was set aside and these are my reasons.

The context

2. The claim arose out of a publication of an article entitled "*Lifestyle – Race, Class to Rd*" written by Mr. Tony Robinson, the third defendant. The article was published in the Sunday Observer newspaper on January 25, 2004 by Jamaica Observer Limited ("JOL"), the first defendant. Mr. Paget deFreitas, the second defendant, was the editor in chief of the newspaper at the time of publication.

3. The following are the words that led to this claim:

> *We all witnessed the glaring spectre of racism right here when the wedding took place between Joe Issa and Asha Maglini (sic).*
>
> *The groom's family cut him off worse than a taxi in traffic, did not attend. No mother, no father, nobody. This is the year of our Lord 2004. Disgraceful. You see where people's minds are. Yet they walk among us and smile like friends.*
>
> *At times we are our own worse enemies. I heard some folks speaking about how distressed they were at how some Jamaican Hotel workers treat them.*

4. There can be no doubt that these words are in fact defamatory and since they have been reduced to a permanent form, also libelous. These libelous words, unsurprisingly, saw Mr. John Issa issuing a claim form and particulars of claim on March 23, 2005. Mr. John Issa sought compensatory, exemplary and aggravated damages. The claim form specifically asserted that the article was published "falsely and maliciously".

The procedural history

5. Mr. Festus Bell, process server, swore in his affidavit, dated May 10, 2005, that on March 23, 2005 he went to premises located at 40 – 42 Beechwood Avenue, between the hours of 4:00 p.m. – 5:00 p.m. At those premises he saw one Miss Bridgette Hardy, whom he did not know before. Mr. Bell swore that Miss Hardy identified herself to him as the personnel officer and duly authorised agent of JOL.

6. After satisfying himself of who Miss Hardy was, he served her with the claim form, the particulars of claim, the notice to the defendant, and an acknowledgement of service. He said that all these documents bore the seal of the Supreme Court of Jamaica.

7. On April 6, 2005, an acknowledgment of service was filed by all three defendants by their then attorneys at law, Brown-Hamilton and Associates. The acknowledgement of service indicated (a) that the claim form was served, (b) the particulars of claim were not served, (c) the names were properly spelt, (d) their intention to defend the claim, (e) their address was 40 – 42 ½ Beechwood Avenue, (f) their attorneys were Brown, Hamilton and Associates. At the foot of the document, it explicitly states that the acknowledgement of service was filed for all three defendants.

8. No issue was raised in this acknowledgment of service about the status of Miss Hardy and whether she could properly accept service on behalf of JOL. In fact, there was no contest over whether 40 – 42 Beechwood Avenue was JOL's business offices. Rather late in the day, JOL sought to raise these issues through additional affidavits. I rejected the affidavits on the basis that in light of the fact that for near unto four years the case proceeded on the basis that Miss Hardy could have properly accepted the documents and that 40 – 42 Beechwood Avenue was accepted to be a place at which JOL could be served, then those issues could not now be relied on to defeat a default judgment.

9. No defence was filed, and the claimant, as he was entitled to do, applied for judgment in default of defence on May 10, 2005.

10. By application dated June 16, 2005, all three defendants applied for the following orders:

    (1) The default judgment entered against the first defendant be set aside.

    (2) The defendants be granted permission to file and deliver their defence within fourteen (14) days of the date of the order.

    (3) There be such further or other relief as may be just.

11. The first paragraph of the June 16 application only applied to JOL while the other two paragraphs applied to all three defendants. Also, paragraph one is based on a misapprehension because judgment was not entered against any defendant until much later, namely, October 19, 2005. This application was set for hearing on October 19, 2005. That application was supported by affidavits filed by Miss Jacqueline Mighty, the General Manager and Financial Controller, of JOL; Mr. Paget deFreitas, and Mr. Tony Robinson.

12. The affidavit of Mrs. Mighty asserted that JOL had a defence to the claim. In support of this assertion, Mrs. Mighty exhibited a document headed "Voluntary Declaration" purporting to be signed by Miss Asha Manglani. She also exhibited a letter, dated April 13, 2005, purporting to be signed by Mr. Joseph Issa, the husband of Miss Manglani and son of Mr. John Issa. Mrs. Mighty explicitly states in her affidavit that the defence is based on the voluntary declaration and the letter of Mr. Joseph Issa.

13. I must say that if what Mrs. Mighty has said is true, that is, that the defendants are relying on these two documents, then this is not the most promising material on which to rest a defence. All that Miss Manglani has said is that Mr. Issa's sisters, Mesdames Zein and Muna Issa, were not pictures of heartfelt, unbridled, rapturous joy and delight, when they discovered that she and their brother were serious about each other.

14. Miss Manglani also indicated that Mr. and Mrs. John Issa, the parents of her husband, had not invited her to their house or elsewhere. She also stated that she was told by a manager of one of the hotel properties managed by Mr. John Issa's company told her that she was persona non grata at all properties in the hotel group. She adds that she has good reason to believe that her husband's parents spared no effort to "subvert [her] wedding plans including but not limited to discouraging persons from attending and participating in the wedding."

15. Mr. Joseph Issa, for his part, expressed an unsubstantiated opinion that the libelous article had a factual basis. He did not provide any basis for his opinion. Clearly, Miss Manglani's declaration and Mr.

Issa's opinion cannot possibly form the basis of a sound defence. Miss Manglani has not furnished one jot or tittle of evidence to support her "good reason to believe" that her present father and mother in law attempted to scuttle her wedding. At best, all that this has established is that her husband's immediate family were cool to the idea of her becoming a part of the family but it is quite a quantum leap to say that Mr. John Issa is a racist.

16. Assuming without deciding that this is the case, Mr. and Mrs. John Issa may have disapproved of her for a variety of reasons which may be quite legitimate but in the absence of further information coming from Miss Manglani and Mr. Joseph Issa, it is not quite clear what effective use could be made of these documents.

17. The significant evidence in the affidavits of Messieurs deFreitas and Robinson is that despite the fact that they were not served with either the claim form or particulars of claim they instructed their attorneys to file an acknowledgment of service.

18. I should point out that the claimant filed a second request for judgment on June 2, 2005 but only against JOL. No one acted on this request and so it does not call for further mention or consideration.

19. The next significant event is a requisition, dated August 26, 2008, from the Registrar noting that there was an issue of whether the defendants were served with the particulars of claim because the defendants stated in the acknowledgement of service that they had received the claim form but not the particulars of claim.

20. It is not quite clear why there would be an issue of service with JOL when the clear and unequivocal evidence of Mr. Bell was that he not only served the relevant documents on JOL but also had the signature of an employee of JOL acknowledging that JOL received the claim form and particulars of claim. At best, only the second and third defendants could raise the issue of non-service of the particulars of claim.

21. In response to this requisition querying service raised by the Registrar, Mr. Raymond Clough, filed an affidavit, dated September 1, 2005. The burden of the affidavit was to prompt the Registar to enter judgment for the claimant.

22. On October 18, 2005, Givans and company, attorneys for the defendants, launched a massive offensive. They filed an application asking for the orders listed below. This notice was also set down to be heard on October 19, 2005, the same date as the June 16 application. This October 18 application sought:

> *(1) an order and/or directions that the immediate procedural issues in this claim be taken together on the hearing of the applications in the Claim Nos. HCV 1306, 1374, 1408, 1456 of 2005 in such manner as indicated by the Honourable Court.*
>
> *(2) an order that no substantive steps be taken by the parties herein pending the Court's determination of the issues concerning the non-service of the particulars of claim and service on the parties of the claim.*
>
> *(3) an order and/or declaration that service of the Claim as defective and irregular by the absence of the Particulars of Claim (sic) among the documents served on the 1st defendant in a situation in which there was no actual service on the 2nd and 3rd defendants.*
>
> *(4) an order that the affidavit of service of Festus Bell filed herein be struck out as being false in stating that the Particulars of Claim (sic) was among the documents left at the office of the 1st defendant.*
>
> *(5) an order requiring the deponent Mr. Festus Bell to be cross examined on the application herein.*

(6) an order that all previous applications herein be deferred pending resolution of the issues, the subject of this application.

(7) an order directing the Registrar how to proceed in respect of any perjury found by the Court to have taken place in this Claim (sic).

23. Not all these orders were pursued at the hearing of this application. Paragraphs 4, 5, 6, and 7 were not pursued. Paragraph 1 is no longer relevant to this application.

24. The defendants amended this October 18 application in June 2009 when the matter came before me for hearing. The amendment sought this additional relief:

(1) The judgment entered in Judgment Binder No. 737 folio 8 is a nullity and/or was irregularly entered and is to be set aside.

(2) An order striking out the claim.

25. It is this October 18, 2005 application, as amended, that is before me. .

26. The June 16 and October 18 applications came before McDonald J. (Ag) (as she then was) on October 19, 2005. Both applications were adjourned to March 23, 2006.

27. On the same date that the applications came before McDonald J. (Ag), the Registrar entered judgment against all three defendants on the request for default judgment dated May 10, 2005.

28. On March 23, 2006, both applications were adjourned to a date to be fixed by the Registrar. This adjournment anaesthetised all the litigants. Everyone was immobilized for over two years. The matter

next came before the court on November 12, 2008, and adjourned to December 3, 2008.

29. On December 3, 2008, the June 16, 2005, application was withdrawn and so is no longer before me for adjudication.

The evidence

30. The defendants filed affidavits in support of their application. Miss Bridgette Hardy swore that on March 23, 2009, the process server came to JOL. He told her that he had two court documents. She states that, "I signed for the documents by signing my name on the documents. Although there were (sic) a number of papers taken by the Process Server (sic) he only selected two (2) for me to sign among the documents he carried" (see para. 4). She further stated that neither she nor the process server went through the documents. She added that signed in good faith (see para. 5).

31. Miss Hardy explains that she placed the documents that she received in an envelope and placed them in her desk drawer. She next handled the envelope on March 30, 2005. The Easter holidays intervened between March 23 and March 30. According to her, when she realised at some point that she should have received a document marked "particulars of claim", she commenced a search for this document. It was not found.

32. Mr. deFreitas filed an affidavit, dated October 18, 2005, in support of the October 18 application. He stated that although he was not served with any of the documents he cooperated by advising Brown Hamilton and Associates, to file an acknowledgement of service. His only request instruction to counsel was that the acknowledgement of service should make it clear that he had not received the particulars of claim.

33. Mr. Tony Robinson also filed an affidavit in support of the application. He explained that he was not served with any documents but he was told by counsel that he should cooperate with the process. He decided to do this and agreed to an acknowledgement of service being filed on

his behalf as long as it was made clear that the particulars of claim were not received.

34. Miss Winsome Excell, Mrs. Mighty's secretary, also filed an affidavit stating that Mrs. Mighty received the documents on March 30, 2005, because she (Mighty) was out of office between March 23 and 30, 2005. She also stated that when she received the envelope it was sealed. She also stated that the particulars of claim were not found after an extensive and exhausting search. This convinced her that it was not served as asserted by the process server.

35. Mrs. Mighty filed a second affidavit stating that a search was made for the particulars of claim but it was not found.

36. The burden of these affidavits was to establish that the particulars of claim were not served on the defendants and in particular JOL. In respect of the second and third defendants, Mr. Bell never claimed to have served the second and third defendants. He, however, insisted that he served the first defendant.

The submissions

37. Mr. Spaulding's advanced three main propositions that the judgment entered on October 19, 2005, was a nullity or irregularly entered.

38. First, the judgment was irregular or a nullity because it was entered on a defective claim. Learned Queen's Counsel was of the view that the claim for libel was not pleaded in accordance with the Civil Procedure Rules ("CPR") because the particulars of claim failed to comply with rules 8.1 (1), 8.2 and 69.2 (c). The fatal defect was that malice was not pleaded as required by rule 69.2 of the CPR. Thus, said he, no valid judgment could be entered on such a defective claim and therefore the judgment was a nullity.

39. Central to the submissions on whether malice was properly pleaded is paragraph 13 of the particulars of claim. It reads:

The Plaintiff claims exemplary damages and will rely on the following, inter alia, in proof of the said claim for exemplary/aggravated damages:

(a) The Defendant acted out of spite and with reckless disregard for the truth when they published the alleged apology which gave credence and repetition to aforementioned falsehood concerning the Claimant his wife and family originally made in the Sunday Observer on the 25 January 2004.

(b) That the aforementioned publications by the Defendants were known to be false, and were deliberately and willingly calculated by the Defendants to damage the Claimant socially and otherwise and in his business and consequently the Claimant suffered great loss and damage to his reputation and business.

(c) That the aforementioned publications by the Defendants were known by the Defendants to be false, and were deliberately and willingly calculated by the Defendants to damage the Claimant, his wife and family, individually and collectively, both socially and otherwise and in their respective business and consequently the Claimant suffered great loss and damage to his reputation and business.

40. Mr. Spaulding submitted that this paragraph fell far short of what is required when malice is pleaded. In response to this attack on the pleadings, Mr. Dabdoub submitted that malice was sufficiently pleaded even though paragraph 13 was directed at a different purpose when it was originally pleaded.

41. Second, the pending applications before the court when the matter came before McDonald J. on October 19, 2005, as a matter of law, prevented the Registrar from entering judgment.

42. Third, if this were not the case, and the Registrar had the lawful authority to enter judgment, her decision to enter judgment was erroneous because the pending applications were sufficient to deflect her from entering judgment.

43. It is now appropriate to refer to the rules cited by Mr. Spaulding. Rule 8.1 (1) (b) reads:

> *(1) A claimant who wishes to start proceedings* ***must*** *file …*
>
> *(a) the claim form; and*
>
> *(b) unless either rule 8.2 (1) (b) or 8.2 (2) applies –*
>
> *(i) the particulars of claim; or*
>
> *(ii) where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this part.* (my emphasis)

44. Rule 8.2 (1) (b) states:

> *(1) A claim form may be issued and served without the particulars of claim (or affidavit or other document required by rule 8.1 (1) (b) (ii) only if*
>
> *(a) …*
>
> *(b) the court gives permission.*

45.Rule 8.2 (1) and (2) reads:

> *(1) A claim form may be issued and served without the particulars of claim (or affidavit or other document required by rule 8.1 (1) (b) (ii) only if –*
>
> *(a) the claimant has included in the claim form all the information required by rules 8.6, 8.7, 8.8, 8.9 and 8.10; or*
>
> *(b) the court gives permission*
>
> *(2) However in a case of emergency when it is not practicable to obtain the permission of the court a claimant may issue and serve the claim form without the particulars of claim (or affidavit or other document required or permitted by rule 8.1 (1) (b) (ii)) provided that the claimant –*
>
> *(a) certifies in writing that the issue and service of the claim form is a matter of emergency, stating why; and*
>
> *(b) serves a copy of –*
>
> *(i) the certificate; and*
>
> *(ii) the application for permission*
> *with the claim form.*

46.Rule 69.2 states:

> *The particulars of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 –*

(a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; and

(b) where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, give particulars of the facts and matters relied on in support of such sense; and

(c) where the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation.

The analysis

47. Let me state clearly that I do not find any breach of rules 8.1 (1) (b), 8.2 (1) (b) and 8.2 (1) and (2) except so in relation to rule 69.2 (c) which requires malice to be pleaded in the particulars of claim, if malice is relied on, in a defamation action.

48. According to Mr. Spaulding, the particulars of claim do not comply with rule 69.2 (c), that is to say, there are no particulars of malice. He submitted that this omission to plead malice as required by the rule 69.2 (c), where malice is being relied on makes the pleading fatally defective and therefore no default judgment can properly be entered on a claim with such a fundamental defect. He submitted that the claim should be struck out and the judgment entered on the claim declared a nullity. I do not accept either of these propositions.

49. Malice is being used in rule 69.2 (c) to mean express malice. I think the problem here is that the pleader used the old formulation of "falsely and maliciously" which was a common form of pleading even if the claimant was not alleging "express malice" in the sense that that expression is understood in the tort of defamation (see claim form and para. 4 of particulars of claim).

50. Malice, in the tort of defamation, goes to the state of mind of the tortfeasor. He is said to be acting maliciously if he is motivated by spite or ill-will. Malice, in the sense just explained, was usually pleaded before the CPR, by saying that the tortfeasor, with express malice, published the defamatory words. This pleading was usually followed by particulars setting out the facts and circumstances from which it can be said that express malice can be inferred. Also this pleading came in the reply to the defence.

51. The pleader in the instant case did not give full weight to rule 69.2 (c). The rule requires that where malice in the sense of express malice is being relied on it should be stated in the particulars of claim.

52. Mr. Spaulding cited the case of ***deFreitas v Blythe*** S.C.C.A No. 43 of 2008 (delivered March 11, 2009) in support of his point that malice in the sense of express malice must be pleaded in the particulars of claim. He sought to press the case beyond its proper limits to say that the case held that improper pleading of malice made the claim a nullity.

53. In that case, the claimant in his libel action did not plead malice in the particulars of claim. He sought to raise it in the reply. The Court of Appeal held that rule 69.2 (c) required that malice be raised in the particulars of claim and not in the reply.

54. There is nothing in the judgment that said that what was pleaded as malice in the reply was not sufficient a plea of malice. All that the case decided was that malice could not be pleaded in the reply. Significantly, the case did not decide that the libel action, without a plea of malice, was not properly pleaded. Therefore to the extent that this case was being used to support the proposition that what was pleaded in the instant case does not amount to malice or that failure to plead malice meant that the claim was incurably defective, the case does not support either proposition.

55. Further, the error made by counsel in ***Blythe*** is easy to understand. Before the CPR, the claimant would allege the libel. If the defendant

raised defences such as fair comment or justification, then the claimant would plead express malice in the reply.

56. It appeared that the pleader in ***Blythe*** had consulted a recent edition of the White Book or any civil procedure text from England and Wales. If he did, he would have done exactly what he did because that is what the English texts recommend. The pleader's error was not appreciating that the English practice and procedure does not require that malice be pleaded in the particulars of claim. In England, the claimant sets out the defamatory words. If the defendant pleads fair comment or justification, then the claimant replies by pleading express malice. In Jamaica, by contrast, rule 69.2 (c) now requires that malice in the sense of express malice must now be pleaded in the particulars of claim.

57. If I am correct that malice in rule 69.2 (c) is referring to what used to be called express malice, then it would seem to me that for the future libel claims should simply use the word malice for what was known as express malice. Also as a matter of pleading, in light of rule 69.2 (c) and to avoid confusion it is perhaps desirable that pleaders omit the archaic "falsely and maliciously" and simply that that the words were defamatory of the claimant.

58. Mr. Dabdoub sought to say that the formulation "falsely and maliciously" meant that malice was pleaded. I cannot agree with this. The expression means without lawful justification as distinct from spite and ill-will.

59. In resolving the submission on this point made one has to have regard to what is a libel claim. Such a claim arises where it is alleged that the defendant has, in a permanent form, published material that lowers the claimant in the eyes of well thinking persons. Such a claim is actionable per se without there being proof of malice. Malice is not an ingredient of libel. Thus the cause of action is properly constituted if the defamatory words are in a permanent and published to persons other than the claimant.

60. An omission to plead malice in the sense of express malice does not mean that the cause of action as pleaded is defective. The very wording of rule 69.2 (c) confirms this. It does not say that a libel claim fails if malice is not properly pleaded. It only requires, that where it is being relied on then it must be pleaded in the particulars of claim.

61. Mr. Spaulding also cited the case of ***Eric Abrahams v The Gleaner*** (1994) 31 J.L.R. 1 to support the proposition the claim as pleaded in the case before me is defective and should be struck out. I have read the case. As I understand it, it is about whether the defence of justification and qualified privilege was adequately pleaded. The Court of Appeal held that it was not. In effect the court held that what was pleaded did not amount to the defences being relied on. The case before me is quite different. The claim as pleaded is legally and factually adequate to ground the libel. Malice is not required to establish the case. The ***Abrahams*** case, therefore, does not support the proposition put forward by Mr. Spaulding.

62. I therefore conclude that if malice is not an essential ingredient of libel then it must follow that the absence of a pleading of malice or if pleaded but pleaded improperly, does not prevent a default judgment being entered. I also conclude that in this case failure to plead, assuming there has been a failure to plead malice properly, does not make the claim defective, or the judgment entered on the claim a nullity as submitted by Mr. Spaulding.

63. It is my view that malice was not pleaded in paragraph 13 of the particulars of claim. It does not state the facts and circumstances on which it is being said that each defendant was actuated by malice. The claimant has not stated why he is saying that each of the defendants was motivated by malice. Malice is the absence of bona fides. There is usually no honest and genuine belief that what was said was true. This puts it plainly, I hope. A person may publish what is false but believes it to be true. If that is the case there is no malice. It is the stigma that flows from an allegation of malice, by parity of reasoning with an allegation of fraud, why particulars of facts and circumstances to ground this most serious of allegations.

64. The beguiling nature of the paragraph 13 should be noted. It seems to be a collection of commonly found expressions used when express malice is being pleaded but on careful analysis, the specific sin of each defendant is not sufficiently specified. What paragraph 13 does is to state conclusions but it does not state what facts lead to the conclusion contended for by the paragraph. To say that someone published a statement knowing it to be false is in reality a conclusion but what is required is a statement of the facts and circumstances pointing to the stated conclusion.

65. It is also well established that an employer is not fixed with the malice of his employee, by way of vicarious liability, unless it is shown that that employee was "actuated by malice in the course of his employment" (per Lord Denning M.R. ***Egger v Viscount of Chelmsford*** [1965] 1 Q.B. 248). The Master of the Rolls stated at page 248:

> *It is a mistake to suppose that, on a joint publication, the malice of one defendant infects his co-defendant. Each defendant is answerable severally, as well as jointly, for the joint publication: and each is entitled to his several defence, whether he be sued jointly or separately from the others. If the plaintiff seeks to rely on malice to aggravate damages, or to rebut a defence of qualified privilege, or to cause a comment, otherwise fair, to become unfair, then he must prove malice against each person whom he charges with it. A defendant is only affected by express malice if he himself was actuated by it: or if his servant or agent concerned in the publication was actuated by malice in the course of his employment.*

66. On reading the entire particulars of claim, there is no specific statement of facts and circumstances from which it could be inferred that Mr. deFreitas, in his capacity as editor in chief of JOL, was actuated by malice such that his malice is to be attributed to JOL.

The same applies to Mr. Robinson. In fact, Mr. Robinson is not an employee of JOL. This being so, his malice, if any cannot be attributed to JOL. JOL's malice, if any, would have to come from a different source.

67. Again, I turn to the Master of the Rolls at pages 264 – 265 in ***Egger***:

> *I cannot help thinking that the root of all the trouble is the tacit assumption that if one of the persons concerned in a joint publication is a tortfeasor, then all are joint tortfeasors. They must therefore stand or fall together. So much so that the defence of one is the defence of all: and the malice of one is the malice of all. I think this assumption rests on a fallacy. In point of law, no tortfeasors can truly be described solely as joint tortfeasors. They are always several tortfeasors as well. In any joint tort, the party injured has his choice of whom to sue. He can sue all of them together or any one or more of them separately. This has been the law for centuries. It is well stated in Serjeant Williams' celebrated notes to Saunders' Reports (1845 ed.) of Cabell v. Vaughan : "If several persons jointly commit a tort, the plaintiff has his election to sue all or any number of the parties; because a tort is in its nature the separate act of each individual." Therein lies the gist of the matter. Even in a joint tort, the tort is the separate act of each individual. Each is severally answerable for it: and, being severally answerable, each is severally entitled to his own defence. If he is himself innocent of malice, he is entitled to the benefit of it. He is not to be dragged down with the guilty. No one is by our English law to be pronounced a wrongdoer, or be made liable to be made to pay damages for a wrong, unless he himself has done wrong; or his agent or servant has done wrong and he is*

vicariously responsible for it. Save in the cases where the principle respondeat superior applies, the law does not impute wrongdoing to a man who is in fact innocent.

68. I am fully aware that Lord Denning was going against dicta from the House of Lords in ***Adam v Ward*** [1917] A.C. 309. However, I am convinced that Lord Denning's analysis rests upon better logical and analytical foundations than that of their Lordships in ***Adam***. I am free to adopt Lord Denning's views in the absence of binding authority from the Court of Appeal of Jamaica or the Judicial Committee of the Privy Council on an appeal from Jamaica.

69. At this point in our legal development we are not required to demonstrate how well we can adhere to English law since the time has long passed when it is assumed that the English solution by virtue of being English is necessarily the best solution. We are now free to examine common law concepts from all common law jurisdictions, including the United Kingdom, and if any jurisdiction has developed a line of reasoning that is coherent, logical and provides a better solution than that which comes from the House of Lords, it is difficult to see why that idea should be rejected and that of the House of accepted merely because it is stated by the House of Lords. The opinion of the House, like the opinion of other courts, is entitled to respect. Therefore if Lord Denning's reasoning is more acceptable than the dicta of the House, I cannot think of any good reason, other than the existence of binding authority, why I should not accept Lord Denning's analysis.

Was the judgment regularly entered against all three defendants?

70. I now go to the next major point raised by Mr. Spaulding. Before examining the relevant rules of the CPR I need to make a finding on this service issue.

71. In the face of clear evidence that Miss Bridgette Hardy signed the claim form and particulars of claim, Mr. Spaulding embarked on the unachievable task of trying to persuade me that I ought to conclude that there is some uncertainty over whether Mr. Festus Bell served

the relevant documents. This uncertainty was said to arise because of the following. It was suggested that the good faith and good reputation of Mrs. Mighty, Miss Hardy, Mr. deFreitas, Mr. Robinson and JOL were sufficient for me to say that Mr. Bell may have been mistaken when he says that he served the particulars of claim on JOL. According to learned Queen's Counsel, given that the defendants have displayed such commendable good faith, integrity, and have actively cooperated with the court and the claimant, to facilitate the conduct of the proceedings, the defendants, and in particular JOL would not assert that they were not served with the particulars of claim unless that was really the case.

72. In my view, the signature of Miss Hardy on the first page of the claim form and first page of the particulars of claim are items of real evidence which are only explicable on the basis that she actually received the documents. There is no other explanation with the same degree of explanatory power as that which I have just stated. Mr. Spaulding's suggestion that the process server may have been mistaken is simply not an acceptable hypothesis. It has nothing to support it but intelligent rationalization.

73. This submission must fail. I do not see how honesty and integrity can take the place of real evidence, especially when the real evidence was obtained from Miss Hardy, who expressly admits that the process server asked her to sign in two places. The evidence is all one way. Eloquence is not a substitute for real evidence. The signature on the documents has placed the non-service point beyond the reach of JOL. No one has suggested that Mr. Bell engaged in an act of forgery of the signatures and no one has suggested that the signatures are not Miss Hardy's. Indeed, during the hearing Mr. Spaulding expressly disavowed any imputation of dishonesty to Mr. Bell.

74. The fact that the officers and employees of JOL searched for the particulars of claim and did not find them, is not in my opinion, sufficient for me to say, that the particulars were not served on JOL.

75. I now go to the relevant rules of the CPR that touch and concern this question of judgment in default. The relevant rule that states the

conditions that must be satisfied before judgment for failure to defend can be entered is rule 12.5. That rule reads:

> *The registry **must** enter judgment at the request of the claimant against a defendant for failure to defend if –*
>
> *(a) the claimant proves service of the claim form and particulars of claim on that defendant; or*
>
> *(b) an acknowledgment of service has been filed by the defendant against whom judgment is sought; and*
>
> *(c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;*
>
> *(d)…*
>
> *(e) there is no pending application for an extension of time to file the defence.*

76. This rule is very plain. Once the conditions, both positive and negative, have been met, the Registrar **must** enter judgment on the application of the claimant. There is no discretion here. It is simply a box-ticking exercise. It is to be observed that rule 12.5 (a) and (b), are disjunctive. They are not joined by "and" but by "or". The claimant may prove **either** (a) **or** (b). He is not required to prove both.

77. The question to my mind is, why would the rules make provision for a default judgment to be entered merely on the filing of an acknowledgment of service without also requiring proof of service of the claim form and particulars of claim? This is an important issue in this case because Mr. Dabdoub relied heavily on the fact that Messieurs deFreitas and Robinson filed an acknowledgment of service without claiming any relief under rule 9.6 (1). According to counsel,

when they did this it was open to the claimant to request a default judgment.

78. The submission here is an intricate one and I set it out in detail. According to Mr. Dabdoub, once the acknowledgment of service is filed without praying in aid rule 9.6 (1), then even if the claim form and particulars of claim are not served then judgment in default of defence can be entered. It was on this basis that Mr. Clough was pressing the Registrar to enter judgment against the second and third defendant when he made the request for default judgment in May 2005. I agree with Mr. Dabdoub's analysis of the rules in this regard.

79. How did Mr. Dabdoub get to this conclusion? I need to go back to the case of ***Warshaw, Gillings and Alder v Drew*** (1990) 27 JLR 189. The relevant passage at page 193E – 194A is set out below.

> *It is well established that it is open to a defendant in an action to enter an appearance in it voluntarily, even though the writ in it has not been served on him, and that by doing so he waives such service. Modern authority for this proposition is to be found in Pike v. Michael Nairn & Co. Ltd. [1960] Ch. 553. That was a case of proceedings begun by originating summons which was not served on the respondent. Cross, J., said at page 560:*
>
> > *The service of the process of the court is made necessary in the interests of the defendant so that orders may not be made behind his back. A defendant, therefore, has always been able to waive the necessity of service and to enter an appearance to the writ as soon as he hears that it has been issued against him, although it has not been served on him.*
>
> *…*
>
> *It appears to their Lordships that, if a defendant in an action who has not been served with the writ*

in it can waive such service by voluntarily entering an appearance, it must follow that he can also waive such service by voluntarily taking an even more advanced step in the action than entering an appearance, such as issuing and prosecuting a summons for an order dismissing the action for want of prosecution.

80. This part of the advice was not necessary for the decision but because their Lordships heard full argument on the point, the Board felt able to give an informed view of the matter. His Lordship was speaking in the context of the Civil Procedure Code that has now been repealed, however it is clear that Lord Brandon, by referring to cases that preceded the Code was seeking to establish the major premise of his syllogism without tying it to the text of any particular civil procedure rules. His Lordship was seeking to establish a principle of general application in civil proceedings.

81. Lord Brandon made the point that it is always open to a party to civil litigation to waive service of documents. This has been so for several hundred years, regardless of the procedural rules that are extant. In my view, a litigant can waive service of documents under the CPR.

82. In addition, the CPR has rid civil procedure of the trouble some issue of conditional and unconditional appearances. The CPR has now set out a comprehensive code detailing what defendants may and can do depending on what they wish to accomplish.

83. It is time to set out the relevant rules and to analyse them, stating what they require and the consequences of certain kinds of conduct.

84. The relevant rules are 9.1, 9.2 (1) and (5), 9.3, 9.6 (1).

85. Rule 9.1 reads:

> *(1) This Part deals with the procedure to be used by a defendant who wishes to contest proceedings and avoid*

judgment in default of acknowledgment of service being obtained.

(2) Where by any enactment provision is made for the entry of an appearance, an acknowledgment of service must be used.

86.Rule 9.2 (1) and (5) provide:

(1) A defendant who wishes-

(a) to dispute the claim; or

(b) to dispute the court's jurisdiction,

must file at the registry at which the claim form was issued an acknowledgment of service in Form 3 or 4 containing a notice of intention to defend and send a copy of the acknowledgment of service to the claimant or the claimant's attorney-at-law.

…

(5) However the defendant need not file an acknowledgment of service if a defence is filed and served on the claimant or the claimant's attorney at law within the period specified in rule 9.3.

87.Rule 9.3 states

(1) The general rule is that the period for filing an acknowledgment of service is the period of 14 days after the date of service of the claim form.

(2) Paragraph (1) does not apply where

(a) The claim form is served outside the jurisdiction in accordance with Part 7; or

(b) The claim form is served on an agent of an overseas principal under rule 5.17.

(3) Where permission has been given under rule 8.2 for a claim form to be served without a particulars of claim, the period for filing an acknowledgment of service is to be calculated from the date when the particulars of claim is served.

(4) A defendant may file an acknowledgment of service at any time before a request for default judgment is received at the registry out of which the claim form was issued.

88.Rule 9.6 provides the following:

(1) A defendant who-

(a) disputes the court's jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.

(2) *A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service.*

(3) *An application under this rule must be made within the period for filing a defence.*

(4) *An application under this rule must be supported by evidence on affidavit.*

(5) *A defendant who-*

(a) files an acknowledgment of service; and

(b) does not make an application under this rule, within the period for filing a

Defence, is treated as having accepted that the Court has jurisdiction to try the claim.

89. The wording of rule 9.1 (1) is perhaps unfortunate. What it really ought to say is simply that the part applies where a defendant wishes to contest the proceedings and avoid a default judgment being entered (see for example, rule 9.1 (1) of the Barbados CPR). I say this because part 9 is not confined to avoiding judgments in default of acknowledgment of service but also applies to avoiding judgments in default of defence. When the entire part is read, it is clear that rule 9.1 (1) by stating that the part is restricted to contesting proceedings and avoiding judgment in default of acknowledgment of service is an error. If one looks at rule 9.2 (5), it permits a defendant to file a defence without filing an acknowledgment of service provided the defence is filed within the time permitted to file the acknowledgment of service.

90. Rule 9.2 (1) sets out what the defendant must do if he wishes to dispute the jurisdiction of the court. Jurisdiction is used in rule 9.2 (1) to mean two things. The first is jurisdiction in the sense of whether the court has the lawful authority to adjudicated or hear the claim at all. The second is jurisdiction in the sense of exercising the power that the court has, that is to say, the court has lawful authority to adjudicate on the claim but the defendant does not with the court to do. It is my view that jurisdiction has the same meaning in rule 9.6. It is open to a defendant to argue either or both meanings of the word jurisdiction in any particular claim.

91. Under the old rules, a defendant who wished to say that the court did not have any power to hear the claim at all would enter what was known as a conditional appearance. When he did this he was not taken as accepting that the court lawful authority to hear the claim.

92. Now that the CPR is in effect, a defendant who wishes to argue that the court has no lawful authority to hear the claim must file an acknowledgment of service **and** make an application under 9.6 (1) to that effect. This is jurisdiction in the first sense mentioned.

93. Also, if the defendant wishes to raise a jurisdiction question in the second sense he must file the acknowledgment of service **and** file an application to that effect.

94. Where a defendant has been served with a claim form and particulars of claim and all that he has done is to file an acknowledgment of service a judgment in default of defence may be entered against him.

95. If the defendant wishes to raise a jurisdiction issue he must comply with rule 9.6. Unless there is an issue of whether the court has jurisdiction over the claim or whether the court should exercise any jurisdiction it has, including entering default judgments, the court can act in accordance with its powers, either on its own motion, where the law permits this, or on the application of an appropriate party.

96. At this point in the analysis, I wish to remind us that rule 12.5 permits a judgment in default of defence where the defendant has filed an acknowledgment of service alone. As stated earlier, where an acknowledgment of service has been filed, under rule 12.5, the claimant is **not** required to prove that he served the claim form and particulars of claim. The reason for this possibility, must be because civil procedure has always permitted a defendant to waive service. In effect, the CPR is saying that once the defendant files an acknowledgment of service and does not raise an issue under rule 9.6, even if it is in fact the case that he has not been served with the claim form and particulars of claim the non-service of these documents is of no moment. The reason for this comes from the reasoning of Lord Brandon in ***Warshaw***. The purpose of service is to bring the claim to the attention of the defendant. By filing an acknowledgment of service, the defendant is saying that he knows of the claim and need not be served.

97. But what if the defendant despite having filed an acknowledgment of service wishes to forestall entry of judgment in default of defence? If he accepts that the court has the lawful authority to hear the claim, what he must do is to file an application under rule 9.6. In that application the defendant concedes the lawful authority of the court to hear the claim but he is asking the court not to exercise any

further power, such as entering judgment in default of defence. This is how part 9 and rule 12.5 operate together.

98. However, this is not the end of the story. The acknowledgment of service asks a number of question which the defendant ought to answer. In answering those questions, the defendant is not making an application under rule 9.6. Let me give an example from the instant case. Merely to say that one has not been served with the particulars of claim is not sufficient to stave off a default judgment if an acknowledgment of service has been filed. This is so because rule 12.5 permits a default judgment to be entered without proof of service of the claim form and particulars of claim once it is proved that an acknowledgment of service has been filed. The fact that a defendant was served with a court sealed document does not necessarily mean that he is making an issue of it because he may have received an unsealed copy from the claimant and therefore knows exactly what the claim is. The CPR is saying to defendants, if you file an acknowledgment of service without an application under rule 9.6 in circumstances where you have not been served with the claim form and particulars of claim, a judgment in default of defence can be entered against you.

99. Thus it is legitimate for the defendant to say in his application under rule 9.6 that he has not been served with particulars of claim or claim form (if that is the case) and so the court should not proceed to exercise any power it has. By doing this the defendant makes it clear that he is not waiving service of those documents by filing an acknowledgment of service. At the risk of repetition, saying on the acknowledgment of service that one has not received this or that document is of no import in stopping a default judgment. It is the application under 9.6 which does this.

100. All of what I have said assumes that there has been no application for extension of time to file a defence. By virtue of rule 26.1 (2) (c), a defendant may apply for an extension of time within which to do any act prescribed by the rules. The application can even be made after the time set for doing the specified act. Rule 12.5 (e) states that if there is an application to extend time within which to

file a defence then the Registrar cannot enter a default judgment. I trust that it is noted that rule 12.5 (e) does not speak to extension of time within which to file an acknowledgment of service. What this means is that if there is a request for judgment in default of acknowledgment of service and by the time the Registrar comes to act, there is an acknowledgment of service on file but it is out of time, under rule 12.5 she can still enter judgment because the pending application under rule 12.5 (e) must be an application to file a defence out of time.

101. Since nothing in part 12 states the time within which an application for an extension of time for filing a defence must be filed, this means that such an application can be made out of time because rule 26.1 (2) (c) applies. I have not seen anything in part 12 that excludes that rule explicitly or by necessary implication.

102. It seems then that the following principles are established from the interaction of the various rules cited:

> 1. the acknowledgment of service is not a mere formal document. As rule 12.5 points out, a judgment in default of defence can be entered on the filing of the acknowledgment of service even if the claim form and the particulars of claim have not been proved to have been served. This result is entirely logical and not harsh because the defendant may have waited to be served with the claim form but decided not to. If he chooses to file an acknowledgment of service without being served with claim form, he is really saying I waive my right to be served with them. Thus rule 12.5 (b) makes perfect sense;
>
> 2. where a defendant files an acknowledgment of service without making an application under rule 9.6, the fact that he has not been served with the claim form or the particulars of claim, is not a bar

to the Registrar entering judgment in default of defence on request of the claim;

3. where a defendant files an acknowledgment of service and who has not in fact been served with the claim form or the particulars of claim wishes to prevent a judgment in default of defence being entered against him, he must make a rule 9.6 application within the time required to file a defence;

4. if the defendant does not make a rule 9.6 application, he may make an application for extension of time as this is the only application other than a rule 9.6 application that can stay the Registrar's hand when the request for default judgment is made.

5. when a defendant states in his acknowledgment of service that he has not received the particulars of claim, he is simply answering a question on the claim form. Stating that one has not received certain documents is not an application under rule 9.6 and does not have the power to deflect a default judgment;

6. the only application in rule 12.5 that can stop a default judgment is an application for extension of time.

103. In this case before me much has been made of the application of October 18, 2005. To my mind nothing in the October 18 application followed the CPR. Let me make it clear that I do not accept the proposition that because the October 18 application was before the court that prevented the Registrar from entering default judgment. If this were possible then all that a defendant need to is to file any application of any kind and then claim that the Registrar cannot act. This would deprive the rule empowering the Registrar to

enter default judgment of all efficacy. This must not be allowed to happen. The request for default judgment was intended to be a simple, uncomplicated and speedy process. That is why it does not import any element of discretion. As Mr. Dabdoub says, follow the rules and difficulties are minimized.

104. The design of the rule was deliberate. It eschewed any application of discretionary power with all of the potential difficulties that that can entail. The Rules Committee did not wish the Registrar to become embroiled in controversy over whether the discretion should be exercised in this way or the other. Judicial decisions should maintain this principle.

105. Thus so far as the defendants are relying on the October 18 application as a bar to the entry of a judgment in default of defence, the submissions fail. If at the time the Registrar actually entered judgment she had only the October 18 application then in my view she would be entitled to ignore them and enter judgment.

106. It is only if there is an application to extend time within which to file a defence (see rule 12.5 (e)) or an application under rule 9.6, that her hand should be stayed. The October 18 application raised none of these issues. The alleged dispute over service was really more apparent than real. All three defendants filed an acknowledgment of service without following rule 9.6. But for the June 16, 2005, application, the judgment entered in this case would not have been set aside.

107. It is at this point that the application of June 16, 2005, assumes great importance even though it was eventually abandoned in 2008. Mr. Dabdoub stressed that the June 16 application was abandoned and so should not play any role in this case. I cannot agree. The issue is whether the Registrar could have properly entered judgment at the time she did when there was in fact an application to extend time within which to file a defence. The answer is that the Registrar ought not to have entered judgment because this application was pending. This is what makes the judgment irregular and so must be set aside.

108. To put it another way, the firm of Brown and Associates, clearly read the rules and understood their implication hence the June 16 application.

109. Paragraph 2 of the June 16 application is in substance an application to extend time within which to file a defence. This meant that rule 12.5 (e) was a barrier to the Registrar entering judgment. On this basis, the judgment was irregularly entered and so must be set aside.

Disposition

1. Judgment entered to be set aside.
2. Costs to the defendants to be agreed or taxed.
3. Claimant granted permission to amend the claim form and particulars of claim.
4. Claimant to file and serve amended claim form and particulars of claim not later than August 18, 2009.
5. The defendants to file and served defence not later than September 18, 2009.
6. Trial by judge alone
7. Trial on May 18, 19 and 20, 2010.
8. Standard disclosure of documents not later than October 2, 2009.
9. Inspection of documents not later than October 23, 2009.
10. Witness statements to filed and exchanged not later December 11, 2009.
11. Pretrial review for March 30, 2010 at 10:00 am for an hour.
12. Applications may be made during the week of December 14 to 18 2009 between 8:30 am and 10:00am.
13. Costs of case management to be costs in the claim.
14. Claimant's attorney to prepare, file and serve this order.