[2014] JMSC Civ 167

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010 HCV002214

BETWEEN	***PERCIVAL JAMES PATTERSON***	***CLAIMANT***
A N D	***CLIFF HUGHES***	***1st DEFENDANT***
A N D	***NATIONWIDE NEWS NETWORK LTD.***	***2nd DEFENDANT***

Mr. K.D. Knight Q.C., Mr. Bert Samuels, Mr. Matthieu Beckford and Ms. Stacy Knight instructed by Messrs. Knight, Junor & Samuels for the Claimant.

Lord Anthony Gifford Q.C., and Miss Anika Gray instructed by Gifford, Thompson and Bright for the defendants.

November 26, 27, 28, 29, 2013, May 9, and October 30, 2014.

Defamation- Damages sought for libel - whether words defamatory – qualified privilege –Reynolds privilege.

P.A. Williams. J.

The Background

1. On the 15th day of May 2009, listeners to the radio station Nationwide News Network Ltd. "NNN"; the 2nd defendant; awoke to what was described as "Breaking News". The item of news was delivered by Mr. Cliff Hughes, the 1st defendant and the managing director of "NNN", along with Miss Emily Crooks, the then host and managing producer of the morning news and current affairs programme named "This Morning."

2. The item of news was about what was classified by the 1st defendant as a "major incident at the Norman Manley International Airport" involving some prominent individuals, arriving on a private jet on which was found a diplomatic pouch. This pouch when allegedly scanned was said to contain hundreds of thousands of US dollars – approximately five hundred thousand US Dollars (US$500,000.00). The names of the persons travelling on the private jet were not given but listeners were encouraged to continue listening to Nationwide News for more on this "huge" story including the revelation of the names. The information was said to have been received from a highly well placed official source.

3. In a subsequent newscast it was revealed that, according to the sources, the retired Jamaican Prime Minister Hon. Mr. P.J. Patterson, the claimant, and his special assistant and two executives of the telecommunications firm Digicel were on the flight that brought some Cuban diplomats into the Norman Manley International Airport. The details of the incident were outlined by Miss Crooks; as given to them by their sources.

4. The claimant had in fact travelled into the island by private aircraft with a high level delegation headed by the Group CEO of Digicel and members of its technical team but he knew of no such incident taking place. On the same day, Friday May 15, 2009, he wrote a statement outlining what he said had happened. He was offended by the news broadcast which he felt contained implications of baseless allegations of wrongdoing against him.

5. On the 20th of May 2009, the then Prime Minister of Jamaica Hon. Mr. Bruce Golding issued a statement concerning the report he had received from the police on their investigations into the incident. The investigations confirmed that information similar to that reported by "NNN" had "circulated" but the police had not been able to determine the source or origin of this information which had ultimately been proven to be erroneous.

6. By the 28th of May 2009 the attorneys-at-law acting on behalf of the claimant wrote to the defendants indicating that their client had been defamed in that

breaking news story broadcast during the airing of the programme "This Morning" on May 15, 2009. After outlining the words which were used and published which it was felt had "tended to injure and degrade the character of [their] client exposing him to hatred, contempt and ridicule which also tended to lower him in the estimation of right thinking members of society", a demand was made. The demand was for a suitably worded apology to be published on that station as well as in the two (2) leading newspapers and that the claimant be paid damages commensurate with his station in life locally and internationally along with his legal costs. The demand was not met and the claimant commenced this action.

The Claim

7. On the 29th of April 2010, the claimant filed his claim form claiming against the defendants damages for libel including exemplary and aggravated damages resulting from various radio broadcasts hosted by the 1st defendant. He is seeking the following remedies, inter alia, against the defendants jointly and/or severally:

    1) Damages for libel including exemplary and aggravated damages;

    2) Interest at commercial rates pursuant to the average weighted loan rates for commercial banks as published by the Bank of Jamaica or such other rate as the court may deem fit;

The offending words

8. In his particulars of claim, the claimant outlined the words he found to be defamatory of him as contained in the various news reports on the 15th of May first during the programme "This Morning" then in the Mid-days news and finally on the Evening News and Cover story programmes:

    A) In the "This Morning" programme;

        (i) "We can tell you from a highly well placed official source, there was a major incident at the Norman Manley International Airport last

night involving a current senior politician and a former senior retired politician, involving some Cuban diplomats, the landing of a private jet at the airport last night, Norman Manley, with a diplomatic pouch. When the diplomatic pouch was scanned hundreds of thousands of US Dollars was in that diplomatic pouch."

(ii) "The Customs Authorities, I gather, acting in consort with the law enforcement agencies of the State, involving Customs, the Solicitor General's Department, as well as the Office of the DPP all acting in consort and apparently on intelligence, not only searched the plane but also questioned the two (2) senior politicians in the presence of the three (3) diplomats, Cuban Diplomats."

(iii) "It got very heated, based on what my sources are telling me, so much so, that the diplomats involved re-boarded the aircraft and left with the diplomatic pouch containing what is estimated to be approximately five hundred thousand US dollars. I gather from my sources, the law enforcement sources, that the authorities were concerned about the source of this money and its intended use and they were acting under the Proceeds of Crime Act. We will have more on this story, it's a huge story."

(iv) "Absolutely, so wads of cash, US dollars by two senior politicians, one current and one retired (former) acting of course they would still have their diplomatic passports because of by virtue of the positions that one is now occupying and that one occupied and so they came – "they flew in on a private jet, absolutely " (Cliff Hughes) came with diplomats with wads of US Dollars which have now gone back to their source of origin as to what exactly the money was to be used for here, we are not sure ……or the source of the money…..but it is sufficient that there was intelligence coming from the origin of the information, the money, so much so, that it could have been traced, tracked here to Jamaica and the diplomatic, ahm…..what you call it,

pouch, the pouch, diplomatic pouch, was searched which is quite unusual, doesn't really happen like that.

More on that story we have the names of the individuals – we will tell you later, shall be bringing you that very soon. Keep listening to Nationwide News – what a prekeh, (Cliff Hughes) (laughter)." Hmm my word!

v. On the mid-day news on May 15, 2009 on the Nationwide radio the defamatory saga continued: "Good afternoon I am Elizabeth Bennett with the details: Several questions are swirling this afternoon about what happened late last night at the Norman Manley International Airport in Kingston. Nationwide News sources tipped us off this morning that an incident involving two or three Cuban diplomats, a former Jamaican Prime Minister, a current senior PNP politician, Customs and Immigration Officials and the Narcotics Police Division took place sometime after 9 last night at the Norman Manley Airport. Emily Crooks has the details

Emily Crooks: "According to our sources the retired former Jamaican Prime Minister P.J. Patterson and his Special Assistant, Deborah Hamilton, and two executives of the telecommunications firm Digicel were on the same flight which brought in the Cuban diplomats to Norman Manley International Airport"…….

"There are conflicting repots as to whether or not another senior and active PNP politician was involved in the incident…….. Local Customs Officers asked the Diplomats about the source of the cash. It is also understood that the local Customs Officers were not satisfied with the explanation given."

On May 15, 2009 on the Evening News and Cover Story programmes Nationwide perpetuated the defamation by publishing the following:-

(vi) Emily Crooks: "And Nationwide News has since learnt that retired former Prime Minister P.J. Patterson in a letter dated May 12, 2009 to the Ministry of Foreign Affairs and Foreign Trade advised that he was making a private trip to Cuba with a number of business people. This letter was aimed at the Ministry of Foreign Affairs, Foreign Affairs Ministry extending to Mr. Patterson the usual courtesies of travel accorded to a former Prime Minister. It is further understood that a dispute developed over whether the luggage of those of Mr. Patterson's party should be searched. The former Prime Minister was the only member with diplomatic privileges".

(vii) Alston Stewart, a spokesman for the claimant went on the programme and said: "It's a one day trip, therefore they went with no luggage, in fact so much to the point that even a ……a laptop that went with them was left behind by mistake, there was no luggage, there was no need for any search of any luggage unless you are talking about searching briefcase. (Elon Parkinson saying – and you are speaking therefore of the luggage of both Mr. Patterson and his assistant). All members on the trip …….on the trip."

Cliff Hughes: So……no luggage to be searched but a briefcase is a piece of luggage ……eh…..(Elon Parkinson saying - a lot of people tend to think ……that ahm…you know ….in my years in the travel industry when you ask Jamaican ……they think it's just suitcases) (Carol Narcisse saying – I am sorry …..Mr……..Mr…….I am sorry Mr. Stewart said there was no……no luggage was taken on the trip is that what he said, is that what he said (Cliff Hughes saying – yes), Elon Parkinson saying – he said it was a one day …….he said they travelled lightly ……fine …..am I to interpret that as in the going out and also in the coming in because I may travel lightly leaving I may not travel lightly coming back so it does not

explain anything about what was the status of luggage or no luggage amongst the persons coming in last night.

(viii) Cliff Hughes: "Well this morning we knew from an impeccable source from the state apparatus that listen the Norman Manley International Airport was the scene of an incident last night of huge proportions –

That the former retired Prime Minister P.J. Patterson was in on a flight from Cuba with a number of people on that flight and there was an incident regarding a diplomatic pouch, I am telling you, a diplomatic pouch including cash……Ok….how much cash that was not known. We were told this morning that both the offices of the Director of Public Prosecutions and the Solicitor General's Department, the Narcotics Police, the Custom and Immigration people were involved including Mr. Patterson in how the so called diplomatic pouch should be treated….yes ….and the advice from the Solicitor General and the DPP was that listen, this ought to be detained if not searched right pending further and better particulars."

9. The claimant in his particulars went on to state what he understood these words meant in their natural and ordinary meaning and then further sought to comply with the provisions of the Jamaican Civil Procedure Rules "CPR" 69.2 which provides:

69.2 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.

10. The particulars set out and said to be pursuant to Rule 69 are:

1. That the claimant was involved in a clandestine arrangement which was criminal in nature, when it was published that the claimant travelled by private jet with Cuban diplomats and on the aircraft in a diplomatic pouch, when scanned, hundreds of thousands of United States Dollars were found.

2. (a) That the claimant corruptly used his diplomatic privileges in an attempt to shroud criminal activity. The defendants published that the claimant had his diplomatic passport and sought the privileges attached from the Ministry of Foreign Affairs and Foreign Trade before his travel to Cuba.

(b) That the dispute concerning the search of the luggage of the claimant's party arose because of the claimant's unfounded belief of his entitlement to diplomatic privileges in Jamaica.

(c) That the claimant corruptly sought to use his status as a former Prime Minister and/or his perceived diplomatic privileges in an attempt to shroud criminality.

3. That the claimant was associated with illicit funds and was further associated with the movement and/or concealment and/or transfer of the said illicit funds into Jamaica to be used for unlawful purpose.

4. That the claimant sought to engage in a criminal conspiracy or participation in an illegal enterprise with Cuban diplomats.

11. It is the assertion in his particulars that these words published by the defendants were broadcasted on programmes by radio for general reception throughout Jamaica and the international community and provides a link to “NNN’S” business website at nationwidenewsnetwork.com that allows persons worldwide to listen to live broadcasts over the internet. The defendants maintain that they get the news first and are accurate and fair in its reporting and this was so stated on May 20, 2009 in a discussion programme which related, inter alia, to the subject matter of this claim.

12. It was further asserted that at the relevant times the world wide web had millions of users who all had access to the words complained of and the defendants well knew that the publication once made on this platform could and would be accessed by a substantial but unquantifiable number of subscribers to other internet provider systems in Jamaica, the Caribbean, the United States of America and around the world. Further, “NNN” radio enjoys wide listenership in Jamaica and several Caribbean islands and it can therefore be inferred that a large but unquantifiable number of users heard and/or read the broadcast and/or the publication.

13. Thus the claimant’s assertion is that his reputation has been seriously damaged and he has suffered considerable distress and embarrassment. It is his contention that notwithstanding a letter demanding inter alia an apology as well as his press release distancing himself from any knowledge of or participation in any wrongdoings or involvement in any incident as they reported, no apology was made. It is also asserted that even after the then Prime Minister, having caused an enquiry to be conducted, issued a press release exonerating the claimant. The defendants refused to accept the accuracy of the release.

14. The claimant contends that there was no incident, major nor minor nor of huge proportions, nor any Cuban Diplomats, nor any diplomatic pouch, nor any scanning, nor any revelation of money in any pouch, nor any questioning of him by anyone, nor any intervention by him in any incident, nor any involvement in any dispute whatever, at the Norman Manley International Airport as reported by the

1st Defendant and/or the 2nd Defendant on the 2nd Defendant's radio station on May 15, 2009.

The Defence

15. The defendants admit that they published the words as set out by the claimant but deny that these words are defamatory of the claimant in nature or in their natural and ordinary meaning. Further and in any event they aver that the said words complained of were published on occasions of qualified privilege. They set out the particulars they rely on in asserting this defence and these will be duly considered.

16. They further state that they acted responsibly in publishing the words complained of and that there was no malice on their part in broadcasting same. The particulars given will be also considered subsequently during my analysis.

17. They further state that the words published should not be examined in isolation but the broadcast should be considered as a whole. They deny that the words were capable of the meanings, jointly or severally, as set out in the claimant's Particulars of Claim. They aver that the natural and ordinary meanings of the words published are not defamatory of the claimant to the ordinary and reasonable listener and neither are they capable of bearing the meanings alleged by way of innuendo. Further they denied the allegation that the published broadcast could bear the meaning as set out by the claimant pursuant to CPR 69.2.

18. The defendants deny that the claimant's reputation was seriously damaged either regionally or internationally as a result of the said published words, he having been conferred with honors and appointed to significant positions after the publication.

19. They state that it is their professional, moral and social duty to report and impart its reasoned knowledge of information received. It is their duty to the public to report and the public has an interest in receiving highlights of perceived

inconsistencies in statements proffered by various public officials. In this regard they contend that the comments made about the Press Release from the then Prime Minister, were fair comments in expressing the opinion that there were gaps in the story released to the public as an explanation for the incident.

20. They deny that the claimant is entitled to general damages, exemplary damages or aggravated damages and say, inter alia, in conclusion:

    (i) That at no time did the defendants allege that the claimant was involved in any particular act or was in possession of any item which could amount to any wrong doing on his part, neither could any such meaning be derived from the words published and broadcast by the defendants.

    (ii) The defendants having not defamed or in any other way injured the claimant was under no obligation to retract their statements or issue an apology to the claimant.

The Reply to the defence

21. Much of what was asserted in reply to the defence of the 1st and 2nd defendants was by way of challenging certain particulars and as such will be considered later in this discussion, if necessary. It is however noted that included in the reply, was the assertion that the words were in fact published maliciously.

22. Included in the particulars of malice were:

    (a)…….

    (b) At the time of the breaking news broadcast, the defendants had failed to contact the claimant before publication even though they had the claimant's telephone numbers.

    (c) A spokesman for the claimant Mr. Delano Franklyn contacted the first defendant and informed him that the content of the "breaking news" story was false but the defendants persisted with the story.

(d) At the time of the “breaking news ”broadcast the defendants had not made any contact with the portfolio ministers of government to verify the story, thus the defendants had no or no reliable alternative source of information as to the alleged incident at the airport.

(e) The defendants had no grounds or any sufficient grounds for honestly believing that the allegations in the story concerning the claimant were true and recklessly broadcast same.

(f) Notwithstanding the intervention of spokespersons for the claimant, the results of the investigation by the Prime Minister, the comments by Ministers of Government and although they are now aware that the fundamental factual basis of the “breaking news” story complained of is false, the defendants have not made or offered any correction or apology to the claimant in respect of any of the words complained of, but have instead sought to defend the broadcast by pleas of fair comment and qualified privilege which are inaccurate and unfounded based on the exculpatory investigation by the Prime Minister and the comments of other Ministers of Government.

(g) In the premises the broadcast was published maliciously with the absence of honest belief.

The Parties

23. The claimant is a former Prime Minister of Jamaica and former President of the Peoples National Party. He is by profession an attorney-at-law and was admitted to the Inner Bar as Queen’s Counsel in 1983. He was appointed by Her Majesty the Queen as one of her Privy Counsellors in 1993. In 2002 the Order of the Nation “O.N” was conferred on him. He is also in receipt of other National Honours, International Accolades and Distinguished Awards during his tenure in

public office and thereafter. He said he retired from public and political office in March 2006.

24. He was at the time of this matter the President and Principal of Heisconsults a firm which offered a range of regional and international consultancy services.

25. The first defendant admits being a well known television host and radio broadcaster. He is by profession a journalist and first entered the field of broadcast journalist in 1986. He is the managing director of the 2nd defendant. He also admits being a shareholder in the 2nd defendants which he admits broadcasts programmes by radio for general reception throughout Jamaica and to the international community and provides a link to its business website at nationwidenewsnetwork.com that allows persons worldwide to listen to its broadcasts via the internet.

The issues

26 In the closing submissions for the claimant, Mr. Knight QC reviewed the elements of defamation, identifying them as being:

(i) the statement must be published
(ii) the statement must refer to the claimant
(iii) the statement must be defamatory

He then considered the defence of qualified privilege which he argued was defeated by proof of malice. This malice he further argued would also defeat the defence of fair comment. He then went on to examine the requirements of qualified privilege as laid down by Lord Nicholls in **Reynolds v. Times Newspapers Ltd [2001] 2 AC 127.** He concluded by considering the appropriate award to be made as damages.

27. In the closing submission for the defendants, Lord Gifford QC posited that the issues to be decided by the Court are:

(a) whether the defendant's coverage of the breaking news story taken as a whole was capable of leading an ordinary listener to a defamatory imputation/inference adverse to the claimant?

(b) if the answer to (1) is yes, can the defendants rely on the defence of the **Reynolds'** privilege?

(c) if the answer to (2) is no, what damages should be awarded.

28. It is the established and required standard that a claimant must establish three (3) things in order to succeed in a defamation matter such as this, namely:-

(a) that the words were defamatory

(b) that they referred to him

(c) that they were published to at least one other person other than the claimant himself.

29. Although on behalf of the claimant, efforts were made to engage the Court in a consideration of whether the words were in fact published and did in fact refer to the claimant, the case for the defendants was not presented in such a manner to suggest that there was any dispute in those areas. The first issue therefore that I deem relevant must be whether or not the words as published were defamatory.

30. On the case also as presented for the defendants, the main contention was that they were entitled to rely on the defence of **Reynolds**' privilege. Although there was some reference in their defence as filed to fair comment, it is noted that this was in relation to assertions made about things said in discussion programmes aired by the 2nd defendant by the various hosts who have been described as being contracted and/or employed and/or engaged as newscasters and/or servants and/or agents of "NNN". These comments were made after the broadcast of the words said to be defamatory with the offending broadcast being an item of news. The defence of fair comment was not pursued by Lord Gifford QC in his closing submission in relation to the defamatory words. In the

circumstances, therefore, I do not find that this is a defence which would be relevant to the matter before the court. Hence the second major issue to be considered will be whether the defendant can rely on qualified privilege.

31. The determination of these two issues now identified will impact on the matter of whether the defendants are liable. The matter for an assessment of damages will only then be considered, if necessary

Are the words defamatory?

32. In approaching the first issue one needs to be mindful that this is a question which should be considered in two stages. The guidance from the text Kodilinye Commonwealth Caribbean Tort Law 2nd Edition is useful. At page 293 is stated:

> *"In a trial with judge and jury, the judge's function is to decide whether the words are capable of being defamatory. If he answers this question in the affirmative, it is then for the jury to decide whether they are defamatory in the circumstances of the particular case. Where trial is by judge alone as is almost invariably, the case in Commonwealth Caribbean jurisdictions the judge must perform both functions. As Bollers J explained in* ***Ramsahoye v. Peter Taylor and Co. Ltd. ([1964] LRBG 329 p 331".***
>
> *In this Colony where there is no jury I can do no better than repeat the dictum of Camacho C.J.* ***in Woolford v. Bishop ([1940] LRBG 93 p 95)*** *where he stated in his judgment:*
>
> "*On this aspect of the case, the single duty which devolves on this court in its dual role is to determine whether the words are capable of a defamatory meaning, and given such capability, whether the words are in fact libelous of the plaintiff. If the Court decides the first question in favor of the plaintiff, the court must then determine whether an ordinary intelligent and unbiased person reading the words would understand them as terms of disparagement, and an allegation of dishonest and dishonourable*

> *conduct .The court will not be astute to find subtle interpretations for plain words of obvious and invidious import."*

33. Another explanation of the duty of a trial judge in approaching this question was given by Carey J.A. in **Gleaner Co. Ltd. V. Small (1981) 18 JLR 347** at page 377 where he said:

> *"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*."

34. It is considered particularly important therefore that when sitting alone in matters such as this, the judge has to resist the urge of using the "judicial mode and manner" in determining the meaning of the words used. In **Lewis v. Daley Telegraph [1963] 2All ER 151** Lord Reid at page 154 had this to say.

> *"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 knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs……*
>
> *What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning."*

35. The discussion on how to determine the natural and ordinary meaning has been adapted to the Jamaican context in the decision of the Judicial Committee of the

Privy Council in an appeal from a decision of the Court of Appeal in Jamaica in **Bonnick v. Morris and the Gleaner [2003] 1 AC 300**. Lord Nicholls of Birkenhead at page 306 paragraph 9 had this to say:-

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

36. The authors of the text **Gatley on Libel and Slander** 11th edition canvassed an approach to this task in a manner I think is useful. At paragraph 3:13 it is said:

> "*Where a judge has to determine meaning it has been said that the correct approach is to ask himself what overall impression the material made on him and then to check that against the detailed textual arguments put forward by the parties. Hence in **Armstrong v. Times Newspapers [2006] EWHC 1614 QBD** at [31] Gray J. deliberately read the article complained of before reading the parties respective statements of case or the rival skeleton argument."*

37. Having already noted the words complained of I now refer to the meaning ascribed to them by the claimant. In his Particulars of Claim he detailed that the words in their natural and ordinary meaning meant and were understood to mean that he:

I was involved in criminal activity to wit drugs dealing and/or money [sic]

II was laundering money, and/or

III breached the Customs Regulations to wit bringing in or facilitating or assisting in the bringing into Jamaica foreign exchange in excess of US$10,000.00 without declaring same as is required on the Customs/Immigration form; an/or

IV aided, abetted or procured breaches of the Proceeds of Crime Act; and/or

V conspired with others to breach the criminal laws of Jamaica and/or

VI used his diplomatic privileges to breach the criminal laws of Jamaica; and/or

VII was involved in an incident at the Norman Manley International Airport which had criminal overtones; and/or

VIII was questioned by Customs Authorities on suspicion that the source of 'wads' of US Dollars was illegal or the intended use was illegal and in breach of the Proceeds of Crime Act; and/or

IX was involved in criminal conduct; and/or

X was involved in a criminal enterprise which encompassed concealing and/or transferring from a foreign jurisdiction 'wads' of United States Dollars into Jamaica in breach of domestic criminal laws, and/or

XI was embroiled in determining how the alleged diplomatic pouch should be treated, i.e. detained or searched and thereby intermeddled for his own protection, in the affairs of prosecutors, government lawyers and law enforcement affairs; and/or

XII used his diplomatic status as a veil to cover his unlawful action and/or wrong doing.

38. In his witness statement/evidence-in-chief the claimant said he formed the view, which was shared by several of the persons with whom he had spoken about the matter that the broadcast conveyed to the public at large-

a) That he corruptly used his diplomatic privileges in attempt to shroud criminal activity. The defendant having published that he had his diplomatic passport and sought the privileges attached from the Ministry of Foreign Affairs and Foreign Trade before his travel to Cuba;

b) That the dispute concerning the search of his luggage and of his party arose because of his unfounded belief to an entitlement to diplomatic privileges in Jamaica;

c) That he corruptly sought to use his status as a former Prime Minister and/or his perceived diplomatic privileges in an attempt to shroud criminality;

d) That he was associated with illicit funds and was further associated with the movement and/or concealment and/or transfer of the said illicit funds into Jamaica to be used for unlawful purposes.

e) That he sought to engage in a cover-up and criminal conspiracy or participate in an illegal enterprise with Cuban Diplomats.

39. In their closing submissions Mr. Knight QC submitted that the prima facie meaning of the words was defamatory in that they accused the claimant of serious criminal conduct. He urged that there was no need to read between the lines as the words published stated clearly that the claimant had been questioned in connection with money entering the island in suspicious circumstances. While recognizing that suspicion does not necessarily equate with guilt, it was urged

that the published story gave the impression that the claimant was involved in criminal behavior.

40. The defendants in denying that the words are defamatory of the claimant in nature or in their natural and ordinary meaning urged in their defence that they did not make any allegations of misconduct on the part of the claimant and on the said day of the broadcast included an accurate statement of the claimant's purpose of travel. They also noted that the words published should not be examined in isolation as contained in the Particulars of Claim but that the entire broadcast should be considered as a whole.

41. In his witness statement/evidence-in-chief the 1st defendant stated that he edited the report that revealed the claimant as the individual who had been a passenger on the flight from Cuba. He did so with a view to ensuring that it was an accurate reflection of the information they had received from the official sources and that there were no negative allegations or inference that would be raised against the claimant. Further he said they did not report that the claimant was the owner or custodian of any item of interest to the custom's department and did not in any way connect the claimant to the item. He did not believe that the report was defamatory of him and in any event did not intend to damage his reputation.

42. In the submissions on their behalf, Lord Gifford QC began his challenge to the meanings alleged by the claimant by noting that in different ways it was being said that the words published meant that the claimant was guilty of a crime. He submitted the word were not capable of that meaning and do not mean that the claimant was a criminal or even suspected of criminality. At their highest, the words in his opinion meant no more that that an incident took place which may have involved criminal conduct on the part of some persons, on a flight on which the claimant was a passenger and which was required to be fully investigated.

43. He noted the statement in **Gatley on Libel and Slander**, 11th Edition at paragraphs 3 – 27:

> "*A statement that someone is under suspicion or investigation cannot reasonably be understood as stating that he is guilty, for if the ordinary sensible person was capable of thinking that whenever there was a police inquiry there was guilt, it would be almost impossible to give accurate information about anything."*

44. He also referred to what he considered to be the leading case on this issue **Lewis v. Daily Telegraph** [supra]. He found the words of the Law Lords who dissented of assistance in steering a proper course between words which imply suspicion of guilt and words which imply actual guilt. Lord Hodson at page 167E said:

> *"I am myself satisfied that the words cannot reasonably be understood to impute guilt. Suspicion no doubt can be inferred from the fact of the inquiry being held, if such was the case, but to take the further step and infer guilt is in my view wholly unreasonable. This is to draw an inference from an inference and to take two substantial steps at the same time."*

45. It then became the submission that the words complained of do not imply that the claimant was even suspected of criminal activity. It was urged that the broadcasters took care to say that there was no suspicion attached to the claimant. There were other parts of subsequent broadcasts that were highlighted which it was noted had sought to make it clear that the claimant was not in possession of the reported diplomatic bag. By the fifth broadcast on the 18th of May the defendants had reiterated that there was not nor had there ever been, any suspicion attaching to the claimant.

46. The submission continued that in the event there was a finding that the words broadcast meant that the claimant was suspected of being involved in criminal activity then the argument must turn to the issue that that is not the meaning of the words which is pleaded and relied on by Claimant. The words of Lord Devlin in **Lewis v. Daley Telegraph** [supra] were relied on; where at page 175A he said:-

> *"The judge must rule whether the words are capable of bearing each of the defamatory meanings, if there be more than one, put forward by the claimant".*

47. It was argued that with two exceptions, each of the meanings pleaded involve saying that the defendants spoke words which in their natural and ordinary meaning meant that the claimant had committed a crime. Of the other two pleaded meanings which did not involve "an alleged imputation of actual criminal activity", the first it was noted concerned words which meant that the claimant "was questioned by Customs Authorities on suspicion." This meaning could have come from the words of the first broadcast but by the second broadcast the defendant maintained it was made clear that they were not saying he was questioned on suspicion of any wrongdoing. It was said that he "intervened" which the defendants submitted is a neutral word which would not imply any participation in illegal conduct. It was the opinion of Lord Gifford Q.C. that the fair-mind listener not avid for scandal, would hear the second formulation which attributes no element of suspicion directed at the claimant and would have forgotten or discarded from their mind the earlier statement.

48. The second pleaded meaning that did not impute criminal conduct identified by the defendants was the issue of the claimant being said to have had an unfounded belief of his entitlement to diplomatic privileges in Jamaica. The defendants submitted that the alleged meaning is not defamatory and the meaning as pleaded was not what the broadcasts said. Lord Gifford noted the thrust of the broadcasts as being "(a) there had been interest in the plane from foreign intelligence; (b) there was a diplomatic pouch on the plane which contained a large quantity of US dollars; (c) there were Cuban diplomats who were questioned; (d) the claimant was on the plane; (e) customs sought advice from law enforcement officers as to how to treat the diplomatic bags. Thus it was argued that the defendant did not say that the dispute arose because of any belief of the claimant.

49. A somewhat unusual feature about this case is the exhibiting of various other sections from other programmes aired on “NNN” following that broadcast which the claimant alleges defamed him. It is unusual in that these included discussions with members of the public and other media practitioners expressing their views or what the broadcast meant. The impact of these discussions has been used by both sides to advance certain their different arguments . For the claimant, some of these discussions were pointed to as indicating that the words did in fact defame him. For the defendants, it was said that some of the discussions were somewhat incoherent, some callers appearing avid for scandal and others more rational.

50. I am however reluctant to use these discussions in assisting me to determine whether the words were capable of being defamatory. The case of **Capital and Counties Bank v. Merry (1882) 7 AC 741** demonstrates where actions by members of the public were found not to be conclusive on the question of whether words were libellous. In that case, the defendants, a firm of brewers had what was described as, a squabble with the manager of a branch of the plaintiff’s bank. They sent to the tenants of their public house (who knew nothing of the squabble) a printed circular with the following words: “Messrs Hently and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Countries Bank”. The circular became known to other persons and there was a run on the bank causing it loss. The bank brought an action for libel alleging that by innuendo the circular imputed insolvency to them. It was held by the House of Lords (Lord Penzance dissenting) that in their natural meaning the words were not libellous, that the inference suggested by the innuendo was not the inference which reasonable persons would draw, and that as the evidence failed to show that the circular had a libellous tendency there was no case to go to the jury, and that the defendants were entitled to judgment. This case was summarized in this manner by the authors of **Gatley on Libel and Slander** 11th edition at para. 3.24.

51. It is necessary for me to consider the words as a whole, and in context of how they were broadcast. It is also imperative that I consider the words as they would have meant at the time they were published. Whatever was said and done in subsequent broadcasts, to my mind, cannot and should not be used to determine and explain the import of the meaning at the time it was broadcast.

52. In cross-examination of the 1st defendant, Mr. Knight QC sought to get from him, his understanding of the words. This to my mind would be of limited assistance in determining what the words would have meant to the ordinary reasonable person. It is well established that the intention of the publisher of the words is immaterial. Further to this the belief by the publisher that the words would not be defamatory is of no moment.

53. There is one other passage from the text **Gatley on Libel and Slander** that I feel compelled to refer to for the guidance it provides as to the general approach to be taken in determining the meaning of the words. At para 3.13 it is stated:

> *"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."*

54. I now turn to a consideration of the words. The first thing I understand from the context and the opening words used to introduce the news item is that the news was of some major significance. It was breaking news which the 1st defendant described as a major incident. Certainly as a reasonable fair-minded person my attention would immediately be riveted on the broadcast. The fact that customs authorities acting in consort with law enforcement agencies of the state- the Solicitor General's department as well as the office of the Director of Public Prosecutions were said to be interested in the private aircraft, its passengers along with one item in particular would mean that something untoward was afoot. The fact that wads of cash in excess of what is of the maximum allowance for admittance upon declaration into the country would mean something illegal was being attempted. The fact that the money was in a diplomatic pouch would mean it was under the control of a diplomat and then could not be searched. The fact that the discussion got heated so much so that the diplomats involved re-boarded the aircraft and left with the pouch would mean that they were displeased at being prevented from entering undetected with this illicit sums of money. The first news item having got one's attention encouraged one to indeed keep listening to that station so as to learn the names of the persons involved. At this stage the words used would mean that whoever was on board that plane was attempting to in effect smuggle a large sum of money into the country in circumstances that meant it could not have been for legitimate purpose.

55. The next item of news called only one name of a person who could be regarded as a public officials – the claimant. At this stage the news was still that local customs official questioned the diplomats about the source of the money. The fact that the officers were said not to be satisfied with the explanation given after the claimant had intervened would mean that the legality of the sums remained in doubt. The fact that the news item chose to highlight that the claimant was a Queen's Counsel would suggest that he was expected to have used his legal knowledge and training to intervene.

56. By the final news item of that day complained of, the fact was made known that the claimant had advised the relevant authorities of his trip with the aim of having usual courtesies of travel accorded to a former Prime Minister extended to him. This when coupled with the information that he was the only member with diplomatic privileges would remove all questions as to who could be presumed to have been in control of the diplomatic pouch. It would not be unreasonable to believe that the only member with diplomatic privileges would also know what was in that diplomatic pouch.

57. The next set of words complained of again had the 1st defendant speaking of an incident of huge proportions. The claimant was the only person whose name was called and the focus again was on the diplomatic pouch containing cash – now the amount was not known. Once again the persons said to be involved with trying to determine how the pouch should be treated were person who would only be involved if there was some illegality. Once again the item revealed that the claimant was involved in this process.

58. The item on the whole, in my opinion meant that the claimant was involved in something illegal and clandestine. Only this only would explain why the incident would take on huge proportions. This meaning however is not sufficient to conclude precisely what type of illegality was involved whether drug dealing and/or money laundering. However the other meanings as pleaded by the claimant which are within the sphere of illegality are reasonable ones.

59. In the circumstances, I am satisfied that the words used in the broadcasts were capable of some of the meanings pleaded by the claimant and were in fact defamatory of him.

Can the defendants rely on the defence of Reynolds privilege?

60. In the submissions for the defendant, Lord Gifford QC reminded the Court of the need for it to bear in mind the Charter of Fundamental Rights and Freedom which under section 13 (4) “applies to all laws”. The Charter under section 13 (3)

(c) guarantees the right to freedom of expression and under section 13 (3) (d) protects "the right to seek, receive, distribute or disseminate information, opinions and ideas through media." These rights are protected "to the extent that those rights and freedoms do not prejudice the rights and freedoms of others" [Section 13 (1)]. The rights enumerated in the Chapter are guaranteed by section 13 (2) "save only as may be demonstrably justified in a free and democratic society."

61. While hailing the words of Lord Nicholls in **Reynolds v. Times Newspaper [supra]** as a lodestar by which the court may be guided when considering the issues in this case Lord Gifford QC embarked on a discussion reminding the court of the rationale and importance of the freedom of expression required by media practitioners. He noted the approach to this issue taken by courts from other Commonwealth countries namely from Canada the case of **C.A. Grant v. Torstar Corporation [2009] SCC 61**; from South Africa the case of **Khumalo v Holomisa [2002] ZACC 12** and from Australia the case of **Lange v. Australia Broadcasting Corporation [1997] HCA 25.**

62. He reminded the court also of the balance which must be struck between freedom of expression and the right of the individual to protect his reputation. It is however passages from **Reynolds v. Time Newspaper** [supra] that I was referred to in establishing the background against which the defence must now be considered. It was this case that revolutionized the approach that the courts now take when dealing with qualified privilege.

63. However, before embarking on the review of the **Reynolds'** privilege it is important to recall the position that existed before **Reynolds**. This is so because the claimant has urged that the defendants were activated by malice in their broadcasting of this item of news. Indeed their attack on the case for the defence began with the assertion that malice shown toward the claimant in this case eliminates the possibility of relying on a defence of qualified privilege. This suggests that the traditional approach to privilege is being relied on.

64. A useful exposition on the historical development on this area is in the judgment of Dunn L.J in **Blackshaw v Lord [1983] 2 All ER** 311 at page 332:

> *"During the 19th century the judges were using the word 'privilege' as meaning the existence of a set of circumstances in which the presumption of malice was negatived. It was said in* ***Gilpin v. Fowler*** *(1854) 9 Exch 615 – 623- 624 that instead of the expression "privileged communication" it would be more correct to say the communication was made on an occasion which rebutted the presumption of malice. The judges, having to face the problem of what would be the circumstances in which the presumption of malice would be negatived went on two lines, duty and interest, and the public good and for the public interest. By the end of the ensuing 100 years it had been established that certain categories of documents by their very nature rebutted the presumption of malice, and publication of them accordingly privileged. These included fair and accurate reports of judicial proceedings and of proceedings in Parliament. But the courts stressed that the categories were not closed, but in each case it was necessary to determine whether the occasion was privileged not only by reference to the subject matter of the information published but also to its status, and whether that gave rise to the duty to publish."*

65. In **Horrocks v. Lowe [1975] AC 135** Lord Diplock at page 149 said:-

> *"……as a general rule English Law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbor. It supplies a temporal sanction; if he cannot prove that defamatory matter which he published was true, he is liable in damages to whomever he has defamed, except where the publication is oral only, causes no damages and falls outside the categories of slander actionable per se. The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognizes that they have a duty to perform or an*

> *interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turn out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused.*

66. He went on further to consider the question of malice:-

> *"So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial……So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove…… The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice……"*

67. It is of note that during his cross-examination of the 1st defendant, Mr. Knight QC asked the following:-

> *"Knowing who Mr. Patterson was at the time and having received this information you say you got at the time, that he, Mr. Patterson, would bring into the country wads of cash, US Dollars, hidden in a diplomatic pouch, did you honestly believe that he would do that?"*

While not answering the question directly, it was clear from his answers that the 1st defendant would not admit to believing the story. However, the distinction was maintained between the 1st defendant as the journalist and in his personal persona – it was as the latter that he said he would not believe the interpretation of the story as put to him by Mr. Knight QC.

68. It is however of significance to the case for the clamant, the fact that the defendants were asserting that the matter they thought the public had an interest in receiving information about was the adequacy of the airport security and alleged attempts to breach airport security .The argument then became that any privilege accorded to the defendant would give them the right to the publication of information for that reason and no other. It was their conclusion that the story published was centered on the abuse of diplomatic privileges by concealing large sums of money in a diplomatic pouch to circumvent the security arrangements at the airport, and essentially to breach the criminal laws of Jamaica in particular the Customs Act and the Proceeds of Crime Act.

69. It was urged that the defendants received information from relevant persons soon after their first broadcasting of the story that in effect cleared the claimant of any wrongdoing in relation to airport security. Yet the defendants refused to accept this. This refusal, it was argued, showed that the public interest in alleged breaches of airport security based on the facts of what took place at the airport was not the true purpose of the defendants publishing the story. It was opined that the defendants persisted in making the claimant the focus of their reporting of the incident at the airport. It was submitted that the news release issued by the then Prime Minister cleared the claimant meaning the falsehood published by the defendants was corrected by the Head of Government.

70. The contention in the submissions for the claimant was that the defendants maliciously persisted in maintaining the falsehood by criticizing the report on which the Prime Minister's news release was based. Further it was noted that one agent of the 2nd defendant referred to it as "nonsensical." In several programmes thereafter the claimant was mentioned, referred to and discussed and his involvement in an incident at the airport continued to be talked about even after the information revealed that no such incident occurred. This led to the submission ultimately being made by Mr. Knight QC that their motive did not correspond with their alleged reason that there was public interest in receiving

truthful information about any alleged breaches of airport security and thus theirs was an improper motive constituting malice.

71. It is noted that in the closing submissions made for the defendants Lord Gifford QC submitted that the question of whether malice was a relevant concept for consideration was to be answered by the fact that all matters to deal with malice was subsumed in the duty of responsible journalism. Hence, he was content to argue the matter in keeping with the defence of **Reynolds** privilege.

72. To my mind this approach adopted by Lord Gifford Q.C.ought not to be faulted. It is thus the approach as stated by Lord Nicholls in **Bonnick v. Morris and the Gleaner** [supra] that should guide matters such as this. At page 307 paragraph 14 he said:-

> *"Matters relating to malice are to be considered in the context of deciding whether the publication attracted qualified privilege in accordance with the common law as developed by the decision of the House of Lords in Reynolds v. Times Newspaper Ltd. [2001] 2 AC 127.*

73. Their Lordships in the case of **Edward Seaga v. Leslie Harper 2008 UKPC 9** at paragraph 10 said:-

> *"What is significant is that it is plain in their Lordship's opinion that the Reynolds decision was based as Lord Bingham of Cornhill said in Jameel at para.35, on a liberalizing intention." It was intended to give, and in their Lordship's view has given a wider ambit of qualified privilege to certain types of communication to the public in general than would have been afforded by the traditional rules of law."*

74. In considering the **Reynolds** privilege, it is firstly to be recognized that the decision did review the interplay of the constitutional freedom of expression and the protection of reputation. At page 201 Lord Nicholls observed:

> *"Reputation is an integral and important part of the dignity of the individual. It also forms the basis of*

> *many decisions in a diplomatic society which are fundamental to its well being; whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognize that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others."*

75. In the instant case, the defendants cannot plead justification as it has clearly been established that the news item that they broadcasted was false. The investigations revealed that someone had called the sources from whom the defendant got the information and reported that the incident had taken place. It was not firsthand information that had been reported to the defendants. Hence their defence is grounded in their submission that they practiced responsible journalism.

76. In **Bonnick v. Morris** [supra] at page 309 paragraph 23 Lord Nichols said:

> *"Stated shortly the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputation are involved. It can be regarded as the price journalists pay in return for the privilege. If they*

are to have the benefit of the privilege journalists must exercise due professional skill and care."

77. In **Reynolds**, Lord Nicholls gave ten matters which he opined should be taken into consideration when determining whether qualified privilege attach to publication by the news media. He said at pages 204 to 205:-

> "*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. The 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 includes 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 may 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 statement of fact. 10.The circumstances of the publication, including the timing. The list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case."*

78. I will now examine the matters outlined in **Reynolds** to determine if the defendant exercised due professional skill and care so that they can now rely on the privilege.

The seriousness of the allegations.

79. It was the submission for the claimant that the published story contained allegations involving criminal offences and this made it so serious that it demanded careful treatment so as to avoid misinforming the public or harming the claimant if the allegations were not true. There can be no dispute that allegations of criminal conduct are serious. In this case the status of the person alleged to have been involved in questionable suspicious activities were such that it made the allegations even more serious – the first news item had referred to Cuban diplomats, a current senior politician and a former senior retired politician. The story developed to name only one person – a retired Prime Minister and well known public figure. Allegations that such an individual was involved on illegal, criminal activity are no doubt quite serious.

The nature of the information and the extent to which the subject matter was a matter of public concern

80. The defendants contend that they received 20 pieces of information between 8 am and 12 noon on that day. They had received the initial information through the first defendant and this was followed by information received from the Solicitor General by Miss Crooks. Later in the day there was additional information by the then Minister of National Security and from the Acting Prime Minister. The first defendant explained that they thought it was a major story because it concerned the adequacy of the security at the airport; the fact that an external law enforcement agency was concerned; the fact that the head of Customs had called in the Office of the Director of Public Prosecutions and the Solicitor General; the fact that Customs were in a quandary relating to the presence of the claimant and the issue of the diplomatic pouch.

81. The defendants had also asserted in their defence that the broadcast addressed issues of public interest and in all the circumstances they were under a moral and social duty to broadcast the information contained in the programme to the

public in general and listeners of This Morning and Nationwide News who had a corresponding interest and/or were entitled to receive same.

82. In the cross-examination of the 1st defendant, Mr. Knight QC had him acknowledge that most of what was broadcast in that breaking news item and the subsequent mid-day news was false; there was no truth to much of the information that they had received. There was in fact no major incident at the airport. The first defendant accepted that the breaking news story had several falsehoods and that it was not in the public interest to publish such an item. He could not deny that there was no duty, either legal or moral, to publish a story that contained several falsehoods.

83. It was submitted by Lord Gifford QC that the information that had been given, at the time gave rise to issues of intense public interest and concern; including-

(1) whether large sums of foreign money were being brought into the country;

(2) whether privileges attached to a diplomatic bag were being abused and if so by whom;

(3) the fact that foreign law enforcement agencies had expressed concerns about the flight and the possible consequences of this for the reputation of our country;

(4) whether the procedures at the airport were adequate to deal with situations of this kind;

(5) what role were Cuban diplomats playing in this incident;

(6) what awareness or involvement, if any did the claimant have in the matter of the diplomatic pouch and the quantities of cash.

84. If the information received had in fact been true, it may well have been something of public interest and concern. On the information received, the parties

concerned with the “wads of cash” in the pouch had never been allowed entry into Jamaica. The story at its highest would have demonstrated the efficiency of the authorities in detecting a possible breach of airport security, not knowing how to deal with it and consulting the appropriate persons for instructions. It would be disingenuous of the defendants to deny that it was the persons allegedly involved that would have made the information newsworthy.

85. The fact that at the time the information was received it may well have been considered to be a subject matter of public concern. The information turned out to be false and this meant that in reality the public received misinformation. A story was broadcast to many listeners that ought not to have entered the public domain. It turned out to be the kind of story which would have been of much interest to someone who was avid for scandal.

The source of information

86. In the broadcasts the 1st defendant reported that the information had been received from a highly well-placed official source and an impeccable source from the state apparatus. In his witness statement/evidence-in-chief he said he had received it via a telephone call from a prominent member within the state apparatus, in particular a legal office, informing him of an incident of national importance. Under cross-examination he admitted, reluctantly, that this source was a senior officer from the Office of the D.P.P. The information he had received was confirmed to Miss Emily Crooks by Mr. Douglas Leys, the then Solicitor General. Lord Gifford QC said this information was coming from within the heart of the law enforcement regime and from people who were in a position to know what had happened – it was no rumour or gossip.

87. In the submissions for the claimant, it was argued that the defendants being experienced journalists ought to have known that the reliability of a source does not depend only on the status or even the integrity of the individual. It was opined that the fact that the persons who provided the information had no direct

knowledge of the events made it unreliable. This submission is well made and sums up the position correctly.

88. The undisputable fact is that the sources on which the defendants relied to break this news were not at the scene of any alleged incident and therefore were not giving first hand information about matters of which they had direct information. The call that was made to Mr. Leys which was held to have confirmed the story had merely confirmed that someone had called himself and the officer of the Office of the D.P.P. and told them of an alleged incident for which legal assistance was needed – as a matter of urgency. The news broadcast did not then properly represent that what they had been told by their impeccable source was contained in that telephone call received. The sources could confirm the fact of receiving a call but could hardly have been held to be confirming the truth of what they had been told.

The steps taken to verify the information

89. The 1st defendant gave evidence that having got the information from his source; he shared it with Miss Crooks. He said this would have been after 7 a.m. and they then began to "work their sources." He said he was aware that Miss Crooks spoke with other officers from the D.P.P's office, the members of customs along with the Solicitor General.

90. In his witness statement/evidence-in-chief the evidence was given that he had spoken with the Minister of National Security, Dwight Nelson as well as the acting Prime Minister at the time, Dr. Horace Chang who he said, confirmed receiving a reports of the incident in similar terms as what had been reported. It was after these contacts that the decision was made to broadcast the news but not to give the name of the claimant.

91. Under cross-examination, the sequence of events before the decision was taken to broadcast seemed less clear. It became apparent that no contact was made with the government officials prior to the 8 o'clock news. It seemed that having

advised Miss Crooks of the information received, they discussed it, she made some calls, they discussed it some more and then decided to break the story being as evasive as possible in terms of the details.

92. Miss Crooks in her witness statement/evidence-in-chief painted a somewhat different scenario. She got the information from the 1st defendant and then made one telephone call to Mr. Leys who told her details of the information he had received by way of a conference call with the Head of Customs and the officer from the Office of the D.P.P. She advised the 1st defendant of the information received; they had a brief meeting about how the matter would be treated on air and decided to break the story. There was no other attempt on her part to contact anyone else about the authenticity of the information Mr. Leys said he had received from another source.

93. In cross-examination of the 1st defendant, Mr. Knight QC attempted to get from him the efforts made to get verification of the story from persons who could possibly have been on the scene and actually witnessed the incident. The 1st defendant admitted that he had not contacted any such person or even tried to. The information from the government officials was confined to information they had received from elsewhere. The steps taken to verify the information could be viewed as falling far short of those expected from persons engaged in investigative journalism.

94. It is noted that in his submissions Lord Gifford Q C challenged the suggestion put to the 1st defendant that the information he had broadcast was hearsay in that the informants had not themselves been witnesses to the events. He insisted that it was not hearsay that the senior legal officers had been called to give advice about the diplomatic bag containing money, coming from a plane on which Cuban diplomats and a former Prime Minister were passengers. The problem however is that what was broadcasted did not indicate that these senior legal officers had received that phone call, the clear picture given from the broadcast

was of the incident actually taking place. The defendants had taken no independent steps to verify that this was indeed so.

95. Miss Crooks when cross-examined admitted that the Head of Customs was easily identifiable. She also admitted that she failed to ask any questions of the person who had passed on the information to the sources on whom they relied. She claimed that the moment they broke the story, she had made contact with the Acting Prime Minister and was told that he was getting a full briefing from all the parties involved, including the Head of Customs. She explained that since they thought there was a story requiring investigation and when the investigation commenced they did not "think [they] had business at all beyond what the people who were doing the investigation would be telling [them]."

96. From her evidence, it was the Solicitor General who, in the early stages of her enquiring, had told her that it was the Head of Customs who had told him of an incident. This information was known before the decision was taken to break the story. The question that remains unanswered is why no steps were taken to make contact with the Head of Customs before breaking the story – surely this would not have been unreasonable if steps were taken to verify the story as would be expected of a responsible journalist.

The Status of the Information

97. At the time, the story with the first set of offending words was broadcast I am satisfied that all that was known to the defendants was what had been told to them by the legal officers. It was then not even properly investigated to warrant being broadcast in the manner it was.

98. In any event, if contact had been made with the Government officials before the first broadcast, the defendants would have been aware that an investigation was on-going. This information was not stated in the news broadcast and once again this supports my finding it was not properly broadcasted to represent the actual information then available.

The Urgency of the information

99. It was the submission of Lord Gifford Q C that it was essential for the information to be broadcast without delay, once the information from the first source had been confirmed by the Solicitor General and others. He submitted that a hallmark of a responsible investigative journalist in a free society:- you obtain information about possible wrong doing from a reliable source, you check it with other sources, you make it public, and so you ensure that the possible wrongdoing is officially investigated and not covered up.

100. For the claimant, it was argued that with the knowledge that the defendants had, as to the status of the information, there was absolutely no urgency in publishing a story about alleged breaches of airport security. It was submitted that the defendants were motivated by a desire for sensationalism and the obvious commercial benefits that go along with being the first to publish.

101. The information available to the defendants was that the plane with the diplomatic bag and some of the persons had returned from whence they came. In effect therefore there had been no actual breach of airport security. What could be viewed as an attempt at such a breach had been thwarted. Using the hallmark suggested by Lord Gifford QC the defendants, having received what I can only regard as second-hand information, failed to have it properly investigated to be satisfied that there had in fact been wrongdoing that needed to be made public. There was no urgency in having this information broadcast before there was adequate investigation into what may have happened.

Whether Comment was sought from the claimant?

102. It is clear and admitted by both the first defendant and Miss Crooks that they did not have any comment from the claimant prior to broadcasting the first newscast – the breaking news. From the evidence where they outlined what was done from the time the first defendant got the news to the time it was broadcasted there does not appear to have been any effort made to contact the claimant.

103. After the 8:30 broadcast, the evidence of the first defendant and Miss Crooks is that they then did attempt to contact the claimant. Miss Crooks said she obtained the number of his consulting firm from the directory and called the number "more than twice" without success. There was no cell phone number for the claimant known to the defendants. An associate of the claimant, Mr. Collin Campbell was contacted but this did not get them any closer to the claimant.

104. It is submitted by Lord Gifford QC that diligent effort was made to obtain the input of the claimant or his representative and that the defendants were at all times willing to air his side of the story. He also noted that under Lord Nicholls's guidelines in **Reynolds** "an approach to the claimant will not always be necessary." In any event it is noted that an associate of the claimant was eventually contacted and interviewed. This could be considered sufficient except for the fact that the way this associate's attempt to give the account of what happened from the claimant's perspective has become a part of the words complained of. From the interview conducted of Mr. Alston Stewart much was made of whether the claimant had anything that could have been called luggage and whether it could have been searched.

105. It is, however, significant, as noted in the submissions for the claimant that at no time in their news broadcasts did the defendants indicate that they had or were making attempts to contact the claimant. I, however, agree with Lord Gifford's submission that where reasonable efforts have been made, and an associate of the claimant had been reached it would not be reasonable or required by law, to suppress the information because the claimant had not been spoken to directly.

Whether the Article Contained the Gist of the Claimant's side of the Story

106. The short answer to this question is that it did not. The claimant gave evidence that he issued a press release at the earliest possible occasion telling what he knew to have happened on his arrival into the island which was nothing close to what had been reported. The first defendant indicated that this release was not received on the day it was issued and could not recall when in fact it was

received. In any event, at the time the news item with the defamatory words was broadcast, the claimant had not been given an opportunity to tell his side

The Tone of the Articles

107. It is posited by Mr. Knight QC on behalf of the claimant, that it is part of responsible journalism that where a publication concerns criminal conduct which has not been proven in a court of law, the status to be given to those words are that they are mere allegations. Nowhere in the broadcast was the term used. Under cross-examination the first defendant admitted that he never chose to use the words “allegations” or “alleged” to refer to the part played by the claimant. The tone of the story was as if it was the actual events being described and the incident was major. I agree with Mr. Knight QC in his position that the publication must have been aimed at being sensational and the use of the comment “what a prekek” accompanied by laughter at the end of the breaking news and the words “Hmm my word” did not add an air of professionalism to the report.

The Circumstances of the Publication including the Timing

108. The only matter that arises concerning the timing of the publication goes back to the matter already noted that it was broadcast at a time when proper investigation had not been completed.

Conclusion on the Defence of the Reynolds Privilege

109. The argument for the defendants is that they had reasonable grounds for believing their story to be true, they took proper steps to verify the material, they did not believe it to be untrue and they took reasonable steps to contact the claimant and his associates. This is countered by the submission on behalf of the claimant that the defendants had failed to meet every single factor outlined in **Reynolds** and every single requirement of responsible journalism was flouted. Hence their conduct was described as irresponsible and their motive must have been actuated by malice.

110. In the case of **Jameel v Wall Street Journal Europe [2006] UKHL 44** Lord Bingham of Cornwall has this to say at paragraph 33 referring to what he called the test of responsible journalism proposed by Lord Nicholls in **Reynolds:**

> *"Lord Nicholls (at page 205) listed certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege. Lord Nicholls recognized (at pp 202 – 203) inevitably as I think, that it had to be a body other than the publisher, namely the court, which decided whether a publication was protected by qualified privilege. But this does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner."*

111. In the circumstances of this case it was found useful to treat the factors outlined by Lord Nicholls in **Reynolds** like a check-list as it was necessary to consider as fully as possible whether the decision to and manner of publishing this story, which turned out to be false, bore hallmarks of professional journalism. Although the subject matter may well have been of public interest more so than public concern, there was no need for urgency in publishing it without verifying the accuracy of the information. This was critical in an instance where the sources, impeccable though they may be, were not passing on information from a position of firsthand knowledge. The seriousness of the allegations, in imputing criminal behavior in a well known figure such as the claimant were such that in fairness to him, he ought to have been given an opportunity to give his side of the story and if that effort had failed, the public should know it was against that failure that the story was being released.

112. I take note of what Lord Gifford QC in his submission referred to as the good faith of the defendant. He pointed out that the first defendant and Miss Crooks were respected journalists for 26 years and over 10 years' experience respectively. He argued that there was no basis for saying that they did not report what they honestly believed to be true. Further, he urged that there was no basis for any finding of malice in this context meaning an improper motive to injure the claimant or the absence of honest belief.

113. I also take note of the fact that Lord Gifford QC urged that in determining this matter I should look at the sequence of broadcasts as a whole to include matters raised outside of the defamatory words complained of. This would not be appropriate in considering the import of the words used at the time that they were published. It seems clear that once the story started unravelling, the defendants was forced to go into what I define as "defensive mode." One example of this is that they spent much time after the initial broadcast proclaiming that they never said that the claimant had the pouch in his possession or under his control. This would never have been necessary if they did not recognize that the initial broadcast gave the clear and reasonable impression that he had been.

114. In the circumstances I find that the broadcast already found to be defamatory fell short of the standard expected for responsible journalism. The defendants therefore cannot rely on the **Reynolds** privilege and are liable.

115. In **Jameel v Wall Street Journal Europe** [supra] at para 152 Baroness Hale of Richmond had this to say:

> *"The tort of defamation exists to protect, not the person or the pocket, but the reputation of the person defamed. Indeed as Tony Weir points out in **A Casebook on Tort** (10th edition, 2004 at page 519), it is so tender to a person's reputation that it allows him to claim substantial damages without having to show that the statement was false or that it did him any harm, or that the defendant was at fault in making it. In the case of an individual, all this is so well*

established that we have ceased to think it odd (if we ever did) and it would certainly take the intervention of Parliament to change it."

Assessment of Damages

116. In a decision from our Supreme Court, **E.C. Karl Blythe v The Gleaner Company Limited No. 2004 HCV 1671 ,** Anderson J usefully referred to a text **Duncan and Neil on Defamation** from which a list of is given of the main factors to be taken into consideration as mitigating factors to reduce damages. At para. 91 he listed inter alia,

    1. the reputation of the plaintiff
    2. the behavior of the plaintiff towards the defendant and in the action
    3. any apology tendered by the defendant
    4. other facts negativing malice on the part of the defendant.

117. In the instant case, it is noted that the reputation of the claimant can be viewed as having been restored within days with the exoneration of him in the press release of the then Prime Minister. The claimant said he was severely hurt by allegations which sought to involve him in a "clandestine arrangement which was criminal in nature." Under cross-examination by Lord Gifford he expressed that there was a period on the date the broadcast was made when all the reputation he had garnered or earned was severely threatened and imperiled.

118. Two witnesses called on behalf of the claimant, spoke in glowing terms of the reputation of the claimant and spoke of how their view of him was impacted by the broadcast. Mr. David Muirhead QC testified to his viewing the claimant as having an excellent reputation. He explained of his state of shock and disbelief when he heard of the news report. He expressed that his estimation of the claimant is as high as it ever was but during that period of days immediately after the 15th of May, he was worried.

119. Professor Gordon Shirley spoke of the claimant being well known and respected in the Jamaican Diaspora, the Caribbean, the Commonwealth and the International Community. He said the allegations would surely have tarnished the image and character of the claimant in his eyes had it not been for his professional relationship with the claimant which made him take a favourable view of what the claimant had to say on the allegations. He too underscored how the claimant's reputation had been restored over a period of time and spoke of the fact that he still held the claimant in high esteem. He, however, expressed that "in human issues, whenever something like this arises a seed of doubt is planted that is never really repairable."

120. These views by the witnesses were juxtaposed with the fact that the claimant acknowledged having received awards, recognition and appointments of distinction after the words were published. This led Lord Gifford QC to eventually submit that any award of damages should be modest.

121. Mr. Samuels, who argued the matter of damages for the claimant, urged that there should be a substantial award. Among the factors urged for the making of such an award is the status of the claimant being an esteemed public servant, lawyer, political representative and a statesman. He scoffed at the suggestion that the fact that the claimant's reputation has been able to "rise again" should be factored into the consideration.

122. He referred to the case **Rantzen v Mirror Group Newspaper (1986) Ltd 1994 QB 670** as authority for the principle that, notwithstanding the fact that post the libel, the claimant continue to enjoy a good reputation the award for damages can still be substantial.

123. The defendants insist that an apology was made by Miss Crooks on their behalf and this should be factored into the consideration. It is true that once the Prime Minister had issued his press release, Miss Crooks did made a statement in which the claimant's name was mentioned and the words "my apology to you"

came shortly thereafter. Under cross-examination by Mr. Knight QC, Miss Crooks was forced to accept that nowhere in her apology was there a retraction of those parts of the broadcast found to be false. Further, she accepted that her statement did not include an expression of sorrow over the fact of having possibly embarrassed the person referred to or his friends or family as may be well be expected in an apology.

124. The 1st defendant sought to insist that the statement of Miss Crooks was the apology they had made but when being cross-examined by Mr. Knight QC, as to the appropriateness of this apology; the 1st defendant conceded that given what is now known they were prepared to make a far more fulsome apology to the claimant. This concession by the first defendant to my mind was well made. The fact is the mere usage of the words "I apologize" or "my apology to you" for these purposes did not mean that an apology was properly made.

125. There was also a claim made for exemplary damages whereby it was submitted that an award in damages under this heading is to punish a defendant for their conduct and for the court to mark its disapproval of their conduct. It is noted that in the claim, there was an order being sought for aggravated damages as well but no distinct argument was made under this heading. The case of **Rookes v Barnard 1964 AC 1129** was referred to, it being the *locus classicus* for awards under this heading. At page 1228 Lord Devlin said:

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

126. The authors of **McGregor on Damages** 17th edition at paragraph 11-0001 reminded that an award of this nature *"comes into play whenever the defendants'*

conduct is sufficiently outrageous to merit punishment as where it disclose malice, fraud, cruelty, insolence or the like."

127. Further, there are other words of Lord Devlin in **Rookes v Barnard** (supra) which are regarded as the standards against which the offending behavior should be judged .At page 1226 he said it must be:

> *"oppressive, arbitrary, or unconstitutional action by the servants of the state."*

128. In the circumstances of this case some of the things that were said by the hosts of discussion programmes at "NNN" in the days following the broadcast can be regarded as unfortunate. It is true that one host could be viewed as being dismissive of some aspects of the report of what was found to have actually happened calling it "nonsensical." Further another host seems to have been insisting that it was the claimant who was to come out and say something "in his defence." This was even more unfortunate a comment since the claimant had issued a release which the defendants say they had not received.

129. An unfortunate as these statements are, I am not satisfied that this is a matter that calls for the award of exemplary/aggravated damages. The main question that remains therefore is how much damage was done to the reputation of this claimant. Lord Gifford has urged caution in the award such that awards are not inflated by reason of the prominence of the claimant in any particular case. This however needs be considered against the background that it is precisely because of the prominence of the claimant in this case why to my mind the defendants were in a rush to publish their story without thorough investigation and verification.

130. Mr. Samuels urged that while precedents regarding quantum of damages in previous libel cases are of limited value, a good starting point is the award of thirty-five million dollars awarded in 1996 to Mr. Anthony Abrahams in his case against the Gleaner Company et al. The Privy Council in its decision upholding the award in the reported case of the **Gleaner Co. Ltd. and Anor. v. Abrahams**

2004 1 AC 628 found that the amount was not excessive in the circumstances of that case.

131. Mr. Abrahams in that case proved that after the defamatory story he was unable to earn a living in his chosen profession. He called medical evidence about the effect on him of the ostracism and humiliation he had suffered. A psychiatrist called on his behalf deposed that he had suffered both physiological and mental damage, the aggravation of asthma and diabetes, development of obesity through inertia and damage to his self-esteem. Further it was noted that the persistence on the plea of justification and the lateness of the apology were factors that influenced the decision that such a award was appropriate.

132. The amount would at the time of this trial, using the relevant CPI for June 1996 of 40.097 and the CPI for March 2014 of 214.2, would update to $186,971,593.88. Mr. Samuels posited that the claimant in this case was appointed chief among ministers in government on four (4) occasions was a Queen's Counsel and member of the local Privy Council. Mr. Abrahams had been a Minister of Tourism and a member of the Cabinet but was not as 'highly placed' as the claimant. Thus, Mr. Samuels submitted that the award should be in the amount of $180,000,000.00 or certainly not less than the $35,000,000.00 awarded then.

133. Lord Gifford QC referred to the case of **Seaga v. Harper 2005 SCCA 29**, the local Court of Appeal reduced the trial judge's award from $3.5 million to $1.5 million in a case where a Deputy Commission of Police had been libelled. There was found to be very little evidence in proof of injury to his reputation and aggravated damages were not found to be appropriate. Lord Gifford QC also urged that Abraham's case should not be used as a guide given the substantial damage proven to the claimant there.

134. I find the words of Panton P in the unreported local decision of **Jamaica Observer Limited v. Orville Mattis** SCCA No 20/2008 delivered on April 15, 2011 useful in arriving at a final decision in this matter. At paragraph 17 he said:-

> "*It takes years to build a good name and reputation. On the other hand, it takes only a few reckless lines in a newspaper to destroy or seriously damage that name or reputation. The damage usually remains for a good while. Section 22 of the Constitution gives a right to free speech, but it does not permit defamation of one's good character. When such damage has been proven adequate compensation should follow."*

135. In the circumstances I find that from the evidence the damage to the reputation of the claimant was not such as to warrant an award in the nature of the amount awarded in the Abraham's case. The award suggested by Lord Gifford QC of $250,000.00 is however not sufficient to meet the damage done to the claimant in this case; his persona must be taken into account. The evidence indicated that any damage done faded soon thereafter although the defendants persisted in making remarks and adopted a position which some may view as perpetuating the falsehood of the story for longer than they should. I also must bear in mind that although now considered inappropriate an attempt to apologize was made days later. I find that given the nature of the damage proven, an adequate compensation that should follow is twelve million dollars ($12,000,000.00).

The Order

There will be judgment for the claimant in the amount of twelve million dollars ($12,000,000.00).

Cost to the claimant to be taxed, if not agreed.