[2018] **JMSC Civ. 114**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 02440

BETWEEN	**P&S USED CAR TRADERS LIMITED**	**CLAIMANT**
AND	**CVM TELEVISION LIMITED**	**1ST DEFENDANT**
AND	**SUPERINTENDENT CORNWALL "BIGGA" FORD**	**2ND DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**3RD DEFENDANT**

Ms. Chantal Campbell instructed by Kinghorn & Kinghorn for the Claimant.

Mr. Charles E. Piper Q.C. and Ms. Petal Brown instructed by Charles E. Piper & Associates for the 1st Defendant.

Mrs. Shawn Wilkinson instructed by the Director of State Proceedings for the 2nd and 3rd Defendants.

Heard: 1st, 2nd and 29th November 2017, and 30th July, 2018

Libel – Justification – Whether statements made were true in fact and substance – Qualified privilege – Fair comment – Defamation Act [2013] Whether applicable to proceedings - Defamation Act [1963] Sections 4, 7 and 8 – Libel Act Section 15 – Damages

COR: GEORGIANA FRASER, J

THE CLAIM

[1] The Claimant, P&S Used Car Traders Limited (hereinafter referred to as "P&S"), avers that it is a company duly incorporated under the Companies Act of Jamaica with registered offices at Bog Walk in the parish of St. Catherine. The 1st Defendant CVM Television Limited (hereinafter referred to as "CVM") is a company duly incorporated under the Companies Act of Jamaica with registered offices at Blaise Industrial Park, 69 Constant Spring Road, Kingston 10 in the parish of St. Andrew. The 2nd Defendant Superintendent Cornwall "Bigga" Ford (hereinafter referred to as "Superintendent Ford"), was a police officer employed to the Jamaica Constabulary Force and was at the material times attached to the Flying Squad at the Central Police Station in the parish of Kingston. The 3rd Defendant is The Attorney General of Jamaica (hereinafter referred to as "AG"), of 2 Oxford Road, Kingston 5 in the parish of St. Andrew.

[2] P&S brought a claim against the Defendants for damages for defamation. P&S avers that on the 12th & 13th days of December 2008 CVM and Superintendent Ford published and/or caused the publication of certain defamatory words against it in a nationwide news broadcast at 8:00pm and 11:00pm. P&S contends that as a result of the defamatory publication it has been embarrassed, humiliated, exposed to public odium and has suffered loss and damage. They acknowledge that the Attorney General was made a party to the proceedings pursuant to and by virtue of the Crown Proceedings Act, seemingly because of the alleged involvement of Superintendent Ford, who is an agent of the State.

[3] P&S is additionally claiming aggravated damages, exemplary damages, vindicatory damages, interest and cost.

THE EVIDENCE

Evidence of Mr. Sean Green

[4] The Claimant called one witness on its case, namely the Director of the Company Mr. Sean Green. His witness statement dated 5th January 2012 and further witness statement dated 15th March 2015, together stood as his evidence in chief and he was thereafter cross examined on behalf of the Defendants.

[5] Mr. Green on cross examination by Mr Piper Q.C. said he was the sole shareholder and the sole Director since the company's incorporation in 2008 and that the business had been in operation for approximately nine (9) months before the police raided the premises. He further testified that the Claimant Company's sole business was the sale of used and imported vehicles and persons who dealt with the company knew him to be the principal and only person to deal with as the head of the company.

[6] Later in the cross examination conducted by learned Queens Counsel, Mr. Green said that the business formerly operated in Bog Walk, St. Catherine by the Claimant had been dormant since 2012. The business had ceased operations because the buildings had been destroyed by fire. He had operated the business he said, until "vehicles were sold out under the name P&S. The business eventually closed. I sold all the vehicles". He had earlier in his evidence indicated that "up to when the property was destroyed by fire I had not been operating P&S".

[7] His evidence on cross examination as to how the business closed is in stark contrast with paragraph 12 of his witness statement where he lamented that:

> *"Since the defamatory words spoken of the Claimant, the Claimant has been injured in its business and has lost profits tremendously. This has happened because persons who employed the Claimant to sell their motor vehicles returned to the Claimant and took back those motor vehicles. Some of these customers were very clear that they took back their vehicles because of the assertions made in the broadcast that the Claimant was mixed up in wrong doing …"*

[8] Mr. Green further attributed the demise of the Claimant's business to the defamatory words alleged by the Defendants and that the business "continued to decline until it came to a grinding halt. Losses were being suffered as a course".

[9] At paragraph 14 of his said witness statement he categorically denied any allegations of wrong doing, specifically he said:

> "It is not true that –
>
> a. *The Claimant had in its possession and had received into its possession stolen motor vehicles contrary to the provisions of the Larceny Act.*
> b. *The Claimant had stolen or was implicated in the stealing of motor vehicles contrary to the Larceny Act.*
> c. *The vehicles that the Claimant was offering to the Jamaican Public for sale were stolen motor vehicles.*
> d. *At least three vehicles in the possession of the Claimant were stolen contrary to the provisions of the Larceny Act.*
> e. *Some motor vehicles being offered for sale by the Claimant to the Jamaican Public had no supporting documentation".*

[10] Mr. Green admitted that the incident occurred on only one day and that the police had made only one raid at the premises and that was on Monday 12th December 2008. He further agreed that his assertions at paragraph 8 of his witness statement are incorrect as it regards his averment that "on are about the 12th and 13th December 2008, the 1st and 2nd Defendants published and or caused to be published on a newscast carried on and by CVM TV prime times 8:00 p.m. and 11:00 p.m. …"

[11] The witness said some twenty-five (25) cars were on the lot when the police conducted their raid and all twenty-five (25) cars were available for purchase by the public. The police had seized nine (9) of those cars during the raid conducted

on 12th December 2008 and those vehicles were not subsequently returned to him, but were returned to the owners who had brought them to him to be sold.

[12] In further testimony, Mr Green acknowledged that CVM is a well known TV Station in Jamaica, but contrary to the Claimant's pleadings and his witness statement, he did not know the level of local viewership it enjoyed nor the level it enjoyed in 2012; nor indeed its international viewership.

[13] He agreed that during the course of business he became familiar with reports of car stealing rings across Jamaica, and he regarded this as a matter that was of great concern to the public. He further agreed that persons charged in relation to receipt and sale of stolen vehicles would be a matter of public concern.

[14] The Claimant's witness testified that he was the one responsible for the intake of vehicles at the Claimant Company and he would keep records of such intake whether locally or from abroad. He kept a book that included such information as the sellers name, type of vehicle and chassis number. Even where a seller had a change of mind a record would still be made in that book. Those records he said were not available at trial because they had been destroyed by fire, but at the time he had filed his claim they were available and the fire happened after he filed the claim.

[15] Mr. Green agreed that Diana Blake-Bennett had not taken a vehicle to him for sale, and he was positive that none of the vehicles on his complex was owned by her. He admitted that there was located on his premises a "2002 Toyota Voxy shaped with double sunroof" The owner of that motor vehicle he said was Michael Ranger; it was Mr. Ranger who had taken the vehicle in for sale. The documents were in the name "Holness" which was "already stamped out". Mr. Green after much prevarication eventually admitted he had advertised the said vehicle for sale and that he as also Mr. Ranger had been charged by the police for being in possession of this stolen vehicle but he had not been convicted.

[16] Mr. Green agreed that there is no written report of losses sustained by the Claimant and neither had he given instructions for such a report to be produced. Prior to his incarceration he did appear on CVM Television, he had looked at the news and had seen himself at the back of a police vehicle. Mr. Green admitted that he was interviewed by Fiona Flemmings and given the opportunity to state what happened on the 12th December 2008. "On CVM TV I was permitted to give my side of story, could have been in March 2009". Mr. Green later recanted about the date and admitted he was interviewed before he was charged. He also agreed that the utterances of Miss Flemmings on that occasion were accurate.

[17] On cross examination by Mrs. Wilkinson, Mr. Green said he had arrived at his business place on the 12th December 2008 and had seen Superintendent Ford. They had spoken but Superintendent Ford had not informed him about the tampering on the firewall of a Toyota Town Ace vehicle present on the Claimant's lot, neither had Superintendent Ford asked him to provide documentation in relation to that vehicle. He insisted that he had indicated to Superintendent Ford that he had obtained the Toyota Voxy from Michael Ranger; Superintendent Ford had asked who the Voxy belonged to and he told him.

[18] Mr. Green was unable to recall when he had obtained the Toyota Voxy from Mr. Ranger. The Toyota Voxy in question he described as "more dark grey going to black" in colour and had a sun roof. Mr. Green in his usual fashion was unable to recall if there was another vehicle on the lot that day that he had also gotten from Mr. Ranger. He had known Mr. Ranger before 2008 but was unable to recall if he had told Superintendent Ford that he had known Mr. Ranger for 7 years, but he later admitted giving a statement to the police to this effect. Mr. Green denied any awareness that Mr. Ranger had been previously charged for larceny of motor vehicles.

[19] Mr. Green agreed that Superintendent Ford had asked him in relation to each vehicle whom it belonged to. He also agreed that "it is not incorrect that I could

not provide documentation for all the vehicles on the lot". In relation to the Toyota Voxy he said he had satisfied himself as to the owner by making a call to a Cpl. Grey to run the chassis number. He agreed that in his previous evidence he had said that the vehicles seized by the police had been returned to their owners, but none had been returned to Mrs. Holness. He was not able to say whether Mrs. Holness had given a statement to the police denying ownership of the vehicle he had received from Mr. Ranger with the name Holness "already stamped out" and which he had advertised for sale in the *Sunday Gleaner.*

[20] Mr. Green was taxed as making a number of inconsistent statements to the police as follows:

1. By telling the police he had been operating the business for two (2) years, versus his evidence given before this Court that he had been operating for nine (9) months at the time of the police raid.
2. He accepted after been shown his police statement that his evidence that vehicles on the lot were owned by private individuals and companies was in contrast to his earlier utterances that they all belonged to private individuals.
3. Mr. Green agreed that in his witness statement he had said he was charged in relation to two (2) vehicles versus the eight to nine (8 – 9) as he had previously said in his evidence.
4. After he was referred to his further witness statement, he belatedly recalled that it was two vehicles he had been charged for and those two (2) vehicles had been given to him by Michael Ranger to sell.
5. When confronted with his police statement he recanted that he was unable to check vehicles for tampering because he was not a forensic scientist. He had in fact told the police that "...when people bring vehicles to be sold I was able to check vehicles to see if there is any tampering, I agree that it did nor require a forensic scientist".

[21] After much prompting by Mrs. Wilkinson, Mr. Green eventually recalled attending a meeting at the Commissioner of Police's office. He could not however recall that Mr. Ranger was present as also a number of police officers including Superintendent Ford, Det. Sgt. Bennett and a Mr. Grey. In a typical bout of amnesia he was further unable to recall the date of the meeting and that a female, namely Diana Blake-Bennett, was introduced to himself and Mr. Ranger and had subsequently in their presence identified the Toyota Voxy as belonging to her. He denied that on the occasion he had told Det. Sgt Bennett that he did not know the Toyota Voxy.

[22] The witness' wavering memory did not permit him to recall whether he had a point of sale machine at the business premises, but when directly asked, "do you recall pleading guilty to conspiracy to defraud in relation to transactions carried out using point of sale card machine at P&S Used Car Trader's Limited, before Senior Resident Magistrate, Judith Pusey?" Mr. Green answered "yes".

[23] He agreed that Superintendent Ford had not called his name, neither the name of the Claimant during the interview with CVM. He agreed that if indeed stolen motor vehicles were at his premises, then Superintendent Ford as a policeman would have a duty to warn the public. Mr. Green however inanely disagreed that Superintendent Ford would have a duty to further warn the public to be cautious in taking things from persons whom they knew had been charged for stealing.

Evidence on behalf of the Defendants

[24] No witnesses were called on behalf of the Defendants and the Court had also refused applications to tender witness statements into evidence on their behalf, as the Defendants had not met the criteria as stipulated by section 34 of the Evidence Act.

[25] A number of documents were however tendered and admitted into evidence pursuant to notice of intention filed by the Director of State Proceedings on the 18th February 2014. The documents admitted included three statements recorded from Mrs. Diana Blake-Bennett dated 27th September 2008, 16th February 2009 and 19th May 2009 as also the statement of Con. Huston Henlin.

[26] Tendered into evidence were also a number of documents relating to a 2002 Toyota Voxy motor car such as:

- Motor vehicle certificate of title No. 0001075528
- certificate of motor insurance No. PVTS0004763
- certificate of fitness No. 5098712
- motor vehicle registration certificate LA079210
- case No. 50498 - certificate of restoration of obliterated serial number dated 16th February 2009.

[27] The witness Mr. Green had admitted the placement of the advertisement as follows: "*Toyota Noah 2002, voxy shape, double sunroof, leather interior, 7 seater, rims. 985-1747, 364-7164"* in the Sunday Gleaner on 7th December 2008 under the *Auto Classifieds* section. The document was thereby tendered and admitted into evidence as an exhibit.

[28] The contents of Mrs. Diana Blake-Bennett's three (3) statements together with other documents admitted into evidence was to the cumulative effect that Mrs. Blake-Bennett was the owner of the grey, 2002 Toyota Voxy motor vehicle which was stolen on 27th September 2008 from the parking lot at Price Mart sometime after 7:00 pm. Mrs. Blake-Bennett had made a report to the police on the same day and she subsequently identified a motor vehicle on 17th December 2008 at the office of the Commissioner of Police to be the said stolen motor vehicle.

[29] On the 9th May 2009, Mrs Blake-Bennett had again attended at the office of the Commissioner of Police and in the presence and hearing of Michael Ranger and

Sean Green she identified the said motor vehicle as belonging to her. Both men were asked by Sgt. Bennett if they knew the vehicle and responded “no”.

THE ISSUES

[30] The issues for the Court as identified by P&S are as follows:-

1. Whether or not the words as published were defamatory
2. Whether the words referred to the Claimant
3. Whether the Defendants can successfully rely on the defence of qualified privilege/fair comment
4. Whether the 2nd and 3rd Defendants can successfully rely on the defence of justification, qualified privilege or fair comment.

P&S’ SUBMISSIONS

[31] P&S in support of their submissions relied on several authorities. One such authority explored was that of ***The Gleaner Company Limited v. Small*** (1981) 18 JLR 347 where they relied on the judgment of Carey J.A where he stated that:

> *“It is plain from these authorities that the judge must put himself in the place of a reasonable fair-minded person to see whether the words suggest disparagement, that is, would injure the plaintiff’s reputation, or would tend to make people think the worse of him”*

[32] P&S also relied on the decision of ***Lewis v. Daley Telegraph*** [1963] 2 ALL ER 151; and that of ***Bonnick v. Morris and Gleaner Co. Ltd.*** [2003] 1 AC 300. Both of these decision were centred on the objective test standard that ought to apply in cases of defamation.

[33] Further reference was made to the local decision of ***Percival James Patterson v. Cliff Hughes and Nationwide News Network Ltd***. [2014] JMSC Civ. 167, where Williams J, quoted from the text ***Gatley on Libel and Slander 11th Edition*** at paragraph 3.13 which states that:-

> *"The nature of the exercise has been summarized as follows (citations omitted): (1) The governing principle is reasonableness; (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not and should not select one bad meaning where other non-defamatory meanings are available; (3) Over-elaborate analysis is to be avoided; (4) The intention of the publisher is irrelevant (5) The article must be read as a whole and any 'bane and antidote' taken together; (6) The hypothetical reader is taken to be representative of those who would read the publication in question; (7) In delimiting the range of permissible defamatory meaning, the court should rule out any meaning which 'can only emerge as the produce of some strained or forced or utterly unreasonable interpretation……' (8) It follows that it is not enough to say that by some person or another words might be understood in a defamatory sense."*

[34] The contention of P&S is that the words used by the CVM news item, to wit:

> *"Members of the flying squad meanwhile made a massive dent in a car stealing ring with information leading them to a highway car mart in Bog Walk, St. Catherine",*

are defamatory in that the words clearly accused the Claimant of criminal conduct contrary to the Larceny Act. They believe that the words would cause the ordinary reasonable man to immediately attune his mind to such a broadcast as these words would mean that the Claimant was in the business of receiving and selling stolen vehicles and that the authorities have now done enough to greatly decrease or prevent such activities.

[35] In relation to Superintendent Ford, P&S alleged that the following statements made by him through the broadcast on CVM constituted defamatory statements:-

> *"We are taking the vehicles up to the Commissioner's office where we will do the forensic examination on all of them, but positively we can say that three of them were stolen".... "You know we just a say to people say if u know a man fi seven years and know say him a tief don't tek nutten from him because once we come u a gah jail wid him and you a go charge jointly"*

[36] Based on P&S's claim, there is no evidence to suggest that the Defendants mentioned its name in the news item; the Claimant in fact conceded that its name was never mentioned. In light of this P&S reiterated that it operated its used car dealership business along the Bog Walk Highway in a conspicuous place. The Claimant furthermore asserted that they traded under the name "High Way Car Mart" and that the news item referred to "a highway car mart in Bog Walk, St. Catherine" and "the highway car mart in the Bog Walk area".

[37] P&S is therefore of the view that the reference to the car mart in addition to the reference that the owner of P&S was being taken into custody and that the accompanying pictorial image shown on the newscast, was evidence enough that the words published by the Defendants were in fact referring to P&S.

[38] On the issue of qualified privilege raised by the 1st 2nd and 3rd Defendants, P&S submits that this defence is not available to the Defendants and relied on the case of ***Reynolds v. Times Newspaper Ltd*** [2001] 2 AC 127 pages 204-205, in support of its submission. In that case, Lord Nicholls outlined the requirements for qualified privilege as follows:-

> *"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.*
>
> *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.

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 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.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case".

[39] P&S submitted that the actions of the Defendants do not accord with the principles enunciated in ***Reynolds***. They contended that the allegation is a serious one as it contained assertions that P&S was involved in a car stealing ring and that stolen and undocumented vehicles were being offered to the public for sale. In terms of the second ***Reynolds*** principle, P&S contends that there could be no duty to publish a story in which words were just being thrown about without proper verification, it being mere speculation. They underscored that responsible journalism could not dictate that because the police, specifically the flying squad were conducting a search on the grounds of the car mart, then this meant that whatever was said after the cameras went rolling became 'gospel'.

[40] In terms of the third ***Reynolds*** principle, P&S submitted that there were no steps taken by CVM to verify the information. Further, that it is not enough for an

experienced news team to just happen to see a certain activity taking place and just 'record their findings' and publish them. In terms of the fourth ***Reynolds*** principle, P&S contended the newscaster made it clear that the investigations surrounding the matter were ongoing, however the information presented to the public implicated it in illegal activities before any charges were proffered or before any vehicles were forensically examined.

[41] In terms of the fifth principle under ***Reynolds***, P&S submitted that there was no urgency in having the information published on the day in question as the investigations were ongoing. In terms of ***Reynolds*** sixth principle, P&S' contention is that no comments were elicited from its owner prior to the publishing of the offending words. Further, in regards to the seventh ***Reynolds*** principle, the article did not contain the gist of the Claimant's side of the story as at the date of publication.

[42] As it relates to the eighth ***Reynolds*** principle, it is P&S' complaint that the tone of the article was accusatory, offensive and was intended to be sensational, so as to encourage and excite viewers to tune in to such a story and as such enhanced the damage to P&S' reputation. As it relates to principle nine in ***Reynolds***, P&S further complained that the newscast was published at a time when proper investigations were not completed so as to assert that P&S was offering stolen motor vehicles for sale.

[43] P&S has also submitted that the defence of fair comment does not avail the Defendants either and has relied on the UK lower court's decision in ***Reynolds*** **v Times Newspaper Ltd and Others** [1999] 3 W.L.R 1010, and the local decision of ***Rennon Walker v. T.K Whyte, Vernon Davidson et al consolidated with Rennon Walker v T.K Whyte and Vernon Davidson et al*** [2013] JMSC Civ. 32 in support of its contention.

[44] The Claimant is further relying on the guidance provided by the Court at paragraph 109 of ***Reynolds***, where Evan Brown, J. stated that;

*"There are five principles to contemplate in making that determination. First, it has been said that the sense of comment is something which is or can be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc. Secondly, the statement is likely to be considered a comment if it is one of 'pure value judgment, incapable of proof'. Thirdly, it is generally regarded as a comment where reference is made to certain facts and thereafter it is made clear that the relevant statement 'is an inference from the facts'. Fourthly, 'a bald statement with no supporting fact is unlikely to be considered a comment'. Finally, an apparently factual statement which is either true or false may be classified as a comment if it appears to be an inference from other facts. (**See Clerk and Lindsell on Torts Nineteenth edition paragraph 23-169**)".*

[45] P&S also sought to buttress their argument on the issue of fair comment by relying on the text, ***Kodilinye Commonwealth Caribbean Tort Law***, Chapter 10 at page 257, which outlines the qualifying criteria as follows:

a. The matter commented on must be one of public interest;
b. The statement must be a comment and not an assertion of fact;
c. The comment must be based on true facts;
d. The comment must be honestly made.

[46] Upon P&S's analysis of the excerpt from ***Kodilinye*** they submitted that the Defendant did not meet the threshold required for fair comment.

[47] Finally, on the issue of justification P&S in resisting the defence of fair comment as raised by the 2nd and 3rd Defendants, and in support of its position relied on an excerpt from Halsbury's Laws of England 4th ed. Volume 28 paragraph 82, which states that:

"The defence of justification is that the words complained of were true in substance and in fact. Since the law presumes that every person is of good repute until the contrary is proved, it is for the Defendant to plead

and prove affirmatively that the defamatory words are or substantially true".

[48] It is P&S's contention that Superintendent Ford presented no evidence which went to the truth of the offending words. They further sought to rely on the fact that the prosecution of the charges proffered against the Director of P&S was terminated on a "no order made" by the Court, and this underscores the illegitimacy of the charges and consequently the defence of justification must fail.

CVM'S SUBMISSIONS

[49] CVM in their submissions is relying on the defence of qualified privilege and fair comment. They submitted that the published words accurately and honestly and without malice reported on the events that occurred at P&S's business establishment on the day in question, that the issues arising during the event was a matter of public interest and in the public's interest. CVM further averred that they had a duty to publish and report the event that occurred during the course of a police investigation and the statements and comments made by the police in connection with the ongoing investigation. The public had the right to receive the information published which legitimately raised questions of significance to the public and national interest.

[50] In support of this defence CVM relied on the cases of ***Reynolds; Jameel (Mohamed) and Another v. Wall Street Journal Europe Sprl*** [2007] 1 AC 359 and **Edward Seaga v. Leslie Harper** [2008] UKPC 9. They submitted that the Court's enunciations in ***Jameel*** affirmed and clarified the principles outlined in ***Reynolds*** and those were subsequently reiterated in the ***Edward Seaga*** case and which now represents the state of the law in this jurisdiction.

[51] CVM contended that in the ***Edward Seaga*** case, the Privy Council emphasised that the factors set out by Lord Nicholls in the ***Reynold's*** case in determining whether or not there had been responsible journalism, are not to be applied in an inflexible manner.

[52] CVM quoted Lord Hoffman at paragraph 62 of the ***Jameel*** judgment, where he adumbrated that:

> *"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. In most cases the **Reynolds** defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases ("reportage") in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper's inability to prove the truth of the statement at the trial"*

[53] CVM also sought support for their position from the case of ***Roberts & Another v. Gable*** [2008] 2 WLR 129. They submitted that Ward LJ in his judgment noted that under the principles outlined in the ***Reynolds*** case the publisher will not normally be protected unless he has taken reasonable steps to verify the truth and accuracy of what is published. This he said "is where reportage parts company with the **Reynolds** case... In a true case of reportage there is no need to take steps to ensure the accuracy of the published information".

[54] At paragraph 61G, CVM quoted the learned Law Lord as eschewing that to qualify as reportage, the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made.

[55] CVM therefore submitted that their publication taken as a whole:-

a. Raised the question as to whether it would have been thought that vehicles on sale at the Claimant's car mart would turn out to be stolen;

b. Reported on the fact that the flying squad was conducting a search of the Claimant's car mart on December 12, 2008; and

c. Reported the statements and comments of Superintendent Ford concerning the investigation being conducted by the police.

[56] They further submitted that they did not act maliciously in publishing the report and that they sought to give the sole shareholder and director of P&S an opportunity to state his side of the story as soon as he was released from police custody.

[57] In respect of the defence of fair comment, CVM contended that the publication contained comments made by the reporter and Superintendent Ford on matters which are of public interest. Reliance was placed by them on the case of ***Telnikoff v. Matusevitch*** [1991] 3 WLR 952; [1991] 1 Q.B 102, that they submitted was authority for the principle that a Claimant must show that the comment was unfair and must prove express malice. It is therefore their contention that no malice has been proven and that nothing from the manner in which the newscast was published can reasonably be construed as being evidence of malice.

SUPERINTENDENT FORD AND ATTORNEY GENERAL'S SUBMISSIONS

[58] The 2nd and 3rd Defendants sought to rely on the defences of fair comment, qualified privilege and justification. Superintendent Ford and the AG in their defence pleaded that the words used by Superintendent Ford on the day in question were true in substance and in fact. They pleaded further and in the alternative that the allegations as contained in the publication were a fair comment on a matter of public interest.

[59] Additionally they sought to rely upon the statutory provisions of section 33 of the Constabulary Force Act, which is relevant in claims in tort against police officers. They submit that based on the provision of section 33 of the said Act and without the presence of malice, the claim against them must fail. Further, that by reason of Superintendent Ford being a police officer it does not have to be proven that the vehicles were in fact stolen; but that he had reasonable and probable cause to suspect that they were stolen and in so doing that he acted without malice. The 2nd and 3rd Defendants then went further to examine and explain the term 'reasonable suspicion' with case law to support. Action taken by the police that are predicated upon reasonable suspicion or belief are generally treated the same as true statements; however, the court may inquire into the reasonableness of that belief.

[60] They sought support from the decision ***in Evon Gordon v. Det. Cpl. Brown & W/Cpl Green Dixon & Chief of Police Michael Garrick and the Attorney General*** [2014] JMSC Civ. 223 at page 16***.*** In that case the Claimant had initiated a suit for defamation inter alia, arising from a search of his property and allegations of him having stolen motor vehicles. Batts, J. found that despite disparaging remarks being spoken of the Claimant he could not succeed on the defamation claim as:

> *"...given the information in the possession of the police as well as their observations at the time of the search,… that the remarks were nor malicious or without reasonable and probable cause. The claim for defamation will not succeed when regard is had to section 33 of the Constabulary Force Act" (**sic**).*

[61] On the issue of fair comment Superintendent Ford and the Attorney General submitted that there was no malice proven by P&S and that nothing in the manner in which the matter was published can reasonably be construed as being evidence of malice. In this regard they too relied on the case of ***Telnikoff v. Matusevitch*** [1991] 3 W.L.R. 952.

LAW AND ANALYSIS

[62] The Claimant has framed its suit in the tort of defamation, which is an all-encompassing term that covers any statement that hurts someone's reputation. The Claimant is seemingly averring libel both in respect of the utterances made by Superintendent Ford and those made by the CVM reporter. The Claimant undoubtedly has a right to protect its good name as was enunciated by Diplock, J. in ***Silkin v. Beaverbrook Newspapers Ltd***. [1958] 1. W.L.R. 743, at page 745-746. where he said:

> *"… every man, whether he is in public life or not, is entitled not to have lies told about him; and by that is meant that one is not entitled to make statements of fact about a person which are untrue and which redound to his discredit, that is to say, tend to lower him in the estimation of right-thinking men."*

The Elements of The Tort

[63] **In Percival Syblis v. Delores Haughton** [2012] JMSC Civ. 178, at page 4 it was held that:

> *"A man commits the tort of defamation when he publishes to a third person words containing an untrue imputation against the reputation of another. If the publication is made in a permanent form or is broadcasted, the matter published is libel. It is slander where a defamatory sense is communicated by spoken words … Once libel is proved, the law presumes that some damage will flow from the publication. It is therefore actionable per se".*

Are the Utterances of the 1st and 2nd Defendants Defamatory

[64] In the instant claim there is no issue that there were utterances and publications made by the 1st and 2nd Defendants on the 12th of December 2008. The 1st Defendant in its Defence filed on 22nd September 2009 expressly "admits having published words in substantially the terms set out in … the Particulars of Claim at

the times alleged on December 12, 2008…". The admissions made by the 2nd and 3rd Defendants were limited to the extent that "on the 12th December 2008 the 2nd defendant published words to the 1st Defendant".

[65] The utterances are plainly imputing criminal acts or wrongdoing on the part of someone, as to whether it was the Claimant is yet to be determined. Certainly Mr. Sean Green, who is the sole director and one hundred percent (100%) share holder, was arrested and charged for offences arising under the Larceny Act, there were also allegations made of stolen vehicles being found on the premises of the Claimant and said stolen vehicles being offered to the public for sale.

[66] On a plain and ordinary construction of the meaning of the words I am of the view that such words are disparaging of the reputation of a person. I am also of the view that no elaborate dissertation needs be undertaken in making such a determination. Here I have adopted the opinion of Lord Devlin as expressed in **Lewis v. Daily Telegraph Ltd**.[1964] A.C. 234, at page 258, where he opined that:

> *"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 a knowledgeable of the rules of construction."*

[67] I have also considered the reasoning of Lord Devlin In the same ***Lewis*** decision, as it relates to the construction of words and whether such words are understood by the ordinary man to be defamatory. Lord Devlin in his judgment at page 285 stated that:

> *"It is not therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. 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."

[68] In the instant case the Defendants did not merely talk of smoke, they in fact built a bonfire with abundant flames, so that the meaning conveyed by their words, in my view, was quite pellucid. This Court having determined that the words complained of are prima facie defamatory, the Claimant has therefore successfully established that required element of the tort.

Is the Defamation referable to the Claimant

[69] In proof of its claim P&S must particularly and by cogent evidence establish that the alleged defamatory publication was attributable to it. The Claimant's witness Mr. Green in cross examination agreed that the Defendants did not utter his name or the name of the Claimant any at all during the interview of Superintendent Ford that was subsequently broadcasted by CVM. Nevertheless the Claimant is asking the Court to find that indeed the broadcast was referring to the Claimant and asking the Court to consider the following aspects of the evidence as supporting such a finding:

I. The Claimant carried on its used car dealership business conspicuously along the Bog Walk Highway in the parish of St. Catherine and traded under the name "High way Car Mart". The newscast made reference to "a highway car mart in Bog Walk St. Catherine" and "the highway car mart in the Bog Walk area.

II. Reference was made to the owner of the car mart being taken into custody

III. The Defendants in their defences have not denied that it was the Claimant that was being referred to or that it was the Claimant's premises where the events occurred on the 12th December 2008.

[70] The Claimant is of the view that there is no real denial on the part of the Defendants that such utterances and publications are attributed to the Claimant with this submission I do not entirely agree. Whereas the 1st Defendant has not raised any denial as to this element of the tort, certainly the 2nd and 3rd Defendants have raised the question and have submitted to this Court that the Claimant has not offered any evidence to establish this element of the tort, at least not where they are concerned.

[71] Since the position taken by the 1st Defendant on the one hand versus the position taken by the 2nd and 3rd Defendants on the other is different, then the Court must examine the evidence and consider their respective positions separately.

[72] The 1st Defendant has in substance, admitted the publication of the words as set out in the Claim. In that publication the 1st Defendant had made reference to "a highway car mart in Bog Walk, St. Catherine" and had linked that reference to "a car stealing ring". Although the Claimant was not mentioned by name, the verbal description as a car mart and the geographical location along the Bog Walk high way in the parish of St. Catherine in my view is a sufficiently clear reference to the Claimant.

[73] In relation to the 2nd Defendant it is not disputed that it is the actions of Mr. Sean Green that the police had investigated and it was the behaviour of Mr. Green that the 2nd Defendant had spoken about in the CVM interview and broadcast and ultimately it was Mr. Green who was prosecuted and charged for criminal offences arising under the Larceny Act. There is no basis therefore for this Court to make a finding that the 2nd Defendant was at the material time referring to P&S. It seems to me that the wrongdoer that Superintendent Ford referred to was Mr. Green, who is not a Claimant in this suit.

Was there publication of the defamatory statements

[74] P&S must also establish that there has been a publication of the statements and that such statements have caused harm to its reputation, that is to say, the statement was injurious. Since the whole point of defamation law is to take care of injuries to reputation, a claimant suing for defamation must show how their reputation was hurt by the false statement, for example, by showing that the claimant lost work; was shunned by right thinking members of society; or in the case of an artificial person such as P&S that it lost its goodwill as a business.

[75] There is no dispute that there was a publication of the alleged defamatory statements, but as to whether or not the reputation of the claimant has been tarnished by the said publication is however a hotly contested topic.

ANCILLARY ISSUES:

1. Applicable Legislation

[76] A number of ancillary points were raised by the parties in their submissions and I will now address those before getting into the substantive issues arising in the Claim. Firstly, the Claimant had submitted that the relevant legislation for determination of the issues hereof was the 2013 Defamation Act. I disagree with the Claimant's position in that regard and find favour instead with the 1st Defendant's position, that this matter is governed by the Defamation Act of 1963. I say this having regard to the provision of section 4 of the 2013 Act which states that; "*This Act does not apply to proceedings commenced prior to the date of commencement of this Act".* The date when the 2013 Legislation was promulgated is the 28th November 2013, whereas the Claim was filed on 7th May 2009 and thereby predates the coming into existence of the Act.

2. The Claimant's Status

[77] The second ancillary issue I have identified is whether or not a company or artificial person has the ability to sustain a claim for defamation. As far as I understand the law, any person in being can bring an action in defamation.

Section 3 of the Interpretation Act [968] defines a "person" to include "*any corporation, either aggregate or sole, and any club, society, association or other body, of one or more persons."* In any event, this thorny issue has been resolved by McDonald-Bishop J (as she then was) who made it clear in **Khemlani Mart Limited & Kaymart Limited v. Radio Jamaica Limited** (CLAIM NO. 2007HCV 03326) delivered on May 26, 2008 at page 35 that:

> *"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".*

[78] Whereas the law is settled that an artificial person can bring a libel claim, I must nevertheless in this case, determine if P&S Used Car Traders Limited was a person in being at the relevant time. In this trial the only evidence presented by the Claimant as to its status is the assertion made by its witness Mr. Green at paragraph 2 of his witness statement. In that paragraph the Claimant is introduced as "a limited liability company duly incorporated under the Companies Act of Jamaica with its registered office situated at Bog Walk in the parish of St. Catherine". There was a further averment in paragraph 3 of the said statement that "The Claimant is a licensed Used Car Dealer…"

[79] An incorporated business, or a corporation, is a separate entity from the business owner and has natural rights. Incorporated businesses are considered legal entities in the eyes of the law, this means the company is liable for its own taxes, debts and the consequences of any legal actions, and has the right to conduct business and initiate lawsuits under its own name. Incorporation is therefore important otherwise a business may be unable to access or obtain legal remedy.

[80] There was no usual documentation such as articles of incorporation that was filed with the Claim or indeed tendered during the course of the trial to support that the Claimant was a “Limited Liability Company” at the relevant time. There is no evidence except for the bald assertion of Mr. Green that the Claimant therefore is a person in law, competent to bring a claim. There was additionally no licence filed with the Claim and none was tendered at trial to support that the Claimant was authorized or licensed to carry on its particular business or trade of being a used car dealer and therefore had the necessary good standing and reputation to protect.

[81] The reputation of a business though an intangible asset is essential to its survival. The trust and confidence of the consumer market can have a direct and profound effect on a company’s bottom line. It therefore is important for a company to cultivate, establish, build and maintain its reputation. Creating a good reputation however takes time and effort and does not happen overnight. In this case and according to the evidence of its witness, the Claimant would have been in business some 7 – 9 months. There is not one shred of evidence provided by the Claimant to substantiate that it had indeed been doing a thriving business let alone build a good reputation and therefore had one to lose.

3. Principle of Corporate Attribution

[82] While a limited company is deemed to be a legal person separate from its shareholders and employees, as a matter of fact a company can only act through its employees and human agents, from the board of directors down. So there must be rules to ascribe rights and duties to a company from its actors. As a matter of English law, it is generally the case that a company will be responsible for the actions of its directors and, in many cases, its employees

[83] Ascription of liability to companies therefore involves the principles of contract, agency, capacity, tort and crime as they relate to company law. In contract, this manifests itself through the rules of agency; in tort, through the doctrine of vicarious liability. These principles establish under what circumstances a

company may be sued for the actions of its directors, employees and other agents, as also when companies are criminally liable for offences committed by their servants and agents.

[84] In the Privy Council case of ***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] UKPC 5; it was suggested that normal principles of interpretation should be applied to the statute that created the offence to ascertain whose act or knowledge or state of mind was intended to count as being that of the company. This is known as 'the Principle of Attribution.

[85] The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. However, the fact that a company is responsible to third parties for the actions of its employees and directors, is not the same as the question of whether the knowledge or actions of a director should be attributed to the company – for example, vicarious liability does not involve the attribution of wrongdoing by a director (or employee) to the company, but rather imposes strict liability on the company for acts done in the course of employment.

[86] There are many circumstances in which the court must determine whether the knowledge or actions of an officer should be attributed to the company. This will be the case when for example, a rule of law; either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. In certain circumstances, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person "himself", as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the accused person.

[87] How is such a rule to be applied to a company? One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was

imprisonment. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. There will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule.

[88] Adopting such a course is always a matter of interpretation. If the court concludes that attribution obtains and the offence was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

[89] To this end I have looked at the circumstances of this case and particularly the fact that there is a sole share holder and director who gave evidence that he is the "*principal and only person to deal with as the head of the company*". I have critically examined this facts alongside the provisions of the Larceny Act and my interpretation of the substantive rule in respect of the offence of larceny is as follows:

I. Offences under the Act including simple larceny and receiving stolen goods can be committed by *"a person, any person or every person"*. Certain persons in relation to specified offences such a embezzlement and larceny servant, are designated by their peculiar offices or employment such as clerks, trustees and directors.

II. In relation to the offences of larceny of motor vehicle or receiving stolen property such as motor vehicles, there is no distinction that the person must be human or artificial.

[90] As far as I understand the operations of the Larceny Act, an incorporated company would not be precluded from criminal liability. Even in respect of sentencing a judge would have the option of imposing a fine in lieu of a custodial sentence. In relation to the Parish Court Judge (formerly the Resident Magistrate) who would have jurisdiction to hear the matter; section 268 (2) of the ***Judicature (Reslident Magistrates) Act,*** empowers the Parish Court Judge in lieu of a custodial sentence to impose a fine not exceeding one million dollars ($1,000,000) *"…if in the circumstances of any case he thinks fit".*

[91] The general principle extracted therefore is that knowledge and actions of a director can be attributed to the company, although questions of attribution are sensitive to the particular facts. It is also clear that acts by directors become acts of the company, as they *are "the very ego and centre of the personality of the corporation"* as enunciated by Lord Haldane in the case of ***Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*** [1915] AC 705. In the case of **HL *Bolton (Engineering) Co. Ltd v TJ Graham & Sons Limited [1956] 3 ALL ER 624*** at page 630, Lord Denning expressed similar sentiments when he said:

> *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre... (the) directors and managers represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."*

[92] Crucially, moreover, there are numerous and well-established authorities that clearly show that the wrongdoing of the delinquent director or agent will be attributed to the company in order to impose civil or criminal liability on the latter.

A few examples will here suffice; the UK Court of Appeal in ***El Ajou v Dollar Land Holdings plc,*** [1995] 2 All ER 213, attributed the knowledge of its chairman, the directing mind and will to the company, for the purpose of holding the defendant company liable to the claimant for receiving money knowing that it was the proceeds of a fraudulent transaction. In ***McNicholas Construction Co Ltd v Customs and Excise Commissioners*** [2000] All ER (D) 89, the court affirmed the tribunal's decision to attribute the fraud of the company's site managers to the company and thereby rendering the latter liable to the Customs and Excise Commissioners for VAT.

[93] In such circumstances to hold otherwise would mean that a company can never be held accountable for the wrongs committed by it qua its directors and agents, however egregious the wrongdoing. It does not in my view make a difference to the analysis in so far as wrong doing involves a one-man company. The law cannot be taken to be asinine so as to allow one-man companies to escape liability by not attributing the wrongdoing of its sole director and shareholder to it. This flouts justice and common sense. In my view therefore the acts of Mr. Green as sole shareholder and director, for the purposes of determining the issue of the defences as posited by the Defendants herein; can be attributed to the Company.

4. Malice

[94] The fourth ancillary issue that I have identified is that concerning the Claimant's pleadings and its evidential obligation relative to the defence of fair comment. As a starting point I have examined the provisions of the Civil Procedure Rules 2002 (herein after referred to as the "CPR").

[95] The CPR at part 69.2, instructs that "the particulars of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8

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

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

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

[96] On reading the above provisions it seems to me that it is only where a Claimant is averring malice that they are obliged to specify the particular publication that is allegedly malicious in its content. The 1st Defendant herein is contending that the failure of P&S to expressly allege that they uttered the offending words maliciously is fatal to its claim against them, in light of their defence of fair comment. In support of their contention they have placed much reliance on the authority of ***Telnikoff v. Matusevitch***.

[97] In the case of ***E.C Karl Blythe v. Gleaner Company Limited*****, Claim No. 2004 HCV 1671** delivered on May 12, 2011 Roy Anderson, J. at page 42 paragraph 68 opined the following on the issue of malice:

> *"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".*

[98] I have also sought guidance from the Court of Appeal decision of **Paget DeFreitas et al v. Enoch Blythe** 2010 [JMCA] App 18. In that case the respondent/claimant had filed suit seeking damages for libel which he says was contained in an article and cartoon appearing in the editorial on page 8 of the

Sunday Observer dated the 14th day of November 1999 titled "A blighted prospect", written and published by the Defendants. In their amended defence, the applicants/Defendants denied that the article has a defamatory meaning. They also pleaded that the occasion was one of qualified privilege on a matter of public interest, and that the words and cartoon were not published maliciously. In his reply, the respondent/claimant countered that the words and cartoon complained of were published maliciously, and set out particulars from which he claims malice may be inferred.

[99] The bone of contention before the Court of Appeal in the **DeFreitas** case concerned the respondent/claimant's reply filed 8th May 2008 and the leave granted by Hibbert J. on 30th April 2008, to file that reply out of time. On 11th March 2009, Harrison JA, sitting as a single judge of the Court of Appeal had set aside the order of Hibbert J. but subsequently on 30th July 2009 the Court of Appeal unanimously discharged the order of Harrison JA and directed that the matter was to proceed in the usual way in the Supreme Court.

[100] On a subsequent application for leave to appeal to the Privy Council; Panton P. cited with approval the enunciation of Morrison JA (as he then was) who in delivering the judgment of the court had said it is clear that "… as a matter of law, malice is not an ingredient of the cause of action for libel and there is accordingly no necessity to plead it, …" (para.15). Given that fact as well that there was no obligation on the claimant to anticipate the defence raised, the Court of Appeal concluded that it was entirely appropriate for the respondent/claimant to respond by alleging malice in the reply, rather than by way of amendment of the particulars of claim.

[101] As this Court understands the law as distilled in the above decisions, it is my view that the circumstances that obtained in the **DeFreitas** case and the Appellate Court's pronouncements are not therefore at variance with the decision in ***Telnikoff v. Matusevitch.*** The former case deals with issues of procedure and pleadings, the latter deals with substantive issues of proof and evidence.

Consequently the issue of privilege in the context of this case is not as narrow as traditional privilege nor is there a burden upon the Claimant to aver malice to properly ground its Claim. I am therefore of the view that P&S's claim is properly before the Court, albeit, malice was not expressly pleaded by P&S.

[102] Whereas the Claimant does not have to plead malice expressly; does it however have to prove it evidentially in order to defeat the defence of fair comment as raised? In relation to the defence of fair comment as raised by the 1st Defendant my understanding of the law in this regard, is that the Claimant in order to defeat the defence as raised, evidentially must establish malice on the part of the 1st Defendant.

[103] The Claimant while not directly using the word 'malice' or 'maliciously' seems nonetheless to be asking the Court to make such a finding inferentially. I say this as in its *Particulars of Claim* the Claimant had averred "that the actions of the 1st Defendant were calculated to make a profit for itself in publishing…" the offending words as broadcasted. In such circumstances the Claimant is obliged to present evidence in support of such malice as insinuated by it.

THE DEFENCES

[104] A defendant in a defamation case may raise a variety of defences, whether it is libel or slander, such as truth/justification, privilege or fair comment. The Defendants in this case have sought to rely upon all the above defences. One of the issues therefore for the Court's determination is whether the Defendants can successfully establish any of the defences that they have raised. For ease of convenience I propose to now separately address those defences raised.

1. Justification

[105] The common law traditionally presumed that a statement was false once a Claimant proved that the statement was defamatory. Since the law presumes that every person is of good repute until the contrary is proved, it is for the Defendant to plead and prove affirmatively that the defamatory words are true or

substantially true. The test, regarding whether the facts are true or substantially true is an objective test, and the honest belief of the Defendant plays no part in such assessment. Accordingly, the onus is cast on the 2nd and 3rd Defendants to produced credible evidence to support their contention that the offending words of the publication are true.

[106] The Jamaican case of ***Jasper Bernard v. The Jamaica Observer*** CL 2002/B-048 at page 7 is quite instructive on the issue of justification, where Campbell J held that;

> *"Justification is the plea that the defamatory words are true. Truth is a complete defence. To sustain such a plea, it is necessary to prove to the jury that the words were "true in substance and in fact." Proof of the defendant's belief in the truth is not sufficient"*

[107] The standard of proof required in such circumstances is indicated by Lord Denning in the English case ***Hornal v. Neubeugher*** [1957] 1 QBD 247 where he enunciated at page 258, that:

> *"The more serious the allegation the higher the degree of probability that is required but it need not, in civil cases, reach the very high standard required by criminal law."*

[108] A statement does not need to be literally true in order for the defence of justification to be effective. Courts require that the statement be substantially true in order for the defence to apply. This means that even if the defendant cannot prove that every single allegation or iota of the utterance or publication is true, the defence can succeed, if the "gist" or "sting" of the communication is substantially accurate. There is statutory support for this position as evidenced by the 1963 Defamation Act. Section 7 of the 1963 Act provides that:

> *"In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the*

words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges".

[109] Superintendent Ford and the Attorney General are asserting that there is truth to the statements uttered by the 2nd Defendant. They maintain that charges were laid against the sole director/owner of P&S Mr. Sean Green, for Larceny of motor vehicle, in relation to two vehicles that were given to him to sell by a third party known as Michael Ranger.

[110] They maintain that one of the two vehicles for which Mr. Green was charged was a Toyota Voxy, and that the said Toyota Voxy was advertised by Mr. Green for sale, after it was reported stolen from the parking lot of Price Smart on Red Hills Road, Kingston 19 in the parish of Saint Andrew.

[111] They further maintain that the said Toyota Voxy, was recovered from the Claimant's premises and the said vehicle was subsequently identified by the owner, Mrs. Diana Blake-Bennett as her property and which was stolen from the Price Smart parking lot in September 2008. The said vehicle was identified at the Office of the Police Commissioner in the presence of Mr. Green and Michael Ranger.

[112] In his interview with the CVM reporter, Superintendent Ford on my count had allegedly made some nine (9) statements and had additionally uttered a warning in general. In his defence Superintendent Ford had admitted publishing words to the 1st Defendant but had not detailed those words. The publication that the 1st Defendant has admitted in substance had included several utterances made by Superintendent Ford which I accept were made by him. The evidence led in this case in my view supports the following to be true or substantially true:

I. The police had received at least one complaint of a stolen motor vehicle from Diana Blake-Bennett;

II. There is evidence that Mr. Sean Green had placed an advertisement in the Sunday Gleaner on 7th December 2008 for the sale of a Toyota Voxy motor car;

III. The police were armed with search warrants and had made checks/searches at the Claimant's premises for stolen motor vehicles;

IV. At least one verified stolen motor vehicle was found at the Claimant's premises;

V. Some cars at the premises as admitted by Mr. Green had no documentation;

VI. Some nine (9) vehicles were seized by the police from the claimant's premises;

VII. The owner of the premises/business, that is Mr. Sean Green was taken into custody;

VIII. Vehicles seized from the Claimant's premises were taken to the Police Commissioner's office;

IX. Forensic examination was conducted on at least one vehicle and the engine/chassis number restored and the vehicle verified as the stolen vehicle of Mrs. Blake-Bennett.

[113] The Claimant has neatly divorced itself from the activities of its director/agent, Mr. Sean Green. It is not lost upon this Court that Mr. Green was not made a Claimant in the suit and perhaps for good reason. Conversely the claimant has readily embraced the mantle of ownership and agency when it averred and identified itself as the person referred to in the broadcast. How is the Court to treat with this convenient separation? I am of the view that in the circumstances of the case, the Claimant cannot be allowed to escape its obligation of attribution

but must also accept and own the actions of its owner, director and sole share holder and his actions done in furtherance of the business.

[114] Contrary to the Claimant's denial of wrong doing the evidence has disclosed that:

I. The Claimant had on its premises a stolen motor vehicle which it had received into its possession by its agent and director, Mr. Sean Green and was thereby implicated in an offence contrary to the provisions of the Larceny Act.

II. The Claimant by its agent Sean Green had utilized its facilities (phone numbers) and had advertised for sale a stolen motor vehicle, to wit: a grey Toyota Voxy with sunroof etc. Which on a balance of probability I have found to be the property of Mrs. Diana Blake-Bennett; therefore at least one motor vehicle was in its possession that was stolen and the Claimant was thereby implicated in the handling of a stolen motor vehicle contrary to the Larceny Act.

III. At least one vehicle that the Claimant was offering to the Jamaican public for sale was a stolen motor vehicle.

IV. By admission of its agent Mr. Sean Green the Claimant had in its possession and on its lot some motor vehicles being offered for sale by the Claimant to the Jamaican public which had no supporting documentation.

V. The Claimant had via its agent and director Mr. Sean Green committed a criminal offence of conspiracy to defraud by utilizing its point of sale facility to process a transaction involving a stolen motor vehicle.

[115] Based on the evidence and authorities referred to in the foregoing paragraphs I am minded to find that the statements made by Superintendent Ford on the day in question was justified. The information and complaint of a virtual complainant, Mrs. Diana Blake Bennett, coupled with the advertisement as placed by the Mr.

Green for the sale of a vehicle befitting the description of Mrs. Blake-Bennett's stolen vehicle would have been reasonable suspicion grounding the search warrant that authorized Superintendent Ford to search the Claimant's premises for stolen vehicles.

[116] In relation to the use of the search warrant, Section 63 (1) of the ***Larceny Act*** stipulates that:

> *"If it is made to appear by information on oath before a Resident Magistrate or Justice that there is reasonable cause to believe that any person has in his custody or possession or on his premises any property whatsoever, with respect to which any offence against this Act has been committed, such Magistrate or Justice may grant a warrant to search for and seize such property".*

The Act further provides at section 63 (2)(a) of the Larceny Act that :

> *"…where any property is seized under this section, the person on whose premises it was at the time of seizure or the person from whom it was taken shall, unless previously charged with receiving it knowing it to have been stolen, be summoned before a Resident Magistrate to account for his possession of such property, and such Resident Magistrate shall make such order respecting the disposal of such property and may award such costs as the justice of the case may require".*

[117] The foregoing provision indicates that Superintendent Ford would have been acting in his capacity qua policeman who was investigating a criminal offence(s). He was acting on intelligence from a reliable source as to the presence of stolen vehicles lodged at the Claimant's premises. Having searched the premises and having discovered a motor vehicle that in fact turned out to be Mrs. Blake-Bennett's stolen property as also the discovery of several undocumented motor vehicles, as such his assertions were true in substance and in fact.

[118] Albeit there is no evidence that Mr. Green was convicted of the said offence for which he was charged or for any alternative offence, I am mindful that to support

the defence of justification a conviction is not essential. Superintendent Ford was entirely within his jurisdiction to bring criminal charges against Mr. Green in accordance with the provisions of the Larceny Act and put him before the court for determination of such criminal liability. The fact that Mr. Green was not ultimately convicted is no indication that Superintendent Ford acted maliciously or without reasonable and probable cause. I find therefore that P&S' contention that Superintendent Ford presented no evidence which went to the truth of the alleged offending words to be disingenuous.

[119] A further statutory defence is afforded to Superintendent Ford and the Attorney General by virtue of the provisions of section 33 of the Constabulary Force Act while carrying out his duties as a policeman. The section provides that:

> *" Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant"*

[120] It is accepted by the Claimant that Superintendent Ford was acting in his capacity as policeman and agent of the State, the onus therefore lies on P&S, based on the wording of section 33, to prove that Superintendent Ford acted maliciously or without reasonable and probable cause in the execution of his duty. P&S having failed to prove the contrary; invariably means that Superintendent Ford is entitled to the protection of section 33.

[121] In light of my findings above Superintendent Ford and by extension the Attorney General have a complete defence by virtue of justification of the content of the publication and additionally the special statutory defence which the Claimant has failed to defeat.

2. Qualified Privilege

[122] The law recognises that there are times when blunt communication is necessary, and that such communication might well amount to defamatory statements being made of some person, nonetheless in certain circumstances such communication is regarded as tolerable. This exception is not unbridled but is subjected to limitations. In establishing limits the law has developed two traditional categories of privilege. These are qualified privilege and absolute privilege. In the instant case the Defendants are seeking to avail themselves of the defence of qualified privilege. More specifically the Defendants are relying on that sub species of qualified privilege that is directed to matters more in the public domain. This sub specie of qualified privilege is often referred to as the ***Reynolds*** privilege.

[123] Qualified privilege arises from the particular occasion during which the statement was made. The occasion may be such that publication to the world at large may be considered sufficiently important to override the protection of the reputation of the defamed person. A defendant is not entitled to a qualified privilege without proving that he meets the conditions established for the privilege.

[124] Generally, in order for qualified privilege to apply, the defendant must believe that a statement is true and, depending on the circumstances, either have reasonable grounds for believing that the statement was true or not have acted recklessly in ascertaining the truth or falsity of the statement. So that if the matter was one of legitimate public interest then the defendant is protected from liability once (a) he was not malicious; (b) the report was fair and accurate; (c) the subject of the report was a matter of public interest.

[125] Qualified privilege may apply where a statement is made where the person making the communication believes that the public interest requires it. What is in the public's interest or of value to the public according to Lord Nicholls in ***Reynolds***, (at page 202) involves consideration of the quality and subject matter

of the publication. If malice is proved then, as under classical privilege, the defence is lost because the privilege would have been abused.

[126] The traditional position as regards qualified privilege was stated by Lord Atkinson in ***Adam v Ward*** [1917] AC 309 at page 334, who enunciated that:

> *"A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a 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."*

[127] The distinction in the modern approach was highlighted in the ***Rennon Walker*** [Supra] where Evan Brown, J. at paragraph 97 – 98 stated that:

> *"So that, under 'Reynolds privilege' or 'Reynolds public interest defence' as Lord Hoffman in* ***Jameel*** *would prefer, it is the material or information that is privileged. In traditional privilege it is the occasion that is privileged. Therefore, once it has been established that the published material is one of public interest, the test as to whether qualified privilege attaches is that of responsible journalism. According to Lord Bingham of Cornhill in* ***Jameel*** *[2006] 4 All ER 1279, 1291, the rationale of this test is "that there can be no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify." So then, the publisher of false and defamatory information is afforded the protection of qualified privilege upon a demonstration of having taken such steps as a reasonable journalist would have taken to ensure the story's accuracy and fitness for publication."*

[128] The legitimacy of the defence was further expounded in the decision of ***C.V.M. Television v Fabian Tewari*** SCCA No. 46/2003 delivered on November 8, 2006. Here Panton JA (as he then was) accepted that CVM "*may have a duty to publish news of criminal activities and of the behaviour of the police in that respect, and there may be a right on the part of the general public to receive such information, [but] there is no duty to publish inaccuracies"*

[129] Gatley, page 382 para. 14.4 *"it is in the public interest that persons should be allowed to (sic) freely on occasions when it is their duty to speak and to tell all that they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest."*

[130] On the issue of qualified privilege P&S and CVM and the DSP all sought to rely on the ***Reynolds*** case in support of their individual contentions. P&S was content to advance the narrow and confining position as posited in the 10 point principles as was enunciated by Lord Nicholls. CVM however, went further and sought to additionally rely on the later decision of ***Jameel*** which has refined the qualifications of the defence and has since been restated and reiterated in the ***Edward Seaga*** case. I find these latter authorities submitted by CVM to be quite instructive, the latter cases of ***Jameel*** and ***Edward Seaga*** have apparently made the guiding principles of qualified privilege less stringent than those that were laid down in ***Reynolds.***

[131] In ***Jameel's*** case, it was pointed out that the factors set out by Lord Nicholls in describing responsible journalism in ***Reynolds's*** are not to be applied in an inflexible and piecemeal manner that is not the proper approach. The standard of conduct required of the publisher of the material must be applied in a practical manner and have regard to practical realities. This approach is consistent with that enunciated by Lord Carswell in the ***Edward Seaga*** case. Here the Learned Law Lord adumbrated that:

> *The third matter debated since Reynolds's case, and now specifically dealt with by the House of Lords in Jameel's case, is how the factors set out by Lord Nicholls in describing responsible journalism in Reynolds's case are to be handled. They are not like a statute, nor are they a series of conditions each of which has to be satisfied or tests which the publication has to pass. As Lord Hoffmann said in Jameel's case (at [56]), in the hands of a judge hostile to the spirit of Reynolds's case, they can become ten hurdles at any of which the defence may fail. That is not the*

> *proper approach. The standard of conduct required of the publisher of the material must be applied in a practical manner and have regard to practical realities (see [56]). The material should, as Lord Hope of Craighead said (at [107]-[108]), be looked at as a whole, not dissected or assessed piece by piece, without regard to the whole context.*

[132] The material should, as Lord Hope of Craighead said (at [107]-[108]), be looked at as a whole, not dissected or assessed piece by piece, without regard to the whole context. In my view, this is what the Claimant attempted to do in the instant Claim. I am inclined to follow the pronunciations of the Privy Council as stated in the ***Edward Seaga*** case; particularly since it is a precedent binding on this Court. This Court has also considered that freedom of speech such as is enjoyed by media houses is a fundamental human right under the constitution and must be balanced against the rights of other persons not to be injured in their reputation.

[133] In ***Reynolds***, the House of Lords held that a newspaper can escape liability even if the publication is defamatory once it can show that the article was the product of responsible journalism. This approach to defamation law is now part of the law of Jamaica by virtue of decisions of the Judicial Committee of the Privy Council as postulated in ***Edward Seaga*** and ***Bonnick v Morris*** [2003] 1 AC 300.

[134] The broadcast that was published by CVM, as they contend, was based on what they observed on the day in question on P&S's property. They allege that they took steps to verify the information with the police officer who was in charge of the operation, namely Superintendent Ford and that they were informed by the said Superintendent Ford that investigations were being carried out in the matter. I am of the view that the best person to have solicited the information from relative to the event that was unfolding was in fact the police officer in charge.

[135] I am also of the view that the incident which took place on the day in question is a matter of public concern, given the fact that it was alleged that information was received by the police that motor vehicles which had been stolen from members

of the public were suspected to be on P&S's property. As such the material/information on which CVM relied would qualify as privileged.

[136] I also call to mind at this point that the Claimant's witness had indicated that during the course of business he became familiar with reports of car stealing rings across Jamaica, and he regarded this as a matter that was of great concern to the public. He agreed that persons charged in relation to receipt and sale of stolen vehicles would be a matter of public concern.

[137] Mr. Green had agreed with the suggestions of Mrs. Wilkinson that if indeed stolen motor vehicles were at the Claimant's premises, then Superintendent Ford as a policeman would have a duty to warn the public. He however disagreed that Superintendent Ford would have a duty to inform the public to be cautious in taking things from persons whom they knew had been charged with stealing. It is my view however, that Superintendent Ford had such a duty to warn persons against getting involved in nefarious activities by receiving items from known criminals, as there are resulting criminal liability that can arise.

[138] it is my view that in giving effect to the liberalising intent of ***Reynolds, Seaga*** and ***Bonnick***; in a claim such as the instant one, where qualified privilege has been legitimately raised and is supported by the evidence, the issue ought to be resolved in favour of the Defendant. Unless there is compelling reason not to do so. A court should be slow to find defamation in matters of public interest and in adopting that approach, the concept of the public interest should not be given an unduly narrow definition. ***Bonnick*** was a case described as 'near the borderline' (Lord Nicholls [28]) but was resolved in favour of the defendant by the Court of Appeal and the Privy Council despite the fact that the words were in fact capable of a defamatory meaning.

[139] The tenor of the applicable law as distilled from the foregoing cases as I understand it, suggests that having regard to the constitutional importance attached to freedom of expression, the court should not approach the defamatory

words in question in an unduly restrictive way. The Court is not to regard the guidelines as a strait jacket or a single vision tunnel or indeed an obstacle course which the defendant is to negotiate at his peril. The ***Reynolds*** conditions are intended as a guide only, the aim of the Court is to get a holistic view of the matter in a sensible way. No single piece must be examined or analyzed minutely without regard to the surrounding context as a whole in which the words were uttered and published. It must also be remembered that Lord Nicholls did say in ***Reynolds*** that his list was not exhaustive.

[140] Unlike the facts in the ***Fabian Tewari*** case, the account of the events in the instant case that CVM recounted in its broadcast was not inaccurate and at no point has P&S raised the issue of inaccuracies as to reporting of the actual event, what they did raise is that the actual allegations made by the police was unfounded and I have already indicated my findings to the contrary in that regard.

[141] I have attuned my mind to the 10 points test formulated by Lord Nicholls in ***Reynolds*** and I find that in my analysis thereof that CVM has satisfied the 10 points test. Contrary to the assertions made by P&S it is my finding that the defence of qualified privilege does avail the Defendants in the particular circumstances of this case and that the actions of the Defendants do not violate the principles enunciated in ***Reynolds***. That notwithstanding the Claimant was not prosecuted at a trial and convicted in relation to offences arising under the Larceny Act; the publication was of public concern and in the public's interest.

3. Fair Comment

[142] The 1st Defendant submitted that ***Telnikoff v Matusevitch*** [1991] 3 W.L.R. 952 is authority for the proposition that it is the Claimant who must show both that the comment was unfair and made with express malice.

[143] The Claimant in response cited a portion from the judgement of Lord Nicholls in ***Reynolds v Times Newspaper Ltd*** [1999] 3 W.L.R. 1010. In the ***Reynolds*** case, Lord Nicholls at page 1016 adumbrated that:

> *"It is important to keep in mind that this defence is concerned with the protection of comment, not imputations of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere. Further, to be within this defence the comment must be recognisable as comment, as distinct from an imputation of fact. The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made".*

[144] Against this background, the Claimant submitted that the starting point is whether the 'statement' is in fact a 'comment'. It was the Claimant's contention that what the 1st Defendant did was to impute facts. There is no evidence; the Claimant has submitted that the 1st Defendant has established that they were commenting on facts.

[145] Thus the starting point for an assessment of the defence of fair comment is whether facts stated are true. If this hurdle is not surmounted then the defence must necessarily fail. If the defendant has cleared this then the next hurdle is whether any right thinking person could have honestly held the opinion expressed. If the answer to that is yes, then the next hurdle is whether the defendant in fact held that view honestly. This last stage is linked with malice in that even if the first two criteria are met but there is evidence of malice then the comment would not be one honestly held. Malice here means spiteful or vengeful.

[146] Additionally as submitted by the Claimant there is still the important question of distinguishing fact from opinion or comment. Sometimes the nature of the utterances and publications is such that it is difficult to separate one from the other but it is a necessary task. The criteria set out for the defendant to establish the defence of honest comment is subjected to two qualifications. The first is qualified privilege. If the facts were published on a privileged occasion and there was a commentary on those facts published on the privileged occasion, no liability arises if it turns out that the facts were not true.

[147] Secondly section 8 of the ***Defamation Act*** [1963] operates so as to thwart the defence of honest comment from failing if the only reason the defence would fail is that the defendant failed to prove the truth of 'every single allegation of fact.' However, this section only applies if the publication consists 'partly of allegations of fact and partly of expression of opinion.' Section 8 provides that:

> *In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.*

[148] In the circumstances the broadcast initiated by CVM was not mere reportage, if that was the situation then it would not have been necessary for that Defendant to take steps to verify accuracy. In such circumstances the CVM reporter would merely have been reporting the fact that the statements were made by Superintendent Ford and not attesting to the truth of them. In this case CVM had done more than just report the utterances of Superintendent Ford. Miss Fiona Flemmings, the Reporter had made a number of independent utterances of her own to initiate the interview, to wit:

> *"Members of the flying squad meanwhile made a massive dent in a car stealing ring, with information leading them to a highway car mart in Bog Walk St. Catherine. From where its alleged that cars were been sold. Delona Flemming has this C.V.M exclusive (sic).*
>
> *Who would have thought that vehicles on sale at the highway car mart in the Bog Walk area would turn out to be stolen vehicles…"*

[149] To my mind these utterances are statements of fact. For such statements of fact to qualify as fair comment, the independent remarks made by CVM must have been substantially true. I have already indicated that the substance of Superintendent Ford's utterances were justified as being true, the reporter had indicated in the broadcast itself that she had made observations of the police

conducting a raid on the Claimant's premises and sought out Superintendent Ford for an interview. Based on the sequence of factual events which occurred, it can be reasonably inferred that her comment was predicated upon the activities of the police which she had observed.

[150] In respect of her opening statement of fact, the CVM reporter spoke of the police making "a massive dent in a car stealing ring". She also indicated that the investigations led to the Claimant's premises, but the reporter did not indicate that the Claimant was a party to the "car stealing ring." In relation to the Claimant, she merely stated that the police investigations led them to the Claimant's premises. This statement is true, the Claimant indicated through the evidence of its witness Mr. Sean Green, that indeed the police raided his premises and had asked about the ownership of particular vehicles including the Toyota Voxy. The police had also asked Mr. Green to produce documentation for other vehicles on the Claimant's premises, which he failed to produce.

[151] The second statement of fact uttered by the reporter was in relation to stolen vehicles being sold at the Claimant's premises, well as it transpired at least one stolen vehicle was advertised for sale and was on the Claimant's premises for sale to the public. So notwithstanding that the CVM reporter's utterances are more statements of fact instead of comments, the utterances of the CVM reporter taken as a whole are indeed truthful. The 1st Defendant having satisfied the Court that the utterances made by its reporter are justifiable and were in part based on the utterances of Superintendent Ford. In such circumstances the 1st and 2nd Defendants have overcome the first hurdle in the defence of fair comment.

[152] The next hurdle is whether any right thinking person could have honestly held the opinion expressed by the Defendants. My answer to this question is yes as the evidence supports such opinions. The next hurdle to be overcome is whether the 1st and 2nd Defendants in fact held that view honestly. This last stage is linked with the issue of malice; in that even if the first two hurdles are overcome by the Defendants, but there is evidence of malice then the comment would not be one

honestly held. Malice here means spiteful or vengeful. I have previously determined that the Claimant has failed to establish malice on the part of either the 1st or 2nd Defendants and so find that they have successfully overcome this hurdle as well.

[153] The Court having resolved the disputed facts of the raid in favour of the 2nd Defendant as regards undocumented motor vehicles and one stolen motor vehicle found on the Claimant's premises. The Court has found the utterances made by the 1st and 2nd Defendants to be justifiable and by extension would consequently be fair. In the circumstances therefore, the defence of fair comment succeeds.

THE CLAIMANT'S REPUTATION

[154] I further make the observation that it is trite law that libel at common law is actionable *per se*, and as such a Claimant does not need to show actual loss in order to bring such a claim. "*The law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation"* (per Bowen LJ in ***Ratcliffe v. Evans*** [1892] 2 QB 524 at 528), and such a Claimant would be entitled to such general damages as the court may properly award, although he neither pleads nor proves any actual damage.

[155] The Claimant avers that as a result of the defamatory words it has been "embarrassed, humiliated and put to great distress… subjected and exposed to public odium and continue to face such public odium in the course of its trade as a Used Car Dealer…" The evidence on which the Claimant relies to prove this assertion is contained in paragraph 12 of Mr. Green's witness statement.

[156] In paragraph 12, Mr. Green alleges that the Claimant had "… lost profits tremendously. This has happened he said because persons who employed the Claimant to sell their motor vehicles returned to the Claimant and took back those motor vehicles. Some of these customers were very clear that they took

back their vehicles because of the assertions made in the broadcast that the Claimant was mixed up in wrong doing."

[157] A number of considerations arise from the foregoing. Firstly, the Claimant is relying on the hearsay assertions made by Mr. Green because no witness was called by the Claimant to say they had seen and heard the broadcast and it had impacted them in a particular way or has caused them to view the Claimant in a negative light and they had lost confidence in the Claimant's integrity and consequently terminated business dealings with the Claimant. There is not one scintilla of evidence presented by the Claimant to support its assertion that clients had withdrawn their business as a result of the publication of the defamatory words.

[158] Secondly, the Claimant through its witness has presented conflicting accounts as to the cause of the Claimant's demise. So even if the Court was prepared to accept the hearsay statements as supporting the Claimant's averments, the court would be irresolute to what version to accept and accordingly what facts to find.

[159] Whereas Mr. Green in his witness statement blames the Defendants and the offending publication for the Claimant's demise, when he was cross examined he gave a number of conflicting reasons. In response to Mr. Piper Q.C. he had said that the business ceased operations because buildings on the land were destroyed by fire. Later on in cross examination he said that he had sold all the vehicles that were on the lot and after the vehicles were sold out under the name P&S the business closed. Inferentially this must have been before the fire, because the witness in testimony had also said that up to when the property was destroyed by fire he had not been operating P&S.

[160] Mr. Green in his viva voce evidence had at no time ascribed the demise of the Claimant to the utterances or publication of the Defendants. On the contrary his evidence at best in this regard is inconsistent. In the face of such inconsistency, this Court is not enabled by the Claimant to make a finding that the defamatory

words has injured the Claimant in its business or trade and resulted in tremendous loss of profits.

[161] Additionally there is no evidence of a loss, tremendous or otherwise. No evidence was presented to establish the profitability of the Claimant Company before the 12th December 2008, and none to show its financial standing thereafter. The Claimant in my view has not provided any evidence to prove that "as a consequence of the publication it has "suffered loss and damage in the course of its trade".

[162] The Claimant has further failed to fulfil its undertaking as averred in its statement of case; that it will "prove the particulars of loss of profit so soon as its auditors have completed their assessment of the Claimant's losses". No evidence has been presented to the Court in that regard and neither has P&S provided one iota of evidence to support its spurious averment that the actions of the 1st Defendant were calculated to make a profit for itself in the publication of the said words.

[163] It was by no means lost upon this Court that the Claimant's witness was unable to support its particulars of pleadings that CVM TV "boasts the highest numbers of viewers in Jamaica and transmits throughout the 14 parishes of the island … CVM TV also commands a wide number of viewers internationally…" On the contrary the witness Mr. Green in cross examination agreed that in relation to CVM TV he did not know the level of its viewership, he did not know the level of viewership in 2012 and neither did he know its international viewership. Since the proof of the publication lies upon the Claimant then he must support by evidence the extent of the publication that he alleges unless the Defendant admits the same.

[164] In this case the Defendant does not admit the extensive viewership that was alleged by the Claimant and in its statement of defence the 1st Defendant had averred that the allegations of widespread national and international viewership

are untrue. The Claimant therefore is left to strictly prove its allegations, and which in my view it has failed to do.

[165] In all cases involving libel actionable per se the court will award general damages on the basis that the Claimant has suffered damage to reputation and there is no need to prove actual damage.

> *"The law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation, and he is entitled to such general damages as the court may properly award, although he neither pleads nor proves any actual damage". (Per Bowen LJ in* ***Ratcliffe v. Evans*** *[1892] 2 Q.B. 524 at 528).*

[166] If however, a Claimant can prove that he has suffered actual economic or pecuniary losses resulting directly from such libel, the court will award such sum as are proven, as special damages.

[167] I accept that there was a publication of the impugned utterances make by the 1st and 2nd Defendants, but the extent of such publication and the quantum of damages that is demanded by the Claimant has not been evidentially justified by it. There is no evidence upon which this Court can make a factual finding that the Claimant has indeed suffered actual economic or pecuniary loss or in the words of the Claimant "tremendous loss".

[168] Where, as in this case, the libel involves imputation of dishonesty and breaches of the Larceny Act, which is actionable without proof of actual damage, the courts will award general damages, but in order to receive an additional sum for pecuniary loss in terms of a falling off in trade or business, such loss must be specifically pleaded and proved as special damages. Loss of particular customers may be pleaded as special damages and if this is done, proof must be given not only of the loss but the names of the particular customers (see ***Bluck v Lovering*** (1885) 1 TLR 497). So although the Court has determined that the words published are defamatory in their ordinary meaning and are referable to

the Claimant and are libel that is actionable *per se*; if the Claimant is seeking to obtain an award for actual loss, then it still remains an onus on the Claimant to establish such actual pecuniary loss claimed on a balance of probability.

[169] In the circumstances of the case the Court makes the following findings:

I. The words published by the first Defendant are prima facie defamatory as they impute criminal activities and breaches of the Larceny Act**,** on the part of a person in the course of its business or trade.

II. The Claimant has not established by any cogent evidence and not on a balance of probability that it is a company incorporated under the Companies Act and therefore a person with the capacity to sue.

III. The Claimant has not established that indeed it had been in operation for any sufficient period of time and had done any business dealings with other persons so that it had cultivated a good reputation and was therefore entitled to protect such reputation from defamation.

IV. The Claimant has not established that as a result of the utterances and publication of the Defendants it has "suffered loss and damage in the course of its trade".

V. The second and third Defendants have succeeded in establishing the defence of justification which is a complete defence to the Claim brought by P&S.

VI. Additionally, the second and third Defendants are entitled to the special statutory defence available to them pursuant to section 33 of the Constabulary Force Act, which requires a Claimant to establish malice and or lack of reasonable and probable cause on the part of the second Defendant. The Claimants have failed to do so.

VII. On a balance of probability, the 1st and 2nd Defendants have satisfied the requirements to successfully establish the defences of fair comment and qualified privilege.

VIII. In the circumstances the Claimant has failed to establish a case of defamation or its entitlement to the damages sought on a balance of probabilities.

DISPOSITION

[170] In light of my foregoing findings, I will make no assessment as to damages. Judgement is hereby given in favour of the first, second and third Defendants; and cost is awarded to them in an amount to be agreed or taxed.