IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2004 HCV- 1671

BETWEEN E.C. KARL BLYTHE CLAIMANT

AND GLEANER COMPANY LIMITED DEFENDANT

Leonard Green Esq. instructed by Chen, Green & Co for the Claimant; William Panton Esq. and Ms. Cindy Lightbourne instructed by Dunn Cox for the Defendant.

Heard on the 28th and 29th of April 2010 and May 12, 2011.

Action for Libel; whether words libelous on their face or by innuendo; whether if libelous, defendant may avail itself of defence of Qualified Privilege as extended by **Reynolds v Times Newspapers Ltd**; whether apology made fulfils the terms of section 2 of the Libel and Slander Act; whether Exemplary or Aggravated Damages appropriate in this case; whether damages for libel may be updated as in the case of damages for personal injuries; quantum of damages.

ANDERSON J.

1) This is an action in libel occasioned by the publication by the defendant in its newspaper, The Daily Gleaner, on February 4, 2004, of an article on its front page entitled "Blythe's Firm Sued". In that article written by Senior Reporter, Barbara Gayle, it was reported that "Blythe's firm" was being sued by the National Housing Development Corporation (NHDC) for money borrowed by "his Company", Central Westmoreland Trust Limited (CWTL). The Claimant says this publication defamed him and so he seeks damages; compensatory, aggravated and exemplary.
2) For convenience, I set out herein the relevant data on the protagonists in this drama. The claimant, Dr. Enoch C. Karl Blythe, is a well known politician and medical practitioner from

the Parish of Westmoreland. He qualified as a doctor in 1980 and entered politics in or around 1985. Since his entry into that field, he has, on his evidence, served in varying positions in the party of his choice, the People's National Party (PNP). He has served as:-

- ❖ Vice president to comrade Howard Cooke Region 6;
- ❖ Member of the National Executive Council of the PNP;
- ❖ Parliamentary Secretary in the Ministry of Education 1992,
- ❖ Parliamentary Secretary in the Ministry of Health 1992-93,
- ❖ Minister of State in the Ministry of Health 1993-95,
- ❖ Minister of Water 1998-2000,
- ❖ Minister of Water and Housing (2000-2002),
- ❖ PNP Vice President from 1999-2006.

3) The defendant, The Gleaner Company Limited, once known as the "Old Lady of Harbour Street", (but now, since 1969, of North Street), was established in or around 1834 and its main publication, the Daily Gleaner, is one of the oldest continuously published newspapers in the Western Hemisphere. Indeed, for many decades, it was the only regularly published daily newspaper in Jamaica and was so much a part of Jamaican culture, that there are anecdotes of Jamaicans abroad who, having migrated, seeking to purchase a newspaper, would ask to buy a "Gleaner".

4) In its February 4, 2004 edition, the defendant published on its front page as the lead, a story which contained the following words now complained of by the Claimant:

> "The National Housing Development Corporation has sued **Karl Blythe's Company**, Central Westmoreland Trust Limited to recover $307 million arising from two loans in 2000. Blythe a former Minister of Water and Housing, is a **shareholder** and Director of the company.

> The loan was acquired during the period that Blythe was in office and held portfolio responsibility for housing and the NHDC…..
> The money should have been repaid after a year, becoming due in November 2001…… Notice was served on the Trust on April 30 last year to repay the loans but the National Housing Development Corporation claimed that despite its demand for full repayment, the Trust has not complied. The Gleaner was unsuccessful in its attempts to reach Dr. Blythe for comments."

5) In his submissions on behalf of the Claimant, counsel Mr. Greene submitted that the article is defamatory in that, read as a whole and given its natural and ordinary meaning, it would have conveyed to the ordinary and reasonable reader of the newspaper article, on reading the article once, that:

- ❖ Dr. E. C. Karl Blythe personally owned the company CWTL, even though that entity was a company registered by guarantee;
- ❖ Dr. E. C. Karl Blythe personally had shares in the entity and was entitled to a personal benefit as a shareholder;
- ❖ Dr. E. C. Karl Blythe caused monies to be loaned to CWTL in the amount of some Three Hundred and Seven Million ($307m) from the NHDC,
- ❖ He did so when he had Ministerial portfolio responsibility for the lending agency NHDC,
- ❖ Dr. E. C. Karl Blythe Has not repaid the loan that his firm/company received; and
- ❖ He and his firm/company had to be sued by the NHDC so as to recover this amount.

The Claimant's Case

6) The Claimant in his Claim Form and Particulars of Claim avers that on the 4th February 2004, the defendant "carelessly, recklessly and maliciously printed, published and edited, in the Daily Gleaner of that date an Article which was libelous of him". The article which was, as noted above, captioned "Blythe's Firm Sued" contained the words complained of and which have already been set out. It was alleged in the Claim Form that the words were published "knowing the said statements to be false and without belief in its truth and knowing that the same would be to the detriment of the Claimant's reputation in his professional duties as a medical doctor, a Member of Parliament and Vice President of the People's National Party in particular and the public in general".

7) It was submitted by Mr. Greene for the Claimant that the article caused people to think that:

- The Central Westmoreland Trust was a one-man company of which he was the owner.
- He borrowed money for a company owned by him from the National Housing Development Corporation (hereinafter NHDC) whilst the NHDC was under his control as Minister of Water and Housing.
- As owner he had not paid back monies that he owed to the NHDC.
- He had borrowed money for his own use and benefit in abuse of his position of Minister of Water and Housing and was not paying this back.
- He was the sole director and shareholder of the Central Westmoreland Trust (hereinafter CWT).

8) Counsel submitted that "the implication and indeed the innuendo was that he acted fraudulently and immorally and he lacked probity and integrity. His conduct was an abuse of his position .and he caused taxpayer's money to be used for his own benefit; and as a consequence of all this. He was unfit to represent the people of Jamaica and to serve the Jamaican people as he had abused his position by utilizing public funds for his own benefit".

The Evidence

9) Evidence was given by the Claimant on his own behalf and for the Defendant by the writer of the story, Ms. Barbara Gayle and Ms. Sheena Stubbs, an attorney-at-law employed to the Defendant.

The Claimant's Evidence

10) The Claimant denied that he was a shareholder in CWTL. It is not in dispute that CWTL was a Company limited by Guarantee without a share capital. The Claimant does not dispute that at the relevant time he was a subscriber and a director of CWTL. Indeed, he also claimed to have been the "initiator" of the setting up of CWTL. He averred that the offending publication caused him distress and embarrassment and lowered him in the estimation of right thinking members of society. He also said that after the publication of the article, for example when he would slow down in traffic at traffic lights, persons would jeer him and mockingly ask for some of the money he had "stolen." He was of the view that the singling out of his name in the article was a deliberate attempt to impugn his integrity and destroy his reputation, sensationalise the story and

boost sales. Further, it was his testimony that even members of his own family were affected by the reports and some were alleged to have cried, thinking that as a result of the allegations, he would be likely to end up in jail.

11) He indicated that he had not been contacted by the writer of the article and had that been done he would have been able to correct the factual inaccuracies including the allegation that he was still a director of the CWTL. He had to spend time assuring his constituents that the article was false. Some of them, having deposited money on lots in developments being undertaken in the constituency, then demanded the return of such sums.

12) The Claimant stated that on the day the article was published, he contacted the writer, Ms. Barbara Gayle and told her he "did not own the Trust" and requested a retraction. He was asked to provide documents. There is evidence that on that day the Claimant spoke to an employee of the Defendant, one Adrian Frater, at which time he sought to indicate that he did not own CWTL and was a former director of the Trust. As a consequence of the discussion between the Claimant and Adrian Frater, a subsequent article was published on page 3 of the Gleaner on February 5, 2004. That article was captioned "I do not own firm: Blythe", and is included in the bundle of agreed documents. It purported to correct errors of fact or implication (the "Correction Article"). Thus it said that the Claimant had denied that he was the "owner" of the Trust and also denied that he was still a director thereof. However, no apology was published and the Claimant then contacted his lawyers who wrote to the managing director of the Gleaner, in a letter dated

March 1, 2004 and marked for the attention of Mr. Oliver Clarke, demanding that an apology be published. The letter in the relevant paragraph provided as follows:

> We demand an immediate apology from your company on the front page of the Daily Gleaner Publication in a formant that is satisfactory to our client within seven (7) days of the date hereof. Dr. Blythe is also seeking damages from you for the injury you have caused him. May we therefore hear from you with a view to settle this matter.
>
> Your failure to respond will leave us with no choice but to commence legal action against you to recover damages on behalf of Dr. Blythe.

13) The demand letter from the Claimant's attorneys-at-law was responded to by a letter from the Defendant's Legal Advisor dated March 8, 2004. That letter. inter alia, acknowledged the receipt of the Claimant's counsel's letter; referred to the terms of the Correction Article; indicated that the basis for the information about the Claimant being a director was the records of the Registrar of Companies; acknowledged the error about the Claimant owning the Trust and asked the Claimant's counsel to prepare a draft of an appropriate apology "which would satisfy him". The letter indicated that the apology with the agreed terms would be published on page 2 or 3 of the Gleaner and concluded with the words:

> "We stand ready and willing to correct any mistake which may have occurred and to apologise for any harm which may have resulted.

14) The Claimant averred that it was not until some fifty-six (56) days later, on March 30, 2004, that the Defendant purported to publish an apology and this was placed on an inside

page, unlike the placement of the original article of which he had complained.

The Defendant's Case

15) There is no dispute as to the publication of the offending article in the Gleaner as alleged by the Claimant. The Defendant however denies that the natural and ordinary meaning of the words complained of by the Claimant is as suggested by the Claimant. It is also refuted that by innuendo the words would bear the meaning argued for by the Claimant. It was accepted that the there was the exchange of correspondence referred to above. Further, it was submitted by counsel for the Defendant that after the letter of March 8, 2004 from the Gleaner's Legal Advisor to the Claimant's counsel, a letter from the Claimant's then counsel, dated March 24, 2004 which enclosed a draft apology. The letter demanded that the draft apology with the suggested headline intact, be published on page 1 of the Daily Gleaner.

16) An apology was in fact published on page 2 of the Daily Gleaner of March 30, 2004. As pointed out in a letter dated April 5, 2004 from Ms. Jennes Anderson, the Defendant's Legal Advisor, the apology had been published on page 2 of the newspaper, consistent with its policy to publish such apologies on page 2 or page 3. The letter sought to explain that the draft from Claimant's then counsel had been published without amendment, save that the suggested headline could not be accommodated within the available space, without changing the text of the apology. It was therefore published without the headline but with a picture submitted for the Claimant.

17) That letter also stated: "We take the opportunity to again apologize to Dr. Blythe and hope that the enclosed publication of the apology submitted in his behalf represents full and final settlement of this matter". The apology published was captioned "Apology". It was in the following terms:

> "On February 4, 2004, The Gleaner published an article, "Blythe's firm sued" which intimated to the general public and readership of our paper that Dr. Karl Blythe, Member of Parliament for Central Westmoreland, a vice president of the People's National Party and a medical practitioner, was the owner and/or chief executive officer of the Central Westmoreland Trust Limited, which has been sued by the National Housing Development Corporation Limited for sums allegedly due and owing to it.
>
> The newspaper unreservedly apologises to Dr. Blythe for this error, as the company, Central Westmoreland Trust Limited is NOT owned by him, neither is he the company's chief executive officer. The facts are:
>
> - Central Westmoreland Trust Limited was legally incorporated under the Companies Act on February 12, 1993.
> - The company is limited by guarantee and does not have a share capital; that is, there are no shareholders.
> - The trust is a non-government, non-partisan, non-denominational and non-profit organization.
> - Central Westmoreland Trust was established mainly to empower persons residing or working in Central Westmoreland.
> - We do apologise to Dr. Blythe for any embarrassment and hardship experienced by him".

18) In her evidence, Ms. Barbara Gayle the writer of the article speaks to the fact that she is a Senior Staff Reporter and has been employed to the Defendant for over thirty (30) years. During that time she has specialized in investigating and reporting on matters of public interest, particularly with respect

to proceedings in the Supreme Court. She says that she became aware of the claim filed in the Supreme Court by the National Housing Development Corporation Limited against CWTL. She avers that she did a company search at the Office of the Registrar of Companies during which she discovered that the Claimant was a subscriber to the Memorandum and Articles of Association of the company as well as a director of the said company. In the course of her investigations, she obtained a copy of a letter on CWTL's letterhead which was purportedly signed by the Claimant as "Initiator" of that organization, in which letter the Claimant allegedly discussed, *inter alia*, the amount of interest owed by CWTL to NHDC. A copy of that letter was attached to Ms. Gayle's witness statement. That letter specifically refers to the intention "to work out interest owed to NHDC by CWT in addition to the $171M principal".

19) She stated in her witness statement that on February 3, 2004, the day before the article appeared, she made "numerous attempts to contact the Claimant to give him an opportunity to comment" but "the Claimant did not respond to any of my attempts". She denies that she referred to the Claimant as being the "owner" of CWTL and while she did not compose the headline, she did not accept that it conveyed the imputation that the Claimant owned the company. She also stated that she believed that the matter was one of public importance and that she had a duty to publish the allegations and the public had a corresponding right and legitimate interest in receiving the information.

20) The Defendant, for its part, through the submissions of its counsel, denies that the words used in the article are defamatory

either in their natural meaning or by way of innuendo. But it also claims that, in any event, it is protected by Qualified Privilege and that accordingly, judgment should be given in its favour. The contrary conclusion argued for by the Claimant has already been laid out heretofore.

21) Defendant's counsel refers to the meanings which the Claimant had asserted in paragraph 7 of his witness statement as being that which would be the result in the minds of persons reading the article. He submitted that it must be instructive that in cross examination the Claimant seemed to accept that in order to have the meanings suggested, each allegation would need to be prefaced by the words "Karl Blythe's Firm".

22) In dealing with meaning, counsel cited the Jamaican case **Bonnick v Morris and the Gleaner Co. Ltd.** [2002] UKPC 31 and submitted that the approach enunciated by Lord Nichols of Birkenhead therein, is that which should commend itself to this court and would demonstrate that the court should not accept the pejorative meanings argued for by the Claimant. In that case, his Lordship stated:

> "As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarized by Sir Thomas Bingham M.R. in **Skuse v. Granada Television Ltd.** [1996] E.M.L.R. 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the Sunday Gleaner reading the article once. The ordinary reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and also, too literal an approach."

23) It was submitted that an ordinary person would know that a company is a "separate legal entity and cannot be owned by an individual". It was further submitted that it was clear that the heading did not mean that the Claimant owned CWTL any more than speaking of "Bill Gates' Microsoft" or "Richard Branson's Virgin Atlantic". In any event, so it was argued, it was clear from the rest of the article that the author was stating what was factually recorded in court documents and the burden of those allegations was the debt, (on the basis of the pleadings in the claim which she had seen, and other evidence), owed by CWTL to NHDC. In his submission, the article amounted to no more than a a faithful report in respect of proceedings filed. He said:

> All the Article means is that NHDC is saying that CWTL took loans and has failed to repay them. The present case is therefore within the principle in **Cadam v Beaverbrook Newspapers Ltd.** [1959] 1 All ER 453, namely, that a defence of justification could be supported by a plea that the Defendants had merely stated truly that a writ had been issued and its contents was an arguable question.

24) Counsel said that given the admitted, and up to then continuing, relationship between the Claimant and CWTL, the allegation of a default on a loan by this organization and the fact that the alleged lender was an institution under the portfolio responsibility of the Claimant at the material time, the ordinary reasonable reader would be expected to understand no more than that the Claimant was connected with CWTL. Further, citing Lord Nichols in Bonnick, counsel submitted that:

> " … The defamatory imputation, while a matter of importance, cannot be regarded as approaching anywhere near the top end of a scale of gravity. The public is well

aware that from time to time senior managers are made scapegoats."

25) With respect to the statement that the Claimant was a "shareholder" in CWTL, it was submitted that this was an easily made mistake given the fact that the Claimant was a "subscriber" and was clearly associated with the company. Moreover, says counsel, the article did not say or suggest that the Claimant had ever received dividends or any payment from the company.

Claimant's Response to the Submissions of the Defendant

26) The Claimant, as has already been noted, submitted that the natural and ordinary meaning of the words were, and would lead ordinary right thinking people to the view that: -

- Central Westmoreland Trust Limited
- I had borrowed money
- I had not paid back the money
- I had borrowed the money
- I was the sole director
- I had not complied with the requests for repayment
- I acted fraudulently
- I had abused my position
- I was unfit to represent the people

27) The Claimant's counsel submitted that, using the definition of meaning in the passage from Bonnick cited by the Defendant above, the words are capable of the meaning which the Claimant alleges and would be so interpreted by the public. But, I also understand the submission to be that the words must be seen in the context of allegations of corruption which were rife at the material time.

28) En passant, it is worth noting that while judges must faithfully and carefully observe the rules which dictate the matters of which judicial notice may be taken, it ought not to be thought that they are unaware of what is happening in the society in which we are called to serve. Nonetheless, it seems questionable, in the course of submissions to assert, without any clear evidence having been adduced, that all this was taking place about the time the "Jamaica Labour Party had launched its campaign against the governing PNP on the basis that the People's National Party, with which Blythe was affiliated, as an officer serving as vice-president, was a corrupt government and indeed, their policies were rife with scandals. It is within that context that the ordinary reader, "reading the article once," in particular the headline "Blythe's Firm Sued" and the part of the article which states that "Karl Blythe's Company" can be given one and indeed the only one meaning that the apostrophe "s" conveys, that is that of ownership". Even more dubious is that the submission is made as part of the broader submission that the article cost the Claimant the election to the office of president within his party, and the possibility of becoming head of the Government for which no objective evidence was led.

29) In the unreported case of **Dennis Chong v The Jamaica Observer Limited** HCV 0000 of 2008, Mangatal J. provided a very useful and instructive analysis of the issues which arose in that case and which is relevant in this case. The issues which need to be canvassed here are meaning, Qualified Privilege and the **Reynolds** defence as now clarified and explained in the later cases and section 2 of the Libel and Slander Act. I shall look at these issues in turn.

30) **Meaning.**

Kodilinye, ("Commonwealth Caribbean Tort Law, 4th Edition", page 229) states:

"In order to succeed in a defamation action, the plaintiff must establish:

a) That the words were defamatory;

b) That they referred to him; and

c) That they were published to at least one person other than the plaintiff himself".

With respect to b) and c) above there is no dispute in the instant matter. The only outstanding issue of the three set out above is, therefore, (a), the meaning of the words. As the learned author noted, "There are two distinct stages in the exercise of determining whether words are defamatory. In the first place the judge must decide whether the words complained of are capable of being defamatory and then he must decide whether in fact they are". He also noted that Bollers J. in **Ramsahoye v Peter Taylor and Co. Ltd**. [1964] LRBG page 329 at page 331 adopted the dictum of Camacho C.J. in **Woolford v Bishop** [1940] LRBG 93 at page 95 where he had said:

> "On this aspect of the case, the single duty which devolves on this court in its dual role is to determine whether the words are capable of a defamatory meaning and, given such capability, whether the words are in fact libelous of the plaintiff. If the court decides the first question in favour of the plaintiff, the court must then determine whether an ordinary, intelligent and unbiased person reading the words would understand them as terms of disparagement, and an allegation of dishonest and dishonourable conduct. The court will not be astute to find subtle interpretations for plain words of obvious and invidious import".

31) The approach to determining meaning which the above citation suggests is refined and restated in the quotation by Lord Nichols of Birkenhead in **Bonnick v Gleaner Co. Ltd. and Morris** cited above. There his lordship had stated:

> "……..the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the Sunday Gleaner reading the article once. The ordinary reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and also, too literal an approach.

Kodilinye, in his book cited above, continues:

> "Where the words are clearly defamatory on their face, a finding that they are capable of being defamatory will almost inevitably lead to the conclusion that they are defamatory in the circumstances. But where the words are reasonably capable of either a defamatory or a non-defamatory meaning, the court must be decided on what the ordinary reader or listener of average intelligence would understand by the words".

32) In looking at the words which constitute the article in the instant case, I have formed the view that they are not defamatory in their "natural and ordinary meaning". To say that a person is "sued" or even that a person's "company" is sued, is not on the face of it defamatory. Even where words are not clearly defamatory, on their face, however, a claimant may still allege an *innuendo*. Innuendoes are characterized as being of two types: (a) true (or legal) innuendo; and (b) false (or popular) innuendo. While it is not necessary for the purposes of this judgment to go into the details of the

differences, I accept that there is here, a basis at least to consider whether a false innuendo arises. This is where there is a defamatory inference that reasonable persons might draw from the words themselves. According to Kodilinye, in a false innuendo, the words are taken to be defamatory on their face, and, unlike in the true innuendo, there are no special facts or circumstances known to persons to whom the words are published.

33) En passant, it should be noted that, as Kodilinye states, it is of no relevance in deciding whether words are defamatory, that there was no intention to use the words in a defamatory sense. See **Carasco v. Cenac**, [1995] Court of Appeal OECS Civil Appeal No: 6 of 1994, per Byron J.A. It may be of some relevance, however, in considering the extent of damages to be assessed. I accept that the approach to be used for the word "meaning" is as appropriately set out by Lord Nicholls in **Bonnick** (supra). See also the discussion of "single meaning" in **Charleston and Another v News Group Newspapers Ltd.** [1995] 2 AC 65 discussed further on in this judgment.

34) The Defendant's counsel has submitted that the Claimant's case should fail, either because (a) the words in their natural and ordinary meaning were not defamatory or because the defence of Qualified Privilege was available to it. I have already indicated that in my view the words are not, in their natural and ordinary meaning, defamatory. However, I believe that taken as a whole, the article is capable of being defamatory.

Exercising my jury function, I would also hold that the words are in fact defamatory by reason of the fact that there is a clear imputation of impropriety on the part of an organization of which the Claimant was, not just the public face but an integral and important part, enough for it to be described as “Blythe’s Firm”. With respect to the Defendant’s counsel’s submission, I would disagree that it is not an analogous situation to say that if one speaks of “Blythe’s party”, one does not mean he is the leader of the party. For, to use the examples proffered by Defendant’s counsel, where one speaks of “Bill Gates’ Microsoft” or “Richard Branson’s Virgin Atlantic”, or “Butch Stewart’s Sandals”, one is indeed speaking of persons who are so intimately identified with a company and so dominant in the perception of who the company is, that the company is rightly treated as being the alter ego of the individual. Even a reader of the Gleaner “not avid for scandal” could, in my view, reasonably have read the article in this way. I accordingly have come to the view that the article, taken as a whole is clearly capable of being defamatory.

Qualified Privilege

35) The Defendant’s counsel has pleaded that the words in the article are true in their natural and ordinary meaning, and also that they are protected by qualified privilege. It has been demonstrated by the evidence adduced herein that it was not true that Blythe was a “shareholder” either in fact or in law of the CWTL. Accordingly, I would also hold that the headline referring to “Blythe’s Firm” is an incorrect statement of fact. It is useful to note this but not necessary to deal with this further.

36) I now turn to the question of qualified privilege as the Common Law has developed this defence.

Historically, the defence of qualified privilege was available to defeat a claim for defamation where it was shown that the publication took place on a "privileged occasion". In this regard, there is Lord Atkinson's much quoted dictum from **Adam v Ward** [1917] AC 309, 334. There his lordship had said:

> "... a privileged occasion is ... an occasion where the person who makes a communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

The defence in those circumstances could only be defeated by a finding of malice on the part of the tortfeasor.

37) The law protects the freedom to speak one's mind as long as it is not done in a defamatory and dishonest manner that negatively impacts on the individual whom the statement is about. The recent development of this area of the law has been informed by two important principles underlying the concept of constitutional democracy. These are, respectively, the right of freedom of expression and the right to protect one's reputation. Freedom of expression is, of course, guaranteed by section 22 of the Constitution of Jamaica. That provision was the subject of comments by Lord Nicholls in **Bonnick v Morris and Others**, supra, where he said at paragraph 16:

> "……..section 22(1) of the Constitution of Jamaica guarantees freedom of expression. This is subject to the limitations set out in section 22(2). Nothing contained in

any law, or done under the authority of any law, shall be held to be inconsistent with or a contravention of section 22 to the extent that the law makes provision on certain specified matters. One of these matters is a provision "which is reasonably required … for the purpose of protecting the reputations, rights and freedoms of other persons". In the **Reynolds** case the House of Lords held that the law relating to qualified privilege as declared in that case was consistent with article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). Although the wording of article 10 is not identical with the wording of section 22 of the Constitution of Jamaica, their Lordships are of the view that the law relating to qualified privilege as declared in **Reynolds** is, likewise, consistent with section 22 of the Constitution. The wording of section 22 is different from article 10, but in this context its effect is the same.

38) The counterweight to the public interest element is therefore protection of one's reputation as that is also of immeasurable importance. Indeed, As Lord Nicholls himself said in **Reynolds** at page 201 A-C:

> "Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."

39) The evolution of this defence, particularly as it now affects newspaper publications, has seen the defence morph into a whole new paradigm where it has been declared to be a "different jurisprudential creature from the traditional form of privilege from which it sprang" (See per Lord Phillips M.R. in **Loutchansky v Times Newspapers Ltd.** Nos 2-5) [2001] EWCA Civ. 1805. [2002 GBQ 783). Indeed, as noted by Lord Carswell in Privy Council Appeal **Seaga v Harper** (UKPC 90 of 2006) at paragraph 5, it is "still in the process of development". His Lordship continued:

> "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."

40) In the instant case, although the pleadings of the Defendant do not specifically and in terms, refer to the "Reynolds defence", the submissions on behalf of the Defendant are largely informed by that defence as it has now developed. It is in the context of **Reynolds** that this case has to be considered, particularly in light of the fact that two cases from this jurisdiction, **Bonnick** and **Seaga**, have figured in that development and its clarification. In that regard, I agree with Mangatal J's view expressed in **Chong** that although not pleaded, as it represents a development of the Common Law, it must be considered.

41) Lord Carswell in **Seaga** suggested that the beginnings of the development of what has become the "Reynolds defence" may be seen in the case of **Blackshaw v Lord**, [1984] 1 QBD 42, a case which he says, "merits more attention than it has hitherto received" as it "provided 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". It therefore set the foundation for the recognition of the public interest as an element to be considered in terms of privilege. As the learned law lord put it:

> "……..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".

42) In **Blackshaw**, in which the Court of Appeal rejected a claim to generic protection for a widely stated category, 'fair information on a matter of public interest' Fox L.J. referred to a principle stated by Pearson J. in **Webb v. Times Publishing Co. Ltd**. [1960] 2 Q.B. 535, 570:

> "As the administration of justice in England is a matter of legitimate and proper interest to English newspaper readers, so also is this report [of foreign proceedings] which has so much connection with the administration of justice in England. In general, therefore, this report is privileged."

He said:

> "I think that states the principle rather too widely. It is necessary to a satisfactory law of defamation that there should be privileged occasions. But the existence of privilege involves a balance of conflicting pressures. On the one hand there is the need that the press should be able to publish fearlessly what is necessary for the protection of the public. On the other hand there is the need to protect the individual from falsehoods. I think

> there are cases where the test of "legitimate and proper interest to English newspaper readers" would tilt the balance to an unacceptable degree against the individual. It would, it seems to me, protect persons who disseminate any untrue defamatory information of apparently legitimate public interest, provided only that they honestly believed it and honestly thought that it was information which the public ought to have." (See **London Artists Ltd. v. Littler** [1968] 1 W.L.R. 607, 615).

43) The nascent recognition of the importance of public interest as it related to the role of qualified privilege in the law of defamation was eventually to find fuller expression in the decision of the House of Lords in **Reynolds v Times Newspapers Ltd** [2001] 2 AC 127 where it was finally recognized that a defence on these lines was available to those who published defamatory statements to the world at large. It is this interplay between the public interest/freedom of expression and protection of reputation that is at the heart of the Reynolds defence, and I adopt Mangatal J's view, in **Chong**, that the law as it evolved in the subsequent cases, is now part of our law in this jurisdiction.

44) In **Reynolds**, Lord Nicholls summarised the background giving rise to the suit in the following terms.

> "The events giving rise to these proceedings took place during a political crisis in Dublin in November 1994. The crisis culminated in the resignation of Mr. Reynolds as Taoiseach (prime minister) of Ireland and leader of the Fianna Fáil party. The reasons for Mr. Reynolds' resignation were of public significance and interest in the United Kingdom because of his personal identification with the Northern Ireland peace process. Mr. Reynolds was one

> of the chief architects of that process. He announced his resignation in the Dáil (the House of Representatives) of the Irish Parliament on Thursday, 17 November 1994. On the following Sunday, 20 November, the 'Sunday Times' published in its British mainland edition an article entitled ‘Goodbye Gombeen Man’. The article was the lead item in its world news section and occupied most of one page. The article was sub-headed 'Why a fib too far proved fatal for the political career of Ireland's peacemaker and Mr. Fixit'. On the same day the Irish edition of the 'Sunday Times' contained a three page article headed 'House of Cards' concerning the fall of the Government. This article differed in a number of respects from the British mainland edition.
>
> Mr. Reynolds took strong exception to the article in the British mainland edition. In the libel proceedings which followed, Mr. Reynolds pleaded that the sting of the article was that he had deliberately and dishonestly misled the Dáil on Tuesday, 15 November 1994 by suppressing vital information. Further, that he had deliberately and dishonestly misled his coalition cabinet colleagues, especially Mr. Spring, the Tanaiste (deputy prime minister) and minister for foreign affairs, by withholding this information and had lied to them about when the information had come into his possession. The author of the article was Mr. Ruddock, the newspaper's Irish editor.”

His lordship at the commencement of his judgment in the House of Lords also said:

> “This appeal concerns the interaction between two fundamental rights: freedom of expression and protection of reputation. The context is newspaper discussion of a matter of political importance. Stated in its simplest form, the newspaper's contention is that a libelous statement of fact made in the course of political discussion is free from liability if published in good faith. Liability arises only if the writer knew the statement was not true or if he made the statement recklessly, not caring whether it was true or false, or if he was actuated by personal spite or some other improper motive. Mr. Reynolds' contention, on the other hand, is that liability may also arise if, having regard to the source of the information and all the circumstances,

> it was not in the public interest for the newspaper to have published the information as it did. Under the newspaper's contention the safeguard for those who are defamed is exclusively subjective: the state of mind of the journalist. Under Mr. Reynolds' formulation, there is also an objective element of protection."

45) Early in his judgment, Lord Nicholls, in discussing the defence of qualified privilege in the law of defamation, in my view, indicated why he thought that it was opportune to look more closely at the defence in order to more fully address in a legitimate and objectively valid way, the competing interests which must be served in a modern democratic society. He said:

> The common law has long recognised the 'chilling' effect of this rigorous, reputation protective principle. There must be exceptions. At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority.

He was at pains to point out that the underlying rationale for the defence of privilege was to be found in public policy. But as he stated in the course of his judgment:

> "The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century."

46) His lordship in **Reynolds** firmly rejected the invitation of the defendant Times Newspapers Ltd to develop another category of privilege which specifically related to "political information" on the basis that it would not provide adequate protection for reputation. Instead his lordship said:

"…… it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern."

47) He thereafter set out a non-exhaustive list of ten factors which should inform the court's decision in determining whether a matter should be considered of "public interest" sufficient to attract the defence of privilege. He said:

"Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

(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.

(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."

48) It was in this seminal case, therefore, that the principle of the availability of privilege for reports to a wide range of readers and listeners was finally concretely accepted. It was to find acceptance shortly thereafter in **Loutchansky** (supra) in the UK Court of Appeal, and has been specifically approved in **Bonnick v Morris, The Gleaner Company Ltd and Allen** and **Jameel and Others v Wall Street Journal Europe Sprl** [2005] E.W.C.A. Civ 74. It is to be noted, as Lord Hoffmann later observed in **Jameel**, the factors listed by Lord Nicholls "….are not tests which the publication has to pass. 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". They are instruments to assist the court to determine whether the standard of "responsible journalism" has been attained.

49) According to Lord Carswell in **Seaga**, what the Appellate Committee attempted to do and did, in **Reynolds,** was to liberalize the concept of privilege by giving it a "level of elasticity", adapting the common law test to provide some protection for what may properly be referred to as "responsible journalism". In this regard, "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". It is true that Lord Phillips in **Loutchansky (No 2-3)** para 33 and Lord Hoffmann in **Jameel** at para 46 have expressed the view that the privilege as now extended by **Reynolds**, relates to the publication. At the same time, others, (Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Scott of Foscote in the **Jameel** case), have held to the view that it is still grounded in the historical duty/interest privilege.

50) In any event, as Lord Carswell said at paragraph 10 of **Seaga**, and which is equally applicable to the instant case:

> "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 paragraph 35, on a "liberalizing 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."

51) I would hold that there can be no doubt in light of the pronouncements of the Judicial Committee of the Privy Council in the subsequent cases of **Bonnick** and **Seaga** and the House of Lords in **Jameel**, that the **Reynolds** defence, however characterized, is good law in Jamaica. In that regard, I accept the dictum of Mangatal J at paragraph 42 of **Chong**.

> "……the issues should be analysed based on the principles of the common law as developed in **Reynolds** and as discussed by Lord Nicholls in our own local case of **Bonnick v. Morris and the Gleaner**. It is clear that in Jamaica we have accepted the developments in the area of libel law, specifically in the arena of qualified privilege as

delineated in **Reynolds,** and therefore it is those common law principles which should be applied, irrespective of how the case has been pleaded".

52) If further support for the proposition that **Reynolds** is now good law in this jurisdiction, it may be found in the following dictum of Lord Hoffmann at paragraph 57 of **Jameel**:

> "In my opinion it is unnecessary and positively misleading to go back to the old law on classic privilege. It is the principle stated in **Reynolds** and encapsulated by Lord Nicholls in **Bonnick** which should be applied."

In a similar vein are the words of Lord Scott in the **Jameel** case where his lordship said:

> "In my opinion, this appeal presents an opportunity which your Lordships should take to confirm that the approach taken in **Bonnick v Morris** was an approach which accords with the principles expressed by the House in **Reynolds***".*

53) According to Lord Scott, what Reynolds did was to supplement "the touchstone of reciprocal interest and duty" in order to provide the protection of qualified privilege where the circumstances warranted that protection, to statements published to the world at large. It is, therefore, using the principles or guidelines suggested by Lord Nicholls in **Reynolds** that the court must determine the issue of whether the article which is being called into question falls within the description of responsible journalism.

54) In considering the applicability of the law to the instant case, it is necessary to start by considering, to the extent relevant, the factors which Lord Nicholls had suggested as

being relevant in **Reynolds**, and which I have already set out above.

(1) The seriousness of the allegation.

In the instant case, while the allegations in the body of the article were largely true insofar as it purported to faithfully reproduce the pleadings in the NHDC against CWTL case, there were some incorrect assertions that the Claimant was a "shareholder" of CWTL or that it was "Blythe's Firm". The imputation to be drawn by the "ordinary reasonable reader" is that the Claimant, by virtue of his position, facilitated the extending of credit to the benefit 'his' company in the form of a loan and 'Blythe's firm' had now to be sued by NHDC for the money. However, that imputation which I have held arises from the tenor of the article, while serious, is not, in my view, of the greatest gravity.

(2) The nature of the information, and the extent to which the subject matter is a matter of public concern.

Again I find myself in agreement with the assessment of Mangatal J at paragraph 35 of her judgment in **Chong** that:

> "……[t]he question of the proper functioning of public officials in government departments and questions of transparency, efficiency, competence, financial prudence and accountability in relation to expenditure of public funds are in my view clearly matters with which the public would have legitimate and justifiable concern."

I would hold that in the instant case, the subject matter of the article in question which focuses in the behaviour of a minister of

government in his official position is undoubtedly a matter of public interest.

(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.

The source of much of the information for the article was the court documents filed in the Supreme Court and/or the records of the Registrar of Companies. The evidence discloses that at the time the article was written; only the Claim Form and Particulars of Claim had been filed. The Defence which would have provided details of CWTL's response had not been filed and this may have been the basis for greater care on the part of the Defendant in relying on the Court documents. It should, nevertheless, be noted that while the Claimant disputes the averments in the cited pleadings, no issue was taken with the fact that the records referred to herein, which are public, were indeed the source and have been accurately followed.

(4) The steps taken to verify the information.

The writer of the article, Barbara Gayle, stated that she made several attempts to contact the Claimant before the article was published, but without success. There is no reason to doubt her testimony in this regard.

(5) The status of the information. The allegation may have already been the subject of an investigation which commands respect.

The information was, at the very least, available to those members of the public who wished to view the files at the Supreme Court. On the other hand, the imputations which arise

could only have been drawn by someone who had made the connection between the court documents and the documents in the Registrar of Companies.

(6) The urgency of the matter. News is often a perishable commodity.

There does not appear to have been any real urgency that the article be published on the day it was. While some news may be perishable there is nothing in the instant case to point to the view that a delay of a day or two to canvass the response of the Claimant would have made any difference to the impact of the story.

(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.

As noted above, the writer indicated that she did make several attempts to contact the Claimant to elicit a comment from him on the proposed article, but without success. The article was then submitted for publication in order to meet publication deadlines.

(8) Whether the article contained the gist of the Plaintiff's side of the story.

While the offending article in question did not contain the gist of the Claimant's side of the story, the subsequent story published by the Defendant after discussions with the Claimant, did contain his denials.

(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.

The tone of the article itself was not in my view, unduly sensationalist, but it is fair to conclude that the fact that it was the lead story for the day and the nature of the banner headline which was attached to it, was intended to, and did add some titillation and hence interest which could enhance the damage if any, done to the Claimant.

(10) The circumstances of the publication including the timing"

The circumstances of the publication, or perhaps more correctly, the context in which it appeared, was one in which there was a general concern about the perceived level of corruption in Jamaica and the extent to which it was existing at all levels of the society. The issue of possible corrupt or inappropriate and self-serving behaviour was certainly a very present one in Jamaica in 2004.

Availability of Reynolds Defence

55) In the very recent United Kingdom Court of Appeal case, **Flood v Times Newspapers Limited** [2010] EWCA Civ 804, the preliminary issue ordered to be tried before the judge, Tugendhat J. at first instance, was as to the validity of the defence of qualified privilege. There, as in the instant case, the alleged libel took the form of publication in both the print media and on the Internet. Lord Neuberger MR pointed out that the **Reynolds** defence draws no distinction between publication in the print media and on a website, and I make no such

distinction here. At paragraph 18, he took the opportunity to explain again, adopting dicta of Lord Hoffmann in **Jameel**, (that case described by Tugendhat J., in words adopted by Lord Neuberger MR in the Court of Appeal as, "*the most recent and authoritative statement of the law in relation to Reynolds public interest privilege")* what was the effect of **Reynolds**. He noted that the judge at first instance in that case, had adopted counsel's submission that:

> "……..the effect of Lord Hoffmann's explanation of **Reynolds** privilege in **Jameel** [2007] 1 AC 127, was that it required: ……..that the article as a whole should be on a matter of public interest (at [48]), that the inclusion of the defamatory statement should be part of the story and should make a real contribution to it (at [51]), and that the steps taken to gather and publish the information should have been responsible and fair (at [53]). In regard to this last requirement, the following summary in ***Bonnick v Morris*** [2003] 1 AC 300] was expressly approved by Lords Hoffman and Scott in ***Jameel*** (at [57] and [136]):
> (Per Lord Nicholls at para 23 of Bonnick) 'Stated shortly, the *Reynolds* **privilege** is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. ***Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals.*** Maintenance of this standard is in the public interest and in the interest of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.'" (Emphasis Mine)

It is my understanding from the dicta of Lord Neuberger in **Flood**, according to the submission adopted by Tugendhat J and implicitly accepted by the learned Master of the Rolls in **Flood**, that what Lord Hoffmann may be interpreted as having done in **Jameel**, is to have distilled from the non-exhaustive list of ten

(10) factors set out by Lord Nicholls in **Reynolds**, three (3) factors to be present to determine whether there had been "responsible journalism" which concept defined the limits of the availability or applicability of this defence. These were a) that the article as a whole should be in the public interest; b) that the defamatory statement should be a part of the story and make a real contribution to it as a whole and c) that the steps taken to gather and publish the information should have been responsible and fair. As Lord Nicholls had said in **Bonnick**, responsible journalism must find the balance between the right to comment freely on matters of public importance on the one hand and concern for the reputation of individuals on the other. Where that balance is found, the otherwise defamatory article will be able to avail the defendant of the **Reynolds** defence.

The Public Interest

56) As I have noted above, in agreeing with the dicta of my learned sister Mangatal J., the behaviour of elected officials, and a fortiori, that of cabinet ministers, in relation to agencies which are within their portfolio responsibility, is without doubt a matter of public interest. It must also be remembered, as Lord Hoffmann said at para 49 of **Jameel**:

> "The question of whether the material concerned a matter of public interest is decided by the judge. As has often been said, the public tends to be interested in many things which are not of the slightest public interest and the newspapers are not often the best judges of where the line should be drawn. It is for the judge to apply the test of public interest."

He continued at para 50:

> "In answering the question of public interest, I do not think it helpful to apply the classic test for the existence of a privileged occasion and ask whether there was a duty to communicate the information and an interest in receiving it. The **Reynolds** defence was developed from the traditional form of privilege by a generalisation that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House having made this generalisation, it should, in my opinion, be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist.

57) I believe and so hold that, whether a Minister of Government had had some, at least informal involvement with a company in which he had some "interest", (I use that term in a non-technical, non-corporate sense), which company had borrowed large sums of money from a state agency for which the minister had portfolio responsibility is, almost by definition, a matter of public interest. This is so especially where there is a widespread perception of corruption at various levels in Jamaica.

58) Although the question of whether a matter is in the public interest, the Court must also be cognizant of the dictum of Lord Hoffmann at paragraph 51 of **Jameel**. There his lordship had said:

> "But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is

> often a matter of how the story should have been presented. And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting."

The Court must therefore be alive to the need to make the distinction so as not to cross over the line to editorial control. That determination is one which is relevant for the Court in the instant proceedings where, in my view, the libelous imputation arises largely because of the screaming headline and the fact that this was the paper's lead story which has been disseminated both locally and overseas.

The inclusion of the Defamatory statement

59) The question of the effect on the article which passes the public interest test but does contain defamatory material was addressed by Lord Hoffmann in **Jameel** at para 51. He said:

> "If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article."

60) In the classic case, there is some particular averment or statement which is found to be defamatory in meaning towards the Claimant. In such cases, the court must decide whether the inclusion of that material in the story makes a real contribution. In the instant case, there is no "statement" about the Claimant which in its natural and ordinary meaning is defamatory on its face. The defamation arises by virtue of the imputations implicit in the story. Nevertheless, to the extent that the article mentions the Claimant and purports to set out the terms of the pleadings in a case in the Supreme Court, such statements, from which the imputations arise, would seem to be necessary and integral to the article.

61) The article does contain a factual inaccuracy in that it alleges that the Claimant was a "shareholder" in CWTL, an impossibility given that CWTL was a company limited by guarantee. It seems to me that much of the gravamen of the Claimant's complaint arises from this factual inaccuracy as well as the banner headline of the article which described CWTL as "Blythe's firm". In this regard, the following citation from Lord Bingham of Cornhill at paragraph 34 of **Jameel** is relevant:

> "But difficulty can arise where the complaint relates to one particular ingredient of a composite story, since it is then open to a plaintiff to contend, as in the present case, that the article could have been published without inclusion of the particular ingredient complained of. This may, in some instances, be a valid point. But consideration should be given to the thrust of the article which the publisher has published. *If the thrust of the article is true, and the public interest condition is satisfied, the inclusion of an inaccurate fact may not have the same appearance of irresponsibility as it might if the whole thrust of the article is untrue*."

62) I am of the view that whether the inaccurate fact is to be considered to be of importance, is to be determined within the context of the principles of responsible journalism. In the instant case, while the statements that the Claimant was a shareholder in CWTL and that "Blythe's firm" was sued are inaccurate, they are not of such gravity as to provide an overwhelming case for concluding that there is an "appearance of irresponsibility". Finally, with respect to this aspect of the analysis, the comment of Lord Hoffmann at paragraph 62 of Jameel is apposite and must be borne in mind:

> "The fact that the defamatory statement is not established at the trial to have been true is not relevant to the **Reynolds** defence. It is a neutral circumstance. The elements of that defence are the public interest of the material and the conduct of the journalists at the time."

Responsible Journalism

63) As is accepted, it is an essential part of the analysis of the **Reynolds** defence that the article should stand the test of "responsible journalism", a determination as to which is for the Court to make. I accept that the non-exhaustive list of the ten factors articulated by Lord Nicholls, provides a useful background against which to consider this principle. I have already considered these in turn above and made some brief comments as they may be considered to affect the instant case. But, I also note that Lord Hoffmann at para 58 of **Jameel** stated:

> "I therefore pass to the question of whether the newspaper *satisfied the conditions of responsible journalism*. This may be divided into three topics: (1) the steps taken to verify the story, (2) the opportunity given to the **Jameel** group to comment and (3) the propriety of publication in the light of US diplomatic policy at the time." (Emphasis Mine)

64) In the instant case, the questions of verification and opportunity to comment overlap. The writer of the article indicated in her evidence that she was aware of the suit filed in the Supreme Court by the NHDC. Indeed, she had taken the opportunity to check the court files from which she was able to extract the particulars of the suit against CWTL. She also contacted and interviewed Mr. Joseph Shoucair, the attorney-at-law for the claimant NHDC about the law suit which had been filed and had also researched the records of the Registrar of Companies in order to verify the status of the company and its directors. Those records indicated that Claimant, at the material time, remained a director of the CWTL although it was now his evidence that he had resigned as a director prior to the date of the article. Ms. Gayle's evidence is that there was no record of that at the Registrar's office. It is also not in dispute that the Claimant remained on the official letterhead of CWTL, identified as its "initiator".

65) She further testified that she had made several attempts to contact the Claimant in order to get his comments on the story which she was writing. She was unsuccessful and she submitted the story, bearing in mind the publication deadlines, which article was then published without having secured "the gist of" the Claimant's views. It is not in dispute that the

headline placed on an article is not the work of the writer. Defendant's counsel also points out that on the day after the offending publication appeared, and as a result of a conversation between the Claimant and a representative of the Defendant, the Gleaner had published a follow-up article which purported to present the Claimant's side of the story.

66) In this regard, the Defendant's counsel's submissions state:

> "……. as at the date of publishing, the Defendant was in fact a director of CWTL, a fact which was clearly stated in the body of the article and continued to play a leading role in CWTL's affairs. CWTL was "initiated" by the Claimant in 1993, 4 years after he became a Member of Parliament. This fact was so important to him that it was carried on the letterhead of the Trust, in addition to the fact that he is a director. The sole purpose was to identify in the minds of people, his close association with the Trust. Further, in evidence the Claimant agreed that he was the public face of the Trust, but not the only one".

I am not sure that the Claimant's role in the affairs of CWTL may properly be described as a "leading role". However, in the agreed documents there is some evidence that there was correspondence between the Claimant and NHDC in respect of the purported loans by the NHDC to CWTL. For example, there is a letter from the Claimant dated December 20, 2003 to the NHDC in which the Claimant, signing as "initiator" on the CWTL's letterhead states:

> "At that time we will be in a better position to assess whether or not the balance owed by allottees as well as unsold lots would adequately meet CWT's obligation to NHDC. *Should we determine that there is a shortfall,*

CWT will instruct its lawyers to give you the undertaking as it relates to the Blue Castle proposed lots". (Emphasis Mine)

67) It is necessary to make the following observations. Firstly, there is no corporate position within an operating company known as "initiator" which would allow a person, not acting in an executive capacity, to write in the terms in which this letter is written. Secondly, there is an implicit, and indeed overt, acknowledgment that there is a financial obligation owed by CWTL to NHDC otherwise there would be no need for an undertaking from CWTL's attorneys. This acknowledgment is in direct contrast to the evidence of the Claimant who in his oral examination rejected any suggestion that there had been any loan made from NHDC to CWTL and which was outstanding.

I have already spoken to the question of the source of the information and whether the nature of the source would have led to an apprehension that there may have been a need to confirm the allegations contained therein and I do not intend to rehash that here.

Malice

68) Counsel for the Defendant has, in his submissions, pointed out that the Claimant has not pleaded malice and that such must be strictly pleaded and proven. Indeed, Part 69.2 of the Civil Procedure Rules does state that the claimant must state that the words were published maliciously. It is my view that such a submission is misconceived because, as Lord Hoffmann said in **Jameel**, where **Reynolds** applies, it is no longer

necessary to carry out the "two-step" examination of "duty and interest" and "absence of malice". The concept of malice is now to be considered in the context of whether the article represents "responsible journalism". As he said at paragraph 46:

> "If the publication is in the public interest, the duty and interest are taken to exist. The **Reynolds** defence is very different from the privilege discussed by the Court of Appeal in **Blackshaw v Lord** [1984] QB 1, where it was contemplated that in exceptional circumstances there could be a privileged occasion in the classic sense, arising out of a duty to communicate information to the public generally and a corresponding interest in receiving it. The Court of Appeal there contemplated a traditional privilege, liable to be defeated only by proof of malice. But the **Reynolds** defence does not employ this two-stage process. It is not as narrow as traditional privilege nor is there a burden upon the claimant to show malice to defeat it."

69) Williams and Skinner ('A Practical Guide to Libel and Slander", page 179) have summarised malice in the following terms:

> "1) The fact that the defendant did not believe the words were true is usually conclusive evidence of malice;
>
> 2) If the Defendant published the words recklessly, without considering whether they were true or not, he will be treated as if he knew they were false; but mere carelessness, impulsiveness or irrationality will not suffice to prove malice; and
>
> 3) Even an honest belief in the truth of the words will not save a Defendant who can otherwise be proved

to have had some dominant improper motive for publishing them…"

In the instant case no evidence has been presented of the Claimant having any personal vendetta against the Claimant.

Court's Decision

70) The Court accepts that the matter upon which the article sought to comment was a matter of public interest. In my view, it is not correct to say, as the Claimant's submission asserts that:

> The issue for this court is not so much as to whether the contents of the article is a matter of public interest but whether the "whole thrust of the article was true" in so far as the conclusion that the ordinary reader would have come to having read to the article once regarding the conduct of the public official in lending his "firm/company…$307 million" at a time when he had ministerial portfolio over the lending agency.

Rather, with respect, the issues are whether the publication as a whole is defamatory as understood by the ordinary reasonable reader of the Gleaner and, if it is, it is a matter of public interest in which the Defendant has exercised the principles of responsible journalism so as to avail itself of the Reynolds defence. The Court is therefore cognizant of the fact that the determination as to whether the article, if otherwise defamatory, should be considered as protected by Reynolds defence, depends upon an assessment of whether it lived up to the principles of responsible journalism as determined by the court. There is a balancing act here which the Court must exercise in coming to a decision.

The Headline / The Lead Article

71) Before setting out the decision at which I have arrived in light of the principles canvassed above, I wish to consider one other circumstance in this case in light of a case decided in 1995 in the English House of Lords. I have hitherto expressed the view that the gravamen of the Claimant's complaint arises by virtue of the banner headline which wrongly characterized CWTL as "Blythe's Firm" and the Claimant as a "shareholder" which may have conveyed the imputation that the Claimant may have had a financial or pecuniary interest in the company and that company may have benefited from an arrangement with a state agency for which the Claimant then had portfolio responsibility. It may be considered that the sting of the libel, if such it is, arises largely because of these features.

72) **Charleston and another (Appellants) v. News Group Newspapers Limited and another (Respondents)** [1995] 2 AC 65, was a case in which the defendant newspaper had published an article with a headline and illustrated by photos. (The case is not on all fours with the instant matter but it is nevertheless instructive). There the plaintiffs complained of the meaning which they said was conveyed to a publishee who read the headline and looked at the picture, but did not read the article. The question for the court was whether the publication could bear two meanings: one for that group of readers who read the headline and looked at the pictures, but did not read the article, and a second meaning for publishees who read and looked at all three, the headline, the pictures and the article.

73) It was held that a plaintiff in defamation proceedings may not arbitrarily split off different parts of a publication without good reason. A potentially defamatory photograph was accompanied by text which should be read with it. It was accepted that the obviously defamatory headline and photographs were neutralized by the accompanying text. Lord Nicholls delivered himself of the following dicta:

> "Newspapers get thicker and thicker. The News of the World published on 15 March 1992 contained 64 pages. Everybody reads selectively, scanning the headlines and turning the pages. One reader, whose interest has been quickened by an eye-catching headline or picture, will pause and read an article. Another reader, with different interests or less time, will read the headline and pass on, leaving the article unread. What if a headline, taken alone or with an attached picture, is defamatory, but the text of the article removes the defamatory imputation? That is the question of law raised by this appeal. At first sight one would expect the law to recognise that some newspaper readers will have seen only the banner headline and glanced at the picture. They will not have read the text of the accompanying article. In the minds of these readers, the reputation of the person who is the subject of the defamatory headline and picture will have suffered. He has been defamed to these readers. The newspaper could have no cause for complaint if it were held liable accordingly. It has chosen, for its own purposes, to produce a headline which is defamatory. It cannot be heard to say that the article must be read as a whole when it knows that not all readers will read the whole article. To anyone unversed in the law of defamation that, I venture to think, would appear to be the common sense of the matter. Long ago, however, the law of defamation headed firmly in a different direction. The law adopts a single standard for determining whether a newspaper article is defamatory: the ordinary reader of *that newspaper*".

74) The logic of the foregoing, which I adopt here, is that merely because the headline may convey a defamatory imputation, will not in and of itself determine whether an article is to be considered defamatory. The article must of course be read as a whole or, as it has been put, "the bane and the antidote must be taken together".

(I wish to note, en passant, the comment made by the Defendant's counsel in response to the submission of the Claimant that "meaning" is to be considered in terms of the "ordinary, reasonable Jamaican reader". It was submitted for the Defendant that the passage in Bonnick cited by the Claimant ought not to be so interpreted. The underlined section in the passage above would suggest that the interpretation suggested by the Claimant is probably correct).

75) In the case under consideration, (**Charleston**) Lord Nicholls also continued:

> "This is not to say that words in the text of an article will always be efficacious to cure a defamatory headline. It all depends on the context, one element in which is the lay out of the article. Those who print defamatory headlines are playing with fire".

The proper approach therefore always requires the Court to determine the single meaning which the work as a whole conveys to the notional "ordinary, reasonable reader". As Lord Bridge of Harwich stated in the same case:

> "Whether the text of a newspaper article will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question ..... and will

> depend not only on the nature of the libel which the headline conveys and language of the text which is relied on to neutralise it, but also on the manner in which the whole of the relevant material is set out and presented."

76) His lordship also quoted the following words from **Duncan and Neill on Defamation**:

> "In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage."

77) I have cited the above to reinforce the proposition that notwithstanding the banner headline of the offending article and the inaccurate statement of fact, the court must nevertheless consider the whole article and the single meaning to be attributed thereto. As will be apparent from the foregoing, **Reynolds** has forever changed the proper approach to be adopted in determining whether a publication, whether in a newspaper or on the Internet, is to benefit from protection of the law.

78) As Tugendhat J said at para 122 of **Flood** at first instance, in dicta seemingly approved by the Court of Appeal in the same case (per Lord Neuberger M.R):

> "In **Reynolds v Times Newspapers Ltd** [2001] AC 127 the House of Lords reconsidered the weight which the law accords to protection of reputation and freedom of the press, and redressed the balance in favour of greater freedom to publish matters of genuine public

interest: **Jameel v Wall Street Journal Europe Sprl** [2007] 1 AC 359 paras 35 and 38."

Similarly, Lord Neuberger M.R. at paragraph 40 of Flood said:

> "And, as Lord Bingham of Cornhill put it in **Jameel** [2007] 1 AC 359, paragraph 28, **Reynolds** [2001] 2 AC 127 "carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues."

79) **Flood** (supra) was a case in which the Court did have to weigh the public interest against the responsibility of the journalism. There, a newspaper report of a police investigation into the conduct of the Claimant was the product of responsible journalism on a matter of public interest and so was protected by the **Reynolds** privilege. However the failure of the Defendant to report the Claimant's exoneration by the Independent Police Complaints Commission rendered the continuing publication of the original report irresponsible and so not the subject of the privilege.

80) It must be borne in mind that the ten (10) factors articulated by Lord Nicholls "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" (per Lord Carswell at paragraph 10 in **Seaga** supra), the failure at any one of which would make the privilege unavailable. Thus, for example, **Jameel** provides an example where the failure of an article in respect of one of Lord Nicholls tests, did not deprive the publication of being able to rely on **Reynolds** privilege. In his judgment, Lord Bingham of Cornhill, at paragraph 35 said:

> "…….. the Court of Appeal upheld the judge's denial of **Reynolds** privilege *on a single ground, discounting the jury's negative findings concerning Mr Dorsey's sources: that the newspaper had failed to delay publication of the respondents' names without waiting long enough for the respondents to comment*. This seems to me, with respect, to be a very narrow ground on which to deny the privilege, and the ruling subverts the liberalising intention of the Reynolds decision. The subject matter was of great public interest, in the strictest sense. The article was written by an experienced specialist reporter and approved by senior staff on the newspaper and The Wall Street Journal who themselves sought to verify its contents. The article was un-sensational in tone and (apparently) factual in content. The respondents' response was sought, although at a late stage, and the newspaper's inability to obtain a comment recorded. It is very unlikely that a comment, if obtained, would have been revealing, since even if the respondents' accounts were being monitored it was unlikely that they would know. It might be thought that this was the sort of neutral, investigative journalism which **Reynolds** privilege exists to protect. I would accordingly allow the appeal and set aside the Court of Appeal judgment. (My emphasis)

81) It seems to me that in the instant case, the Defendant failed overall to observe the principles of responsible journalism sufficient to be able to rely on the **Reynolds** defence. While the author was not responsible for the banner headline which captioned the story, the Defendant's headline was, in my view, sensational and compromised the public interest which the story fulfilled. I have also come to that view that the headline was specifically drafted to attract maximum attention. In addition, it was factually incorrect to state that CWTL was "Blythe's firm". Further, the factual inaccuracy that he was a

"shareholder" exacerbated the defamatory nature of the article. But perhaps of equal importance, no evidence has been adduced as to why publication of the article could not have awaited consummation of the efforts to secure the Claimant's comments.

Nevertheless, I do believe that in considering the issue of the damages to be awarded against the Defendant, it is also relevant to consider the Defendant's behaviour between the time of publication of the defamatory article and the filing of the claim. In that regard, the Court has been referred to section 2 of the Libel and Slander Act and this is considered below.

Section 2 Libel and Slander Act

82) This provides as follows:

> "In any action for defamation, it shall be lawful for the defendant (after notice, in writing, of his intention to do so, duly given, to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence in mitigation of damages, that he made, or offered, an apology to the plaintiff for such defamation before the commencement of the action or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such an apology."

83) Defendant's counsel recounts evidence which chronicles events which purport to outline the response of the Defendant to the Claimant's stated displeasure at the publication of the article. It was pointed out that as a result of a discussion between an employee of the Defendant and the Claimant, a follow up publication was done to comply with the Claimant's

wishes on February 5, 2006, reporting the Claimant's statements and comments on the Article.

84) There was a subsequent exchange of correspondence between the Defendant and the Claimant's then attorneys-at-law, Crafton Miller and Company, the terms of which have been set out above. It ended with the publication of an apology (also set out above) and a letter from the Defendant explaining why the apology had been published without the heading suggested by the Claimant.

85) It was the submission of Defendant's counsel that the publication of the Claimant's response on February 5, 2004 together with the subsequent apology following the lawyer's letter met fully the criteria set out in **Nail v. News Group Newspapers** [2004] EWHC (QBD) 893 where the court said (in a passage also cited by the Claimant's counsel):

> " ... There is no point in endlessly haggling over or niggling about size or location of the publication of an apology. ... I believe that the important elements of the apology are that it was published quickly after the proceedings and that it was relatively eye catching".

86) On the other hand, Claimant's counsel submitted that the manner in which the Defendant had offered to publish the apology and the delay of fifty-six (56) days in publishing were inconsistent with any sincerity. The invitation to submit the terms of an apology with which the Claimant would be satisfied was inappropriate, although he does not suggest what approach would properly satisfy the Claimant. Further, he says, it ought not to be accepted as capable of mitigating any damages.

Moreover, it was submitted that it was, in any event, also inconsistent with the **Reynolds** defence. He characterized the defence of the Defendant as saying "We did nothing wrong".

87) I believe that this is a mis-characterization of both the Defendant's and the **Reynolds** defence. The Defendant has not sought to plead justification nor has there been any insistence upon the correctness of any fact subsequently proven or admitted to be incorrect. I hold that the Defendant, in the circumstances of this case, may rely upon the apology offered by virtue of the provision in section 2 of the Libel and Slander Act, and I shall accordingly take it into account in mitigation in consideration of damages to be awarded to the Claimant herein as is discussed .

DAMAGES

88) Murphy, (**'Street on Torts'**, 12th edition, page 568-569), in language which I adopt, says:

> "The main function for the tort of defamation is to compensate the Claimant for his loss of reputation: that is, the extent to which he is held in less esteem and respect, and suffers loss of goodwill and association. Damages for this loss of reputation are at large in respect both of libel and slander actionable *per se*...compensation may be given for insult or injury to feelings. In addition, circumstances of aggravation and mitigation are important..."

The Claimant has, indeed, suffered some damage. According to his evidence, his reputation has been negatively affected as some persons have, after the publication of the article, perceived him in a negative light. It is for the Court to decide the amount of compensation to which the Claimant is entitled based on the

imputations reasonably to be drawn from the publication of the article. The extent of those damages will depend upon the Court's views as to the extent of injury to the person's feelings including aggravating factors; the extent of the publication and mitigating factors.

Injury to Feelings

89) It is clear that a claimant is entitled to compensation for injury to his feelings. He contends that this publication has caused him stress and embarrassment. He further avers that he was distressed as people jeered him asking him for some of the money that he "tief", and that his family members cried and feared he would be incarcerated. In **McCarey v Associated Newspapers Limted** *(No.2)[*1965] 2QB 86 at 104, Pearson LJ in dealing with the elements of damages stated:

> "Compensatory damages…may also include the natural injury to his feelings- the natural grief and distress which he may have felt at having been spoken of in defamatory terms……..."

Extent of the Publication

90) The extent of publication is relevant to the question of the quantum of damages. The article complained of was published in a local newspaper which is also posted on the Internet and so was accessible to a wide audience including the Jamaican Diaspora. While this may be a quantitative factor to be taken into consideration, I would deduce from the dicta of Lord Neuberger in **Flood** (supra) that it is not a qualitative factor which would result in the exclusion of the Reynolds defence.

Mitigating Factors

91) **Duncan and Neil, "Defamation**", at page 137 lists the main factors to be taken into consideration, as mitigating factors to reduce the damages. These include:

(1) the reputation of the plaintiff;

(2) the behaviour of the plaintiff towards the defendant and in the action;

(3) any apology tendered by the defendant;

(4) other facts negativing malice on the part of the defendant;

(5) sums received by the plaintiff in respect of similar publications.

For the purposes of the instant claim, it needs only be stated that according to the evidence, the Claimant seemed to have enjoyed a good reputation prior to the publication. It must be remembered, however, that evidence by the Claimant about the feelings of his relatives or indeed, other members of the public, is hearsay evidence, as no witness was brought to testify as to their response to the article. There is, further no basis for the submission by Claimant's counsel that the article caused the Claimant to lose the election for the presidency of the People's National Party. Indeed, as was pointed out in the Defendant's submission, that election did not take place for some two years after the publication. Nor is there any empirical data to support the proposition that he was later denied a cabinet post because he was identified by The Gleaner as owing money to the NHDC. Such an appointment is entirely within the prerogative of the Prime Minister at the time such a nomination is to be made.

92) As far as the second mitigating factor is concerned, nothing turns in this case on any behaviour of the Claimant towards the Defendant. However, the Court takes account of the fact that a follow up article was published within days of the original publication, aimed at providing the Claimant's side of the story. Moreover, an apology was published in the Defendant in terms submitted by the Claimant's then attorneys-at-law. That apology sought to clarify the Claimant's status vis-à-vis the company, CTWL, in an effort to mitigate some of the damage done to the Claimant by the original article. While the Claimant contends that the apology did not come early enough, it is clear from the correspondence that at all material times there were on-going exchanges between the parties in an attempt to resolve the differences. In my view the fact that an apology was published, especially one in conformity with section 2 of the Libeland Slander Act, is to be considered as a mitigating factor when assessing the damages.

93) Finally, I should note that based upon the evidence adduced, I can find no indication of malice on the part of the Defendant. This therefore is also a factor in reducing any award of damages.

Special Damage

94) I wish to dispose firstly of the matter of special damages as part of the claim of the Claimant. "Clark and Lindsell on Torts" [17th Edn. p. 1144] states that "the special damage required in an action for slander not actionable per se *must*

involve the loss of some specific thing or temporal advantage capable of being estimated at a money value." (My emphasis) In **The Gleaner Company and Dudley Stokes v. Eric Anthony Abrahams** Privy Council Appeal No. 86 of 2000, the claimant was able to show that he suffered a loss of earnings and incurred expenditure for medical treatment for depression resulting from the publication of the libelous statement by the defendant. There is no evidence of special damage in the instant case and none has been claimed or proven.

Aggravated and Exemplary Damages

95) The Claimant in the instant case has also asked the Court to award him aggravated, exemplary as well as compensatory damages if the Court finds in his favour. Having considered all the circumstances, I have formed the view that there is no legitimate basis to make an award of aggravated or exemplary damages. My conclusion is based upon the following.

Aggravated Damages

96) Though Lord Devlin first clearly analysed the concept of "aggravated damages" in compensatory terms in **Rookes v Barnard**, [1964] AC 1129, there has continued to be some confusion about whether aggravated damages have a punitive or quasi-punitive function.

According to the England and Wales Law Commission in its report **"Aggravated, Exemplary and Restitutionary Damages"** ([1997] EWLC 247(2) (16 December 1997).

> Although the precise meaning and function of aggravated damages is unclear, the best view, in accordance with Lord Devlin's authoritative analysis in **Rookes v Barnard**, appears to be that *they are damages awarded for a tort as compensation for the plaintiffs mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum*. (My emphasis)

97) It is also clear on authority that, particularly in defamation actions, the conduct of the defendant and his legal advisors after the commission of the tortuous act may give provide a basis for an award of damages to be increased. In the case of **Sutcliffe v Pressdram Ltd** [1991] 1 QB 153 Nourse L.J. gave the following examples:

> "... failure to make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the plaintiff from proceeding; persistence, by way of prolonged or hostile cross-examination of the plaintiff or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself in a manner calculated to attract further wide publicity; and persecution of the plaintiff by other means".

98) The authorities suggest that in order to be eligible for aggravated damages, the facts must satisfy the "exceptional conduct test" which requires the court to focus its attention primarily on the nature of the defendants conduct rather than the extent of the plaintiffs injury, and to determine that such conduct merits an enhanced award of damages.

99) In **Thompson v MPC** [1997] 3 WLR 403 the Court of Appeal used the label "aggravating features" (causing injury to feelings) to refer to the circumstances in which an aggravated damages award was justified in addition to a basic compensatory award.

There does not appear to me on the evidence elicited, to be circumstances which lead me to the view, on a balance of probabilities, that the Defendant's conduct was exceptional, although, by definition, the libel caused "injury to feelings".

Exemplary Damages

100) With respect to the claim for "exemplary damages" I have likewise concluded that there is no basis for such an award.

It is clear from the authorities that exemplary damages are only to be awarded where the court is satisfied that the damages given as compensatory damages including, where necessary, aggravated damages, are not sufficient to compensate the claimant for his loss and injury. In **Rookes v Barnard** (supra) Lord Devlin also articulated the circumstances in which such damages could be awarded. His Lordship said that based upon a study of the authorities there were only three categories of cases in which such an award could be made. These are:

a) Where there was "oppressive, arbitrary or unconstitutional action by the servants of the government". He opined that this did not extend to private corporations.
b) "Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff."
c) A third category in which exemplary damages are expressly authorised by statute.

101) In **Rookes** Lord Devlin, at p 1228 of the report, had drawn attention to the difference of purpose of compensatory damages and punitive or exemplary damages. He said:

"In a case in which exemplary damages are appropriate, a jury should be directed that *if, but only if*, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."

102) This characterization of the law on exemplary damages and in particular the "if, but only if" test has been fully accepted as a correct statement of law. See for example the case of **Kuddus (AP) v Chief Constable of Leicestershire Constabulary** [2001] UKHL 29 (June 7, 2001) where the dicta of Lord Devlin were cited with approval by Lord Slynne of Handley. As noted by Lord Slynne, Lord Devlin had observed at page 1229: "Everything which aggravates or mitigates the defendant's conduct is relevant". I have in this regard looked at the evidence of the conduct of the Defendant and I can see nothing in it which may fairly be said to exacerbate the damage to the Claimant.

103) It seems to me, therefore, that there is no basis for concluding that basic damages would be inadequate to compensate the Claimant for the libel and I so hold.

I turn now to consider the appropriate quantum of general damages to be awarded in this case.

Award

104) The Claimant relies heavily on the **Abrahams** case, which was decided in 2001 for guidance as to how to quantify the award of damages. In that case an award of JA$80.7 million was awarded and the Court of Appeal reduced it to JA$35 million, a figure with which the Judicial Committee of the Privy Council felt it was not competent to disagree. The Claimant's counsel asserts, without adducing any evidence to support it, that the reputation of the Claimant was greater than that of Mr. Abrahams in the **Abrahams** case. It is not clear on what basis this proposition is made. Certainly, the evidence in **Abrahams** was that the claimant there was an international consultant and was unable to secure any consultancies for a period of about two (2) years. Moreover, there was other considerable evidence that the defendants in that case behaved contumeliously in relation to the prosecution of the case and sought to continue to defend the libelous averments long after it had become apparent that they were untrue. It seems clear that in those circumstances the Court was entitled to make the award it did, and to include a sum representative of a deterrent element in the damages. Without more, I cannot accept that **Abrahams** provides a comparable case for the purposes of determining damages and I find it is easily distinguishable.

105) In **Chong**, Mangatal J accepted that it was appropriate to consider previous cases and update damage awards based upon the Consumer Price Index as done in personal injury cases. In that regard, she considered the award made in the **Seaga v**

Harper case, although she rightly cautioned that each case is unique. While there can be no quarrel with the principle, it must be borne in mind that in the personal injury cases, comparisons are based upon the reported injuries being similar. The difficulty therefore is to compare the reputations of different persons in disparate situations as well as the relative damage to reputations occasioned by the libel. In **Chong** Mangatal J. also considered dicta from the Court of Appeal in **Bonnick** where the decision in favour of the claimant at first instance was overturned by the Appeal Court, but the court, obiter, indicated that an award of $650,000.00 would have been appropriate.

106) In **Seaga**, the successful party, Harper, was awarded by the Court of Appeal the sum of $1,500,000.00 reduced from $3,000,000.00. Mr. Harper, at the time the libelous publication was made, was a Deputy Commissioner of Police and, based upon the evidence elicited, was in line to be considered for the post of Commissioner of Police. There was no claim for special damages. As a deputy police commissioner, it is unlikely that the reputation at risk was as great as that of a senior minister of government. However, for purposes of comparison, I believe that the case may provide some guidance as to the level of damages which may be appropriate. The award by Brooks J was made in December 2003 when the re-based CPI was 73.9. In February of this year the CPI was 167.1. This would mean that the award of $1,500,000.00 updated would now yield $3,391,745.60. Given my view of the relative reputations of a Commissioner of Police and senior government minister, I do

not believe that it would be unreasonable to increase that sum to between $5,500,000.00 to 6.5 million dollars.

107) I would also refer to my own unreported oral decision in **Jamaicans for Justices and Carolyn Gomes v New Media Communications Limited and Others** HCV 00280 of 2006. In that case, the first claimant who is a extremely well-known Human Rights Activist and the Executive Director of the 2nd Claimant, was said to have accepted donations on behalf of the second claimant, from "right wing pro-Nazi groups", an allegation which was shown to be untrue and would have been of gravest concern for her and the second claimant's credibility. She was awarded $4,500,000.00 for libel in January 2011. That sum would be marginally updated by less than two per cent to take account of the March 2011 CPI.

108) In **Gladstone Wright v The Jamaica Observer** Suit No: C.L. W 125 of 1999 (unreported) a case now on appeal, a jury awarded a banker who had been libeled by an article which suggested that he had been sent on leave from his banking employment for corrupt banking practices, the sum of $20,000,000.00 and exemplary or punitive damages of $10,000,000.00. The writer of the article in that case sought to justify his allegations based upon his being present in the office of a banker friend of his who called another banker in Montego Bay while the Montego Bay banker purportedly had a conversation with the claimant, which conversation was overheard by the writer of the libelous article.

109) Both the fact that the award was made by a jury and that it is on appeal, make it an unsafe precedent to follow. In addition, I have already indicated that there is no basis for exemplary damages in the instant case.

110) While the gravity of the libelous imputation should not be understated, the Court has to make a determination based on the evidence as to the extent of the damage to the reputation of the Claimant. I do not believe that the nature of the imputation is at the top end of the gravity scale. Given all the above, including the mitigating factors supplied by what I hold to be the generally co-operative behaviour of the Defendant, I believe that an award of $6,000,000.00 for the Claimant in the circumstances of this case represents an appropriate sum and I so order.

111) I also award costs to the Claimant, to be taxed if not agreed.

ROY K. ANDERSON
PUISNE JUDGE
May 12, 2011