IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007HCV 03326

BETWEEN	**KHEMLANI MART LIMITED**	**1ST CLAIMANT**
AND	**KAYMART LIMITED**	**2ND CLAIMANT**
AND	**RADIO JAMAICA LIMITED**	**DEFENDANT**

IN CHAMBERS

Mrs. Denise Kitson and Ms. Lauren Sadler instructed by Grant, Stewart, Phillips & Co. for the claimants.

Mrs. Georgia Gibson-Henlin and Ms. Taneisha Brown instructed by Nunes, Scholefield, DeLeon & Co. for the defendants.

HEARD: February 26, March 3 & May 26, 2008

Defamation – libel –publication on radio and internet- ruling on preliminary issue – whether words capable of defamatory meaning alleged in claimants' statement of case- Civil Procedure Rules,(CPR), 2002, R. 69.4

McDONALD-BISHOP, J (Ag.)

1. The claimants, Khemlani Mart Limited and Kaymart Limited, claim against the defendant, Radio Jamaica Limited, for damages and an injunction for libel. They are contending that on Friday 23rd March, 2007, the defendant, through its RJR News Centre's *News Line* 7 radio broadcast and its website www.radiojamaica.com published a report that they are alleging is defamatory of them.

2. In paragraph 3 of their particulars of claim, the claimants aver:

> *"…the defendant published and/or caused to be published allegations that Khemlani Mart, which is operated by the claimants, illegally obtained and used electricity valued at $13 million in their stores at Tropical Plaza and Union Street Montego Bay."*

In paragraph 4 of the said particulars of claim they contend that the defendant subsequently published or caused to be published on its website a similar report that reads as follows:

> *'JPS Drags KHEMLANI Mart to court for stealing light*
>
> *A prominent commercial establishment is being accused of illegally obtaining electricity from the Jamaica Public Service Company (JPS).*
>
> *RJR news has been informed that Khemlani Mart is being hauled to court for obtaining un-metered electricity for more than one year.*
>
> *The allegation involves Khemlani Mart's branches in Kingston and Montego Bay.*
>
> *It is alleged that the electricity stolen by the two branches has been estimated at $13 million.*
>
> *Reports reaching RJR news are that summonses were served on the general managers of the two branches as well as the company's directors on Wednesday and Thursday.*
>
> *They are scheduled to appear in court on March 28 and April 2 to answer charges of breaching the Larceny Act.*
>
> *The latest development comes just weeks after the JPS issued a strong warning to electricity thieves who fail to make use of an amnesty offered by the company last year.*
>
> *The power company warned that it will be coming down hard on persons caught stealing electricity.*

The JPS further warned that although it has been moving to clamp down on large companies stealing electricity, it will also be coming down on persons who commit this offence at their homes.'

3. The claimants are contending that the words published in their natural and ordinary context and given their natural and ordinary meaning will be construed to convey the following meanings: that the claimants illegally obtained electricity; that the claimants knowingly, intentionally and dishonestly obtained electricity by illegal means; that the defendants have committed a crime under the Larceny Act; that the claimants have knowingly and dishonestly made unlawful connections with the Jamaica Public Service power supply system without paying for such connections.

4. They further aver that the allegations are untrue as they have not been in any illegal extraction of electricity from the JPS and were not aware of the existence of any such illegal connections and so the defendant, in publishing the words without fully investigating the contents of the allegations, did not act as a responsible journalism and broadcast company.

5. They are claiming, *inter alia,* that by reason of these publications, they have suffered great injury to their credit, reputation and business and have been brought into public scandal, ridicule and contempt by virtue of which their reputation and goodwill have been tarnished and lowered in the estimation of right thinking members of society.

6. The defendant, in its defence filed, does not admit the publications alleged by the claimants in paragraphs 3 and 4 of the particulars of claim. It has denied that the publications as pleaded by the claimant in paragraphs 3 and 4 have the meanings attributed to them by the claimants. It also denies ownership and operation of the website, www.radiojamaica.com, on which the words pleaded in paragraph 4 were allegedly published. It denies too that the publication refers to the second claimant but contends that if the said words were taken as referring to the claimants, they do not bear any defamatory meaning as alleged. It pleads further that the words were fair comment on matters of public interest, that being, judicial proceedings commenced against the claimants and, in the alternative, that the words were published on an occasion of absolute privilege or, alternatively, on an occasion of qualified privilege.

THE DEFENDANT'S APPLICATION

7. Following on the filing of its defence, the defendant applied by Amended Notice of Application for Court Orders filed on February 25, 2008 for*, inter alia*, the following orders:

> *(1) A Declaration that the words published in the Defendant's report on RJR Newsline 7 on March 23, 2007 do not bear the meanings attributed to them by the claimants in their statement of claim.*
>
> *(2) A Declaration that the words at paragraph 4 of the Particulars of Claim, allegedly published by the Defendant on the website, www.radiojamaica.com, do not bear the meanings attributed to them by the claimants in their statement of case.*
>
> *(3) An order dismissing the claim.*

8. The bases of the application are summarized as follows: the ordinary and natural meanings of the words published by the defendant do not support a finding in the claimants' favour. The publication does not say, as alleged by the claimants, that the claimants, *in fact,* illegally obtained and used electricity valued at $13 million; the news clip explicitly states *"Khemlani Mart **Accused** of Stealing Electricity".* The report complained of does not make any reference to the second claimant and the connection between the two entities is not readily appreciated by the general public or at all.

THE APPLICABLE LAW

9. The defendant's application is made pursuant to the Civil Procedure Rules, 2002 (CPR) r. 69.4 which reads:

> *69.4 (1) At any time after the service of the particulars of claim, either party may apply to a judge sitting in private for an order determining whether or not the words complained of are capable of bearing a meaning or meanings attributed to them in the statements of case.*
>
> *(2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the statements of case, the judge may dismiss the claim or make such other order or give such judgment in the proceedings as may be just.*

10. This provision is in the same terms as the U.K. Rules of the Supreme Court (RSC) Ord. 82 r. 3A that had been the focus of attention in various reported English decisions. In **Mapp v News Group Newspaper Ltd** [1998] Q.B. 52, it was held that the purpose of the rule was to enable the court in appropriate

cases to fix before trial the permissible meaning of the alleged defamatory words so as to ascertain the degree of injury to the claimant's reputation and to evaluate any defences raised. Hirst, L.J., noted that it is for the judge to rule, when asked to do so, whether the words are capable of bearing a particular meaning or meanings alleged in the statement of claim, that is, to lay down the limits of the range of possible defamatory meanings of which the words are capable and it is for the jury to determine the actual meaning of the words within that permissible range. In **Slim v Daily Telegraph Ltd** [1968] 2 Q.B. 157 at 174, Lord Diplock highlighted the rationale behind this division of function between judge and jury in these matters.

11. It is, by now, well settled that the test to be applied in determining the meaning of words in a libel action is what the words would convey to the ordinary man. Lord Reid in **Lewis v Daily Telegraph Ltd** *sub norm* **Rubber Improvements Limited v Daily Telegraph** [1964] A.C. 234, 258 (HL) explained it clearly when he stated:

> *"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience in worldly affairs. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute a meaning to the words not apparent to those who do not have the knowledge."*

In relation to the test to be applied when a judge is to determine whether or not words are capable of a particular meaning attributed to them by a claimant in an action for libel, Lord Reid further stated:

> *"…I think it sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question."*

12. In **Skuse v Granada Television Limited** [1996] E.M.L.R 276, the English Court of Appeal was given what it viewed as "the unusual task" to decide on the meaning to be actually attributed to alleged defamatory words contained in a television programme. In deciding on the approach to be adopted in undertaking that task, the court reviewed several authorities and affirmed and applied some useful principles. Although my task is not to determine whether the actual meaning of the words alleged by the claimant is defamatory but rather to determine whether the words are capable of bearing the meanings alleged, I nevertheless find the principles distilled in **Skuse** rather instructive and relevant. The head notes, which I accept as being reflective of the court's reasoning, highlighted these major principles:

1. *The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer watching the television once [in 1985].*
2. *The hypothetical reasonable reader or viewer was not naïve but he was not unduly suspicious. He could read between the lines. He could read in an implication more readily than a lawyer and might indulge in a certain amount of loose thinking. But he was to be treated as being a man who*

was not avid for scandal and someone who did not select one bad meaning where other non- defamatory meanings were available. ***Hart v Newspaper Publishing plc (Unreported, Court of Appeal, 26 October 1989) applied.***

3. *While limiting its attention to what the defendant had actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue. In deciding what impression the material would have been likely to have on the hypothetical reasonable viewer, the court was entitled (if not bound) to have regard to the impression made on it.* ***Slim v Daily Telegraph Ltd [1968] 2 QB 157 applied.***

4. *The court should not be too literal in its approach. The layman reads in an implication much more freely than a lawyer and was especially prone to do so when it was derogatory. .*
Lewis v Daily Telegraph Ltd [1964] AC 234 applied.

5. *A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally. . .*
Slim v Stretch [1936] 2 All ER 1237 applied.

6. *In determining the meaning of the material complained of, the court was not limited by the meanings which either the plaintiff or the defendant sought to place on the words.*
Lucas-Box v News Group Newspapers Ltd [1986] 1 WLR 147 applied*.*

7. *The defamatory meaning pleaded by the plaintiff was to be treated as the most injurious meaning the words were capable of conveying. The questions a judge sitting alone had to ask himself were (1) was the natural and ordinary meaning of the words that which was alleged in the statement of claim, (2) if not, what (if any) less injurious meaning did they bear? derogatory. .*
Slim v Daily Telegraph Ltd applied.

8. *…*

9. *The court was not concerned at this stage with the merits or demerits of any possible defence to the plaintiff's claim.*

13. The question that is reserved for my contemplation is strictly one of law and that is to say whether the words alleged by the claimants in their statement

of case as being defamatory of them are capable of the meanings attributed to them by the claimants or capable of any less defamatory meaning whether pleaded or not by either party. The critical question is really this: would an ordinary man reading the publication complained of discover in it matters defamatory of the claimants? It is not the meaning that suspiciously- minded persons would put on the words that is relevant but rather the most damaging meaning that the ordinary fair-minded person who is not unusually suspicious or unusually naïve would put on them.

14. In **Morgan v Odhams Press Ltd.** [1971] 1 W.L.R. 1239, at 1251-1252, Lord Morris of Borth-y-Gest in describing the role of the judge in these matters noted that the principle is the same in defamation cases as in any other case and that is to say that the judge in his control of the proceedings will not leave a case to the jury if the jury could not properly find for the claimant. The judge will withdraw the case if he decides that the words complained of are simply not capable of bearing a defamatory meaning. According to his Lordship, the judge is to decide whether a reasonable man *could (not would)* regard the words as defamatory. If they are capable of being so regarded then it will be for the jury to decide whether or not the words did bear a defamatory meaning.

15. Mrs. Kitson, in submitting on behalf of the claimants, has drawn my attention in particular to the dicta of Lord Guest and Lord Pearson in **Morgan v Odhams Press Ltd.** at pages 1257 and 1268, where they stated that on the hearing of an application to strike out, the question to be determined is not

whether the words are capable of bearing a defamatory meaning but whether they are *arguably* capable of bearing *the* meaning attributed to them in the statement of case. She noted that this would bring the threshold even lower for the claimants and would make the defendant's application more difficult to succeed.

16. In considering the appropriate standard that the words should reach in determining whether they are capable of the alleged defamatory meaning, I would start the analysis with the words of Lord Morris of Borth-y-Gest in giving the decision of the Judicial Committee of the Privy Council in **Jones v Skelton** [1963] 1 W.L.R. 1362. His Lordship instructed that in deciding whether words are capable of conveying a defamatory meaning, the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation. He said that the test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

17. I will act on the basis that the standard of reasonableness should guide the court in these matters since the yardstick is what the words would mean to the ordinary, reasonable, fair - minded person. It is noted that **Morgan** was decided under rules that predated the RSC Ord. 82 r. 3A which is identical to our CPR, r.69.4. In **Mapp,** which was decided in 1998 and in which Ord. 82 r. 3A was under consideration, Hirst, L.J pointed out:

> *"The proper role for the judge when adjudicating a question under Ord. 82 r. 3A is to evaluate the words complained of and to delimit the range of meanings of which the words are* ***reasonably*** *capable…"(*emphasis mine).

He continued to say that *"the judge must exercise his judgment without the Ord. 18. R.19 overtones."* Other authorities have also applied the test of reasonably capable (See for example **Gillick v British Broadcasting Corporation** [1996] E.M.L.R. 267.) Following on the guidance afforded by the decisions applying RSC Ord. 82 r. 3A, I am minded to say that the words complained of should not merely be *arguably* capable but r*easonably* capable of conveying the meaning ascribed to them. In my view, the words alleged should be such as to disclose a reasonable ground for complaint against the defendant since under the new regime, the court may strike out a claim where it fails to disclose a *reasonable (not an arguable)* ground for bringing the claim. The threshold for the words would, therefore, be higher than contemplated by Mrs. Kitson.

THE PUBLICATIONS

18. The claimants have challenged the defendants in respect of both publications. In respect of the *Newsline* 7 publication (which I will also refer to as the radio broadcast) the claimants aver as follows in paragraph 3 of their particulars of claim:

> *"3. …The defendant published and or caused to be published allegations that Khemlani Mart, which is operated by the claimants, illegally obtained and used electricity valued at $13 million."*

It can be seen without much scrutiny that paragraph 3 of the particulars of claim has not reproduced, *verbatim*, the terms of the alleged broadcast. The words are

not particularized for one to see the actual words or the context in which they were used in order to independently determine the meaning to be attributed to them. The defendant has not admitted that pleading. It is not for the defendant to supply the alleged defamatory statement but the claimants who are alleging defamation. I am not particularly satisfied with the claimants' omission in this regard.

19. The CPR in Part 8 has made provisions for the matters that should be contained in a claim form and in relation to the duty of a claimant to set out its case. R. 69.2 deals specifically with the claimant's particulars of claim in defamation claims. R.69.2 (a) provides that in addition to the matters set out in Part 8, the particulars of claim in a defamation claim must give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified. R. 8 then states the consequences of not setting out case. It provides that the claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim but which could have been set out there unless the court gives permission.

20. ***Carter- Ruck on Libel and Slander,*** 5th edition, p. 39 also points out that the claimant must set out in his particulars of claim, with reasonable clarity and precision, the words of which he complains and that where the subject matter of a libel action is a long article or programme, the claimant must specify the particular passages which are claimed to be defamatory of him (**Collins v Jones**

[1955] 2 All ER 145 and **DD SA Pharmaceuticals Ltd. v Times Newspaper Ltd** [1972] 3 All ER 417 cited).

21. The claimants, having omitted to give the precise terms of the radio broadcast, were not asked by the defendant to furnish any particulars about that publication. What the defendant has done instead is to furnish in its defence what it says are the exact terms of the broadcast. In considering the approach to be adopted in dealing with this omission on the part of the claimant, I have duly noted, that they have pleaded in paragraph 4 of the particulars of claim that *similar* words were published on the internet. *Similar,* to my mind, does not necessarily mean *identical* but in looking at what the defendant has pleaded, I find that there is not much difference between that publication as contended by the defendant and the publication particularized by the claimant. With the exception of the headlines, the texts of both publications, as pleaded by the parties, are identical.

22. So, for that reason, I will embark on an analysis of the publications as disclosed in both parties' statements of case to see whether the defamatory meanings attributed to the words by the claimant can stand as being capable of such meanings. In fact, r. 69.4 said the judge may determine whether or not the words complained of are capable of bearing the meanings attributed to them in the *statements of case*. The meaning the defence is contending in relation to the radio broadcast cannot be ignored because the rule must be applied subject to the overriding objective to do that which is just between the parties and to save

time and expense. If I agree with the meanings attributed to the radio broadcast by the defence, in light of the failure of the claimant to plead them strictly, then that will end the claim in respect of that publication. This is a risk that the claimant will have to take given its omission to plead the exact terms of that publication.

23. The defendant has also denied that it owns the website on which the words were allegedly published. In fact, the defendant, in its pleadings, has not admitted the alleged internet publication. It has not pleaded the terms of any publication on the internet. It has put the claimants to strict proof of this. This would, therefore, call for evidence to establish this matter as one of fact as to whether the defendant is responsible for the publication. This is a triable issue that does not fall to be determined on a preliminary ruling.

24. However, despite the defendant's non- admission of authorship in respect of the internet publication, it is nevertheless asking for a preliminary ruling on the meaning of the words. Given the possibility that the claimant could well prove at trial that the defendant is responsible for the internet publication, then the question would arise as to whether the words are defamatory of the claimants as alleged. It seems that it is is for that reason that the preliminary ruling is applied for. It means then that if the claimants have a claim that is bound to fail they should know it and the overriding objective would be achieved by ending the case at an early stage.

25. In considering this application, I must point out from the very outset that it is not for me to say whether or not I believe the claimants or the defendant on any matter especially in so far as it relates to the exact terms of the publications in question. My task is to determine whether the words alleged by the claimant to have been published by the defendant and which the claimants are claiming are defamatory of them are capable of the meaning attributed to them in paragraph 6 of the claimants' particulars of claim. It is the claimants' statement of case concerning alleged defamation that is now material and so the merit or demerit of the possible defence to the claim is immaterial.

26. The caption of the publication pleaded by the claimant reads: ***"JPS Drags Khemlani Mart to Court for Stealing Light".*** This headline has not been admitted by the defence. The caption for the radio broadcast according to the defendant states ***"Khemlani Mart Accused of Stealing Electricity."*** The claimant has not pleaded any caption in such terms. There is thus a factual dispute between the parties in so far as the headlines of the publications are concerned. Despite the differences in headlines, it is noted that the text of the publications alleged by both sides are identical and the terms '*accused*', '*alleged*" and '*allegation'* are used at different points throughout the text starting from the opening paragraph.

Defendant's submission

27. Mrs. Gibson–Henlin, in arguing that the words published are not capable of the defamatory meaning alleged by the claimant or at all, pointed out that the

headline of the news clip does not say that the claimants, in fact, illegally obtained and used electricity valued at $13 million as the claimants are contending. According to her, the same would apply to the alleged internet publication. She maintained that by the use of the words '*accused'*, '*alleged'* and *'allegations'*, there is no imputation of *actual guilt* or any assertion that the claimants have, *in fact,* committed a crime under the Larceny Act (Emphasis mine). According to her, there is merely a suggestion that charges have been brought against the first claimant.

28. She further submitted that the words cannot be construed to mean, as the claimants are contending in paragraph 6, that they *"knowingly and dishonestly obtained electricity by illegal means or that they knowingly and dishonestly made unlawful connections with the Jamaica Public Service Power supply without paying for same."* She said those meanings suggest legal and technical construction of the offences under the Act of which the ordinary man has no knowledge. On that basis, she said the words are incapable of bearing such meaning.

29. In emphasizing her point, she relied on the definition of '*accused'* in the Concise Oxford English Dictionary and argued that the use of the terms *'accused', 'allegation'* and *"alleged"* denote innocence until proven guilty or "*to charge with an offence or crime."* She said that to the extent that the words are taken to refer to the claimants, the words meant and were understood to mean (a) the claimants were accused of illegally obtaining electricity and (b) they were

summoned to court pursuant to the Larceny Act to answer allegations of illegally obtaining electricity. According to her, they mean nothing more.

30. In supporting her arguments in this regard, she relied heavily on the decision of the House of Lords in **Lewis** and of the English Court of Appeal in **Mapp.** In **Lewis,** the headline indicated that the police was enquiring into the affairs of the plaintiff company. The plaintiffs sued for libel on the grounds that the words meant and could be understood to mean that they were guilty of fraud. The House of Lords held that the words were not capable of the meaning contended by the plaintiffs but that at most the words were capable of imputing *"suspicion,"* not *"guilt."* A similar finding was arrived at in **Mapp** where the Court of Appeal found that the words complained of could not reasonably be read as imputing guilt to the plaintiff, as contrasted with reasonable suspicion of guilt, and so the defendants were entitled to an order that the words were incapable of bearing the meaning attributed to them by the plaintiffs.

31. On the basis of these decisions, Mrs. Gibson-Henlin submitted that there is a distinction between imputation of guilt and a mere suspicion and that in this case when the words are taken collectively, it is merely a report of the fact that the first claimant has been charged or accused by the authorities of illegally obtaining electricity and summoned to court pursuant to the Larceny Act to answer to those charges. It is her view that the ordinary man hearing the broadcast or reading the publication once would not conclude that a case has

been made out against the first claimant in respect of those charges. On that basis, the words are incapable of the meaning alleged by the claimant.

Claimants' submission

32. Mrs. Kitson, in response, submitted that the first impression the reasonable readers and listeners would have had are the meanings contended for by the claimant. She said that the words were likely to convey the defamatory meanings contended particularly in light of the extracts: *"It is alleged that the electricity stolen by the two branches has been estimated at $13 million"* and what she termed the "inflammatory" words used in the last paragraphs of the report concerning the recent move of the JPS to deal with persons caught stealing electricity. She maintained that on first reading or hearing of the statement, *"It is alleged that the value of the electricity stolen is estimated at $13 million",* it would be clear that the allegation is with respect to the value of the electricity but that a conclusion had, in fact, already been made that electricity was stolen. Further, that the defendant by closing the report with the "sensational" statements gave the ordinary reader the impression that the claimants were guilty of illegally obtaining electricity.

33. She argued that the ordinary reader and listener is unlikely to dissect the words used and give attention to only those paragraphs in which the words '*accused',* '*allegation'* and '*alleged'* are used given that it is said that the layman's capacity for implication is much greater than the lawyers. She cited the dictum of Lord Devlin in **Lewis** where he stated:

> "*It is the impression conveyed by the libel that has to be considered and not the meaning of each word under analysis and a man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also fire."*

She contends that the defendant did not succeed in excluding a suggestion of the 'existence of fire'.

34. She submitted that only portions of the report used the words *'alleged', 'accused' or 'allegation'* while other sections do not and that the viewer is left with the first impression that the defendant is guilty of stealing electricity. She reiterated the dictum of Sir Thomas Bingham in **Skuse** that

> *"the distinction between negligence and reasonable grounds to suspect negligence may of course be properly made if the words complained of warrant it but it is a distinction more familiar to the lawyers than laymen and it is not one which would occur to the ordinary reasonable listener or viewer of 'this hard hitting, resting, quickly-moving television programme."*

35. Also relying on various dicta from **Lewis** and **Gillick**, among others, Mrs. Kitson submitted that the words published would convey to the ordinary man, a negative and derogatory meaning. According to her, the conclusion that would ordinarily be drawn by the ordinary man from the report is that the claimants have in fact committed the offence alleged and so the words are "arguably capable" of bearing the meanings alleged by the claimants.

ANALYSIS AND FINDINGS: meaning of the words

36. The claimants have denied the terms of the publications saying that they are untrue. Mrs. Gibson- Henlin submitted that the claimants have not denied that the matters are in fact in the courts. That is immaterial at this time as the

alleged publications were made before the matters went to court and the kernel of the complaint concerns the substance of the publication as to electricity been stolen and not merely because it says that Khemlani Mart is being taken to court. The first presumption that the law makes in favour of the claimants is that the material published is false. If the defence knows the truth, the defendant must plead and prove that it is true. If one begins on the presumption that stands in aid of the claimants, until displaced, that the matters contained in the publication are false, then the critical question is whether they are capable of a defamatory meaning.

37. It is seen that the wording of the headline as alleged by the parties differ from each other. The headlines, as given by the claimant, may be read as a statement of fact that Khemlani Mart is being taken to court for stealing electricity from JPS. There is no use of the words *'allegation', 'alleged'* or *'accused'.* On the defendant's version, it would mean that someone has accused, that is to say, has claimed that Khemlani Mart has stolen electricity. This conveys the meaning that Khemlani Mart is said to have done something wrong or illegal, that is, it has stolen electricity from the JPS. The headlines contended for by the claimant is arguably and reasonably capable of conveying the most injurious meaning in its ordinary and natural sense that Khemlani Mart has stolen electricity for which JPS is taking it to court. If this is the headline of both publications, then the words in the headlines would be capable of a defamatory meaning. If one were to accept the defendant's version as the true version then it is saying that someone

is saying or has claimed that Khemlani Mart has stolen electricity. This too could be taken as potentially defamatory if it is false in substance.

38. However, while consideration of the headlines is necessary, the matter cannot be determined purely on the headlines. The law is clear that words cannot be taken in isolation and their meaning determined. A claimant cannot take words in isolation and complain about them if other parts of the article throw a different light on the article in issue. So, it might well be, as the defendants are arguing, that there are words in the text that could serve to neutralize the otherwise defamatory effect of the headline. The fair-minded, ordinary and reasonable man is entitled to take into account the entire publication and the circumstances of the publication and to draw inferences from them.

39. In **Charleston v News Group Newspaper Ltd.** [1995] 3 All ER 313, the House of Lords confirmed that the whole of a publication must be considered when deciding whether words or images are defamatory. In that case, the plaintiffs sued in relation to headline, caption and photographs. There was no reference made to the plaintiffs in the text. In fact, it was clear that the article was not about the plaintiffs. The action for libel failed. The House held that although the question whether a text of an article was sufficient to neutralize an otherwise defamatory headline is a matter for the jury, a claim for libel could not be founded on headline or photograph in isolation from the related text and the question whether an article was defamatory had to be answered by reference to the response of the ordinary, reasonable reader to the entire publication.

40. In **English and Scottish Co-operative Property Mortgage and Investment Society v Odham's Press** [1940] 1 K.B. 440, a summons was taken out against the plaintiff for wrongfully making a return of its profit which was false. The defendant newspaper published the report of proceedings against the plaintiffs in a magistrate court under the heading in heavy italic type ***"False Profit Return Charge Against Society".*** The plaintiff argued in its action for libel that by the words of the report, in the natural and ordinary meaning, the defendants meant that the plaintiffs had deliberately falsified their accounts and had published a return of their profits which they knew to be wrong with a view to deceiving their shareholders and the public. The defendants argued that the words of the report did not bear the meaning alleged or any defamatory meaning and that in their natural and ordinary meaning they were true. The trial judge left the words to the jury on the basis that it was capable of an innuendo and for them to say what meaning the words of the report would reasonably bear. The jury found the words of the report bore the meaning attributed to them by the plaintiffs. On appeal by the defendant, the Court of Appeal held that the judge was correct in leaving the meaning of the words to the jury because the jury might have come to the conclusion that the words were defamatory in the ordinary and natural meaning having regard to the place in which they appear in the paper and having regard to the fact that the word "false" is ambiguous, and if not in its primary meaning, that it may, at least, connote something of a fraudulent nature. So the court held that the jury, in considering the meaning to be attached to the words *'"False Profit"*, were entitled to take into account the

circumstances of the publication: namely the prominence given to the item, the fact that the heading was in bold type and that the report was in a popular newspaper.

41. The cases demonstrate that the headline is important and it is relevant to consider what it may convey to the ordinary man. However, it must always be viewed along with the text in the case and the whole circumstances of the publication. With all things considered, in the end, it is the words used in their context and ultimately the broad impression that they, collectively, would leave on the ordinary man that is material.

42. Throughout the entire text in the publications as pleaded, although the words '*accused', 'alleged*" and '*allegation'* are used at different points, reference is also made to words and phrases such as '*stealing light', 'stealing electricity,'* '*electricity stolen',* '*illegally obtaining electricity*", '*hauled to court for obtaining un-metered electricity for more than a year', 'electricity thieves'* and so on and so forth. The claimants have not pleaded any innuendo; they are contending that the words in their ordinary meaning and context are defamatory.

43. It is established on high authority that the ordinary and natural meaning of words may either be the literal meaning or it may be implied or inferred or may be an indirect meaning. Any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words. The natural or ordinary meaning may, therefore, include any

implication or inference which a reasonable listener, viewer, or reader guided not by special but only general knowledge and not fettered by any strict legal rules of construction would draw from the words: **Jones v Skelton** (supra)**.**

44. In this case the headline pleaded by the claimant states that Khemlani Mart is being dragged to Court by JPS for stealing electricity. There is no ambiguity in that statement. The text however spoke to the allegations against Khemlani Mart. In the headline pleaded by the defendant' *"Khemlani Mart Accused of Stealing Electricity",* there is no ambiguity in the words. This headline is saying that there is an allegation against Khemlani Mart that it has stolen electricity.

45. In my view, the ordinary and reasonable person of ordinary intelligence, experience and education, without the support of extrinsic facts or particular knowledge of the law, could find in the natural and ordinary meaning of several words as contained in the alleged headline (both versions) and throughout the text, the notion of dishonesty, and illegality. The word '*stealing'* alone, in its most ordinary and natural sense, connotes dishonesty; '*illegal'* means and is capable of being understood by the ordinary man to mean unlawful. Someone being '*hauled to court'* means ordinarily and naturally that there is an allegation that the person has breached the law of the land. This would not be unreasonably stretching the words to arrive at a meaning. '*Stealing',* by itself, also connotes, in its most ordinary and natural sense, the act of someone knowingly, intentionally and wrongly taking something that does not belong to him. It is hardly likely, if at

all probable, that stealing could be understood in its ordinary and natural sense to mean or connote accidental, unconscious or legal taking. The ordinary man could and would most likely and reasonably interpret the word to mean an intentional and dishonest act done with knowledge of the person acting. Apart from the literal and direct meaning, a natural inference or implication in the word stealing when used in the context of other words such as '*illegal* 'and '*hauled to court for stealing'* is that there is an assertion or a view that something dishonest and unlawful is done. I will say no more in terms of my analysis and view in the likely event the case should proceed to trial.

46. In summary, I will just say that when all things are considered against the background that it is the broad impression conveyed by the publication that matters, I find it difficult to accept Mrs. Gibson- Henlin's submission that to import the words '*knowingly',* '*intentionally'* and '*unlawfully',* in the meaning of *'stealing electricity'*, would be construing the publication as a lawyer rather than as the ordinary man. I am more inclined to believe that the ordinary man would more readily read between the lines and make inferences from such words, as contended by the claimants, more than a lawyer would do in light of the fact that some of the words are, in and of themselves, intrinsically derogatory. For these words to be found to be entirely incapable of a defamatory meaning within the context of the entire publication, they can only be neutralized by other words used in the text and the circumstances of the publication. The defendant is contending that those words have been diffused and neutralized by the words

'*accused',* '*alleged'* and '*allegation'* which would serve to render the publications non- defamatory.

47. Mrs. Gibson-Henlin on that basis has argued that, like in **Lewis,** the defendant has done nothing more than merely reported the fact of an allegation been made. But is this really so? After a close examination of the instant case, against the background of the reported circumstances in **Lewis** and **Mapp,** as well as other authorities, I am moved to hold that the defendant's alleged publication (even on the defendant's own pleaded version) went further than reporting a mere fact of an allegation been made. It went on to give the terms and substance of the allegations and reported further on the recent campaign of the JPS to deal with electricity thieves. This is significant. This forms part of the context in which the words were published and which were conveyed to the ordinary listener of the news cast or reader on the website on March 23, 2007.

48. In **Hayward v Thompson** [1981] 3 W.L.R. 470, the plaintiff in his claim for libel alleged in his statement of claim that the words published by the defendants in two different articles under headings, "***Two more in Scott's Affair"*** and ***"New Name in Scott's Affair"*** meant and were understood to mean that he was guilty or reasonably suspected of participating in or condoning a plot to murder. The defence argued that the alleged defamatory words were not capable of the meaning alleged or at all or alternatively that they were at most only capable of meaning that the plaintiff was *suspected* of complicity in a plot to murder. They relied on **Lewis.**

49. Lord Denning, M.R. (as he then was) in giving the opinion of the Court did not find the ruling in **Lewis** to be applicable. He found that the articles did not stop at there being an inquiry. He found the headlines to be significant. He also examined the words of the text, the context in which they were written and how they were written and concluded that they were plainly capable of conveying to an ordinary person on a first reading the imputation of guilt, as well as suspicion of guilt, in a murder plot. He found that the judge had properly directed the jury that it was opened to them to decide what meanings the words bore. He reiterated the words of Lord Reid in **Lewis** which I will quote only in part:

> *"The meaning of the words - in a libel case - is not a matter of construction as a lawyer construes a contract: see p. 258. It is a matter of impression as an ordinary person gets on a first reading - not on a later analysis…"*
>
> *"…Of course there are cases in which to report a police or other inquiry into accounts and so on is not defamatory of the individual responsible for such accounts. But, as Lord Devlin said in his speech in Lewis v. Daily Telegraph Ltd.[1964] A.C. 234, 284-285:*
> *"It must depend on whether the impression conveyed by the speaker is one of frankness or one of insinuation.... A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded."*

50. Both counsel in their submissions have also relied on this dictum of Lord Devlin, to varying extent, in trying to assist me in my analysis. I accept that it is the broad impression that is conveyed by the publication that is relevant and not the meaning of each word dissected and minutely analysed in isolation. Now the

facts of **Hayward v Thompson** are different from this case but the approach of Lord Denning and the principles he employed in arriving at his conclusion do commend themselves to me. Lord Denning upon close analysis of the publications recognized that they had gone further than merely reporting the fact of an enquiry and as such he found that **Lewis** was not applicable to those facts. Like Lord Denning, I have examined the headlines as pleaded by both parties in respect of the publications. I have looked at the words in the context and I find too, that the report by the defendant went further than merely saying that accusations were made. The fundamental question must be: what is the broad impression the words could convey to the ordinary man on him first hearing or reading the publication on March 23, 2007? Would it be the imputation of the commission of a criminal offence being larceny or stealing of electricity or would he see it as a report only on the fact that an accusation of larceny has been made against Khemlani Mart and nothing more?

51. In her effort to satisfy me that it is only opened to the latter interpretation, Mrs. Gibson Henlin has raised the presumption of innocence to say that the words '*accused*', *'alleged',* and '*allegation'* would convey the meaning that the first claimant is innocent until proven guilty. I am afraid that is a concept that would be more readily appreciated and invoked by the lawyer rather than by the ordinary man who, as I have repeatedly said, is more likely to read between the lines and will be more prone to loose thinking the more derogatory the words are. In **Lewis,** Lord Devlin noted that there was no mention in the publication of the company been suspected of fraud. He recognized that what was simply said was

that the affairs of the company were being enquired into by the police. With that in mind, he made this attractive point:

> *"A man's reputation may in fact be injured by such a statement even though it is quite consistent with innocence. I dare say that it would not be injured if everybody bore in mind, as they ought to, that no man is guilty until he is proved so, but unfortunately they do not." (emphasis mine).*

52. I share that view. A man's reputation may be injured even where something is said to be an allegation and he is innocent because, unfortunately, it cannot be taken as given that the ordinary man will start an analysis of an allegation with reference to the presumption of innocence. He would more readily read between the lines and read into the allegation an implication of guilt even though such a person is not avid for scandal or is unduly suspicious. An allegation may be a rumour; it may be false; it may be true. It may be defamatory; it may not be. It is therefore open to scrutiny to see how far it goes and the effect it could, not necessarily would, have on the mind of the ordinary person. So, the fact that somewhere in the text of the publication in issue, it is stated that there is an allegation cannot, without more, be a basis to automatically dispose of the matter as being non-defamatory. I am guided accordingly.

53. As it stands, there are words capable of a defamatory meaning in this case but the defendant is saying there are words that have neutralized the meanings of such words rendering them non- defamatory. In **Mitchell v Faber Ltd** [1994] C.A. transcript, 24 March, the court is reported to have stated that where words capable in isolation of bearing a defamatory meaning are published in a context contradicting that meaning (The 'bane and antidote' situation) only in

the most exceptionally clear case should a judge decide the publication was incapable of bearing that meaning rather than leaving the question to a jury at trial (See **Carter-Ruck on Libel and Slander**, p. 44).

54. I will go further and say too that the defendant in stating the substance of the allegations and indicating the nature of the case against Khemlani Mart expressly indicated that it was informed of the matters contained in the publications. The informant was undisclosed. Clearly, the defendant has repeated the matters told to it which, at least, amounts to a claim that Khemlani Mart has stolen electricity from JPS facilities at two of its branches and is being taken to court to answer charges of larceny. This imputes the commission of a criminal offence. By repeating the terms and substance of the allegations, which could be false, the defendant has not merely reported the fact that there is an allegation but also runs the risk of repeating someone else's potentially defamatory statements. I find it safe to opine that the circumstances of this case do not fall squarely within **Lewis** as argued by the defence so as to influence a ruling that they are incapable of a defamatory meaning.

55. The authorities are clear that to repeat a rumour or someone else's defamatory statement is just as much defamation on the basis of what is coined as the 'repetition rule'. The claimants' counsel in her effort to drive home this point relied on **Stern v Piper & Others** [1996] EWCA Civ. 1291. In that case, the defendant newspaper published certain matters of Mr. Stern saying, *inter alia*, that he faces *'High Court Action'* and that he had "a*llegedly failed to honour*

debts of more than £3m". The article quoted a number of allegations against Mr. Stern as contained in a document filed in the action. In an action brought against them for libel, the defendants pleaded justification on the grounds that the words were substantially true in so far as they meant that Mr. Stern was once again in financial trouble and in that he was involved in High Court proceedings in which he was accused of the matters referred to in the document. In an action brought by the plaintiff for the plea of justification to be struck out, the Court of Appeal held that the plea of justification fell afoul of the 'repetition rule' and should be struck out.

56. Lord Justice Simon Brown, in explaining the 'repetition rule' stated:

> "*It is a rule of law specifically designed to prevent a jury from deciding that a particular class of publication- a publication which conveys rumour, hearsay, allegation, repetition -call it what one will - is true or alternatively bears a lesser defamatory meaning than would attach to the original allegation itself*." Emphasis added.

Hirst, L.J. in the same case noted:

> *"It is acceptable that a statement that a writ or equivalent civil proceedings has been issued (or for that matter that an indictment or similar criminal proceedings has been laid) may be capable of conveying no more than the fact that the relevant proceedings have in fact been launched; moreover and most important, there is no hearsay problem."*

57. The decision demonstrates that even though the defendants used the word *allegedly* and showed that it was merely reporting the allegations that were made by someone else during the course of court proceedings, the publication, nevertheless, was held to have fallen within the 'repetition rule' since it was essentially hearsay. Applying the principle to the instant case, it is seen that the

report did not say information was received from JPS or the police or the court's records, it simply said the defendant had been informed or that reports had reached it concerning the matter. The publication could, at least, be held to convey *'hearsay, allegation* or *repetition'*, if not a rumour. There is a hearsay problem. It could be strongly and successfully argued by the claimant that it falls within the class of publication that the repetition rule is said to be designed to address. I do not agree with the argument advanced on behalf of the defendant that the publication, without more, falls squarely within the ambit of **Cadam v. Beaverbrook Ltd.** [1959] QB 413 and **Waters v. Sunday Pictorial Newspapers** Ltd. [1961] 1 W.L.R. 967. This is, indeed, strongly debatable. In light of the existence and applicability of the 'repetition rule', I am not persuaded to the view advanced by the defence, that the words are incapable of being defamatory at all simply on the grounds that they are merely reporting the fact that an allegation or accusation had been made against Khemlani Mart. It would have to surmount the hurdle of the 'repetition rule'.

58. It is my view therefore, that the publications are reasonably open to the possibility of a positive finding that the defendant went further than merely reporting the fact that an allegation of larceny of electricity had been made. They are reasonably open to a positive finding that the defendant had repeated someone else's allegation or rumour or account- whatever it may be- imputing the commission of a criminal offence which would put it squarely within the tentacles of the 'repetition rule.' When the words are examined within the entire context of the publication, including the headlines as pleaded by both parties, I

find that they are reasonably capable of conveying the broad impression that Khemlani Mart has stolen electricity from JPS. I conclude too that, at minimum, the words are reasonably capable of insinuating and conveying the impression that the allegation or accusation against Khemlani Mart is well founded.

59. I conclude, in all the circumstances, that the meaning and effect of the terms ***'accused,' 'allegation'*** and *'alleged'* are matters to be left for a tribunal of fact to say whether they are sufficient to neutralize the potentially defamatory meaning and nature of other words in the publication It is accepted on good and persuasive authority that where words are defamatory and some are not, it is for the jury to decide the actual meanings the words do bear and not the judge on a preliminary ruling.

60. Having said all that, I will at this point refrain from demonstrating any detailed analysis of the content of the publications alleged and from expressing any view I might have formed on any specific aspect of the publication. I heed the words of Neill, L.J. in **Keays v Murdock Magazines (U.K.) Ltd [1991] 1 W.L.R. 1184, 1193** that:

> *"In many cases it may be better where the judge rules that words are capable of bearing a particular meaning for him to refrain from giving any reasons for his own conclusions thus it might be thought that these expressed reasons could influence the trial judge when summing up."*

I think this makes good sense. So, in adopting the words of the learned Lord Justice, I will state that I will not set out all the passages in the publication which have influenced my decision.

61. I will simply say this: in taking the alleged publication as pleaded in the claimants' statement of claim which only differ from that as pleaded by the defendant in respect of the headlines (which incidentally would make no difference to my finding), I would conclude that the words of the publications, in their ordinary and natural meaning, are reasonably capable of a meaning that could be defamatory of an entity, company or person named, known as or trading in the name Khemlani Mart. I find that it is capable of conveying to an ordinary man as the most damaging meaning, the meanings pleaded in paragraph 6 of the claimants' particulars of claim which is tantamount to the imputation of the commission of a criminal offence.

62. There is authority to say that the judge may state whether the words are capable of a less defamatory meaning whether pleaded or not by the parties. The claimants have not pleaded a less defamatory meaning neither has the defendant. In my view, a ruling on a lesser meaning is not warranted in the circumstances. For while the words, at least, may be capable of conveying a lesser defamatory meaning that there are reasonable grounds to suspect that Khemlani Mart has stolen electricity, or that Khemlani Mart is reasonably suspected of stealing electricity, that is a meaning which I hardly believe would readily occur to the ordinary person upon first hearing or reading the publications (dicta in **Skuse** as to the distinction between negligence and reasonable grounds to suspect negligence applied). I conclude that in this case, it is for a tribunal of fact to simply decide whether the words actually bear the defamatory meanings attributed to them by the claimants or the non- defamatory meaning attributed to

them by the defendant. In any event, it will still be opened to that tribunal, despite my ruling, to say if the words bear any lesser defamatory meaning.

THE PROPER CLAIMANT: To whom does the publication refer?

63. The defendant is contending as a ground for the claim to be dismissed that the words are not capable of the meaning alleged by the claimants as the report does not make any reference to the second claimant and that the connection between the two entities is not readily appreciated by the general public or at all.

64. The only person who can properly bring the action is the person defamed. In this case, the claimants are corporate entities. The law is well settled that a company too can maintain an action for defamation but only in respect of words which reflect upon its reputation as opposed to the reputation of its members. What is written or said must reflect on the company's reputation in the way of the operation of its business or trade. There can be no dispute that the imputation to a company of the commission of a criminal offence which involves dishonesty or illegality in its operations could reflect adversely on its reputation in the minds of reasonable, right -minded individuals and would, therefore, be defamatory.

65. It is by now well established that the second requirement in an action for defamation is that the defamatory words must be shown to have referred to the claimant (**See Kodilyne, Commonwealth Caribbean Tort Law, 245**). Unless it is alleged and proved that the subject matter of the action was 'published of and

concerning the claimant', the action is bound to fail (**Carter-Ruck**). There is no requirement that the claimant needs to be referred to by name. In fact, it is not essential that there should be anything in the words complained of to connect them with the claimant. It is sufficient if, by reason of facts and matters known to persons to whom the words were published, such persons would understand the words to refer to the claimant **(See Morgan v Odhams Press Ltd [1971] 2 All ER 1156).**

66. As can be seen, I have so far found that the words are capable of conveying a meaning defamatory of 'Khemlani Mart'. But who or what is Khemlani Mart? The article has not named *Khemlani Mart Limited* but certain things are stated which would reasonably indicate reference being made to a company or corporate entity that bears that name. Against this background, the first claimant has sued for libel on the grounds that it operates and carries on business as 'Khemlani Mart' at Tropical Plaza and that the publication is defamatory of it. The defendant has not taken issue in relation to the assertion of the first claimant that it is referred to or that persons would have understood the publication to be referring to it. This, of course, is understandable.

67. The issue as to identification is taken in relation to the second claimant. There is no reference to a company or entity named KayMart Limited. By applying ordinary company law principles, Kaymart Limited would have a separate and distinct legal personality from Khemlani Mart Limited. KayMart Limited is however saying that, like Khemlani Mart Limited, it operates and trades

as ‘Khemlani Mart’. It claims that it operates the branch in Montego Bay which is referred to in the publication. The claimants are therefore contending that ‘Khemlani Mart’ is a trade name used by both. None, however, has sued in its name and say ‘trading as Khemlani Mart’. The case has taken on an added dimension. It raises issues of law and fact in relation to corporate entities and trade/ business names which would extend beyond a determination as to what the words are capable of meaning under r. 69.4.

68. It is evident that the second claimant is relying on special facts to show that reference to Khemlani Mart is also a reference to it. Mrs. Kitson submitted that there are persons who know this and that evidence will be led at trial to prove this. For the second claimant to succeed, it must be shown that it was defamed by the article when reference was made to ‘Khemlani Mart.’ It is for the second claimant to prove that which it has alleged. The burden is on it to give evidence of those special circumstances which would lead reasonable persons to whom the words were published and knowing such circumstances to hold that the words were referring to it in a defamatory sense (See **Capital and Counties Bank v Henty** (1882) 7 App Cas 741; **Hough v London Express Newspaper Ltd** (1940) 2 KB 507, 513, 514).

69. Viscount Simons LC in **Knupffer v London Express Newspaper Ltd** [1944] A.C. 116, in dealing with words referring to a class or group but in which a claimant was not named, stated the applicable test in this way:

> "*There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law- can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact- Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him. Unless the first question can be answered in favour of the appellant, the second question does not arise…"*

It is for the judge to rule whether the words complained of are *reasonably capable* of being understood to refer to the claimant and for the jury to say whether they do *in fact* refer to him. The question to be asked and considered, therefore, is whether the words are such as would reasonably lead persons, acquainted with the second claimant, to believe that it was being referred to. Mrs. Gibson-Henlin submitted that the claim can be dismissed at this interlocutory stage if it is found that no reasonable person could conclude that the claimant could be identified with the person named in the statement complained of. She cited **Morgan v Odhams Press Ltd** as authority for this proposition. I will see whether it is open to me on the pleadings to say this.

70. The identification of the second claimant depends on knowledge of special facts. The special facts however are not in relation to the meaning of the words. So, the claimant is not relying on any innuendo as to the meanings of the words which are not obvious on the face of them. It is arguing that the expressed reference made to Khemlani Mart, as the subject of the publication, is a reference to it because its trade name is Khemlani Mart and that it operates as such at Union Square, Montego Bay.

71. In the Barbadian case, **Jordon v The Advocate Co. Ltd** (1998) High Court, Barbados, No. 727 of 1996 (unreported), Payne, J in considering an alleged defamatory statement made against the plaintiff, who was not named, found the publication to be defamatory. He is reported to have opined that although reasonable readers generally would not understand the article to refer to the plaintiff, however persons knowing the special facts would reasonably understand the article to refer to the plaintiff and it did not matter whether reference to the plaintiff was intended or whether the defendant knew or could have known the special facts (as recorded in **Gilbert Kodilinye, Commonwealth Caribbean Tort Law,** 3rd edition p. 245).

72. The fact that the words might be taken by some persons to be referring to a company name Khemlani Mart does not automatically mean it cannot be defamatory of the second claimant; the defendant's own knowledge of or intention to refer to the particular claimant is irrelevant (see **Newstead v London Express Newspaper Ltd**. [1974] A.C. 116). The question is whether reasonable people who know the second claimant and knowing it to also be Khemlani Mart, in Montego Bay, would believe that the words complained of were also in reference to it. It does not matter that some other persons might have thought it refers only to Khemlani Mart Limited. In **Knupffer,** Lord Atkin made the point that in order to be actionable, the defamatory words must be understood to be published of and concerning the claimant. It is irrelevant, he said, that the words are published of two or more persons if they are proved to be published of the particular claimant and it is also irrelevant if the two or more persons are called

by some generic or class name. Lord Porter in the same case said, each case must be considered according to its own peculiar circumstances. This is one such case.

73. In all the circumstances and on the strength of the authorities, it is difficult for me to say, in the absence of evidence been led, that no reasonable person could believe that the words refer to the second claimant or could identify the second claimant as the subject or one of the subjects of the publication. The identification of the second claimant is a matter best left to be determined upon the production of evidence. I am not in a position at this stage, in the absence of evidence, to say definitively on a preliminary ruling that the words published are not reasonably capable of referring to the second claimant. So too, I cannot conclude, as the defendant has requested, that the connection between the two entities is not readily appreciated by the general public or at all. For, if it is true and provable that the second claimant is also trading as Khemlani Mart and that this is known to some members of the public to be so, then the words alleged could well be found to have been understood to refer to it as well as being defamatory of it if they are such that the ordinary, reasonable person would have come to such conclusion. This is an issue that must be explored at trial. The question of law is one best left to the trial judge to determine after hearing the evidence. It is one that cannot be easily made on a preliminary ruling where it is the meaning of the words, as alleged, that is to be considered.

74. After serious consideration, I would not seek at this preliminary stage (particularly as it falls before disclosure and the exchange of witness statements) to dismiss the claimants' case on this issue of identification of the person allegedly defamed. The striking out or dismissal of a party's statement of case is usually a draconian measure only to be exercised sparingly in plain and obvious cases. This is not such a plain and obvious case that would warrant the claim to be dismissed at this stage on this ground as contended for by the defendant. In this case, there are critical issues of facts that would need to be explored at trial and which can only be resolved on evidence. It is not for me to conduct a mini - trial on disputed facts and particularly in determining under r.69.4 what should solely be a question of law. The question as to the identification of the parties allegedly defamed is one that is a mixed question of law and fact which should best be reserved for the proper forum, that is, the trial court.

75. Accordingly, I would make the following ruling:

1. The words complained of by the claimants as being published by the defendant are capable of falling within the spectrum of meanings attributed to the words in paragraph 6 of the claimants' statement of case. The words alleged by the defendant as being the publication in the *Newsline* 7 broadcast have been considered and found to be no less so.

2. The defendant's notice of application is dismissed and the case is to proceed to trial.

3. Unless the claimants, within 14 days of the date hereof, file and serve an amended particulars of claim pleading the exact terms of

the publication on the RJR *Newsline* 7 that they contend bear the meaning pleaded in paragraph 3 of the particulars of claim filed herein, they shall be barred from relying on the pleadings concerning the said publication at trial.

4. The defendant is granted leave to amend its defence with respect to paragraph 3 of the claimants' particulars of claim, if necessary, within 14 days of receipt of the claimant's amended particulars of claim.

5. No reference to this judgment should be made in front of any jury which may try this case hereafter. This ruling is only on the question whether the words are capable of bearing the pleaded meaning. It is quite possible that the trial judge may think otherwise and the tribunal of fact will reject the meaning ruled on as the actual meaning: dictum of Neill, L.J. in **Keays v Murdoch Magazines** adopted in part.

6. Costs of this application shall be the claimants, in any event, to be agreed or taxed.

76. I wish to commend counsel on both sides for their industry and admirable presentations which have been of great assistance to me.