

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2006-00932

BETWEEN

NH INTERNATIONAL (CARIBBEAN) LIMITED

CLAIMANTS

AND

GANGA SINGH

DEFENDANT

Claim No. CV2007-04379

BETWEEN

EMILE ELIAS

NH INTERNATIONAL (CARIBBEAN) LIMITED

CLAIMANTS

AND

GANGA SINGH

BEFORE THE HONOURABLE MADAM JUSTICE J. JONES

Appearances:

Mr. A. Fitzpatrick S.C. and Ms. L. Lucky-Samaroo instructed by Ms. V. Narinesingh for the Claimants

Mr. F. Hosein S.C. and Mr. R. Dass instructed by Mr. R. Otway for the Defendant

JUDGMENT

1. The Claimants, Emile Elias (“Elias”) and NH International Caribbean Ltd (“the Company”), collectively called “the Claimants” have brought two actions against the Defendant, Ganga Singh (“Singh”), for defamation. The first action, founded in slander alleges, that Singh published to a newspaper reporter words defamatory of the Claimants. By the second action, founded in defamation, the Claimants sue on the republication of the words in two articles in a daily newspaper of the 19th October 2004. By way of defence Singh pleads that the words are incapable of a defamatory meaning, are not actionable without proof of special damage, fair comment, and qualified privilege. Insofar as Singh pleads qualified privilege he says that this privilege arises as a result of the public interest in the issue and his duty as a parliamentarian and as a response to an attack made against him by Elias.

2. Singh counterclaims against Elias alleging publication to two newspaper reporters words defamatory of him which words were republished in two articles in a daily newspaper on the 15th October 2004. Singh also alleges that Elias caused two further newspaper reports defamatory of him to be published in different newspapers on the 16th October 2004. In addition to the plea that the words are incapable of a defamatory meaning and not actionable without proof Elias denies that he spoke the words either falsely or maliciously and pleads qualified privilege in that the words were spoken in response to an attack made by Singh against him.

3. In reply both the Claimants and Singh plead malice. Both sides seek damages including aggravated and/or exemplary.

4. Given the complexity of the claims and counterclaims and the plethora of newspaper articles I shall deal briefly with the context in which the statements were made and the general law and then deal with the claims and counterclaims separately. With respect to the defence of reply to attack however, since the chronology of the publications is important, it is in my view more convenient to deal with that defence as raised in the claim and counterclaim together.

5. In the instant cases there is no dispute that words were published by Elias and Singh to newspaper reporters of each other and that these words were made public by way of newspaper articles. While there is some minor issue as to the exact words used by Singh the bulk of the contested evidence relates to the Reynolds public interest defence raised by Singh, the question of malice as it is relevant to the defences of fair comment and qualified privilege and to the issue of damages.

The context

6. By and large for the purposes of this overview the facts are not in dispute. Both Elias and Singh are well known public figures. Elias is a prominent person in the construction industry, a member and past president of the Family Planning Association of Trinidad and Tobago and an occasional newspaper columnist. He has been outspoken with respect to issues of national importance in particular with respect to the construction industry and corruption. He is the executive director of the Company, a limited liability company engaged in the construction industry. The Company has over years been

7. It is not in dispute that at the material time the Company was employed by the State on the construction of the Scarborough Hospital. At the same time the Company was also employed on a private project in Mason Hall Tobago (“the Mason Hall project”). This project is sometimes referred to as the Landate project.

8. On the 14th October 2004 as part of his contribution to the budget debate in Parliament Singh made allegations against the Claimants and a minister of government. These allegations concerned the movement of materials from the site of the Scarborough Hospital to the Mason Hall project site which, according to Singh, was owned by the minister or in which the minister had a beneficial interest. During Singh’s contribution in Parliament he had in his possession certain documents. These documents, according to Singh in his contribution, included the Company’s gate passes, material transfer slips and daily record sheets for the Scarborough Hospital project and rental and cartage receipts from the Mason Hall project. Parts of the contribution of Singh were broadcast later that day over the television.

9. Thereafter the newspapers had a field day. In particular articles bearing the following headlines were published in the daily newspapers:

- (i) On Friday the 15th October 2004 the Trinidad Express Newspaper published an article headlined: “Elias: I don’t have to divert what I own.” by Camini Maharaj (“the first article”).
- (ii) On Saturday 16th October 2004 an article headlined: “Tobago cops launch probe into missing files” (“the second article”) written by Richard Lord was published in the Trinidad Express Newspaper.
- (iii) On Saturday 16th October 2004 the Newsday printed an article headlined: “Elias to Ganga Singh: Return my stolen files” (“the third article”).
- (iv) On the same date the Trinidad Guardian Newspaper printed “Elias: Nothing to investigate” (“the fourth article”);
- (v) On Tuesday 19th October 2004 two articles were published in the Newsday both written by Clint Chan Tack the first, on page 5, headlined “Elias: I know how the documents were stolen” (“the fifth article”) and the second, on page 19, headlined: “Ganga: Elias ducking Corruption” (“the sixth article”).

10. These articles form the basis for the suit and countersuit. It is not in dispute that the newspapers referred to above all have a wide circulation within Trinidad and Tobago and are also posted daily on the internet.

11. It is accepted by Singh, in the first action, that he spoke the words complained of to the reporter Clint Chan Tack (“Chan Tack”). In the second action he accepts that he spoke some of the words alleged. According to Singh, Chan Tack telephoned him and asked for his response to Elias’s accusations against him. It is not in dispute that these

accusations had been reported in the press in the first to fourth articles. It is accepted by Elias that in response to what was said by Singh in Parliament he gave certain interviews to the media. In particular he admits that the first, second, third and fourth articles were based on interviews given by him.

The law

12. Neither party pleads innuendo. They both claim that the words in their natural and ordinary meaning are defamatory of them. If I am satisfied that they are defamatory of the complainant I am required to go on to consider the defences of fair comment or qualified privilege raised. If valid thereafter it will be necessary to consider whether there was any “malice” so as to defeat these defences. Only then will the question of damages become relevant.

13. With respect to the original publication the cause of action of each complaint is in slander. While it is not in dispute that in general slander is not actionable without proof of damage in the instant cases, whether by way of separate action as in the case of the Claimants or in the same action as in the case of Singh, they both also sue on the republication of the slander in various newspaper articles. On the facts of the instant cases therefore, for the purposes of damages, the distinction is irrelevant. In addition there is no real difference whether the claim as to the republication is made in the same or different actions.

14. That said it must be noted that neither the reporters nor the newspapers have been made parties to any of the actions. While there is some evidence that a suit was commenced by Elias against a newspaper with respect to the fifth and sixth articles in my opinion this has no relevance to the issues at hand. With respect to the republication the maker of the defamatory statement will be liable if he is actually aware that what is said will or is likely to be reported or if a reasonable person in his position would have appreciated that there was a significant risk that what he said would have been repeated in whole or in part and that it would increase the damage caused by what was said:
Ratcliff v Evans [1892] 2 Q.B.524.

15. On the admitted facts there is no doubt that both Elias and Singh deliberately gave interviews to members of the press in circumstances where they were both aware that the persons were newspaper reporters and that the issue was at the time receiving wide media coverage. In my opinion they were both aware or at least ought to have appreciated that what they said to the reporters would have been published in the newspapers.

16. The first step therefore is to ascertain whether the words complained of were capable of a defamatory meaning. In this regard the intention and knowledge of the person publishing the words are irrelevant. The test is objective. What is the meaning that the ordinary, reasonable and fair minded person would place on the words used?

“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 and 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 the natural and ordinary meaning.”: per Lord Reid in **Lewis v Daily Telegraph Ltd [1964] AC 234 at page 258.**

“.....any meaning which does not require the support of extrinsic facts passing beyond general knowledge but is capable of being detected in the language used can be part of the ordinary and natural meaning of words. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only general knowledge and not fettered by any strict legal rules of construction would draw from the words.”: per Lord Morris in **Jones v Skelton [1963] 1 WLR 1362 at 1370-1371.**

(a) Fair comment

17. To succeed in this defence the maker of the statement must show that (i) the comment is on a matter of public interest; (ii) the words are recognisable as comment as distinct from an imputation of fact; (iii) the comment must be based on facts which are true or protected by privilege (iv) the comment must explicitly or implicitly indicate, at

least in general terms, what are the facts on which the comment is being made; and (v) the comment is one which could have been made by an honest person however prejudiced he might be and however exaggerated or obstinate his views: **Cheng v Tse Wai Chun [2000] 3H.K.L.R.D 418.**

18. Despite the pleadings and the evidence in chief of Elias it was conceded at trial that this was a matter of public interest. In the circumstances the case proceeded on the basis that:

“Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.”: per Lord Denning MR in **London Artists Ltd. Littler [1969] 2 QB 375 at page 391**].

19. While it is said that proof of malice defeats the defences of both fair comment and qualified privilege the word is not used in the same context in both defences. With respect to the defence of fair comment the comment must represent the honest belief of the maker.

“ a comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy

or other motivation, whatever it may be, even if it is the dominant or sole motive, does not itself defeat the defence. However proof of such motivation may be evidence, sometimes compelling evidence, from which the lack of genuine belief in the view expressed may be inferred.”: per Lord Nicholls of Birkenhead in **Cheng v Tse Wai Chun** at page 438.

“The true test is whether the opinion however exaggerated, obstinate or prejudiced was honestly held by the person expressing it”: per Lord Nicholls of Birkenhead in **Reynolds v Times Newspaper Ltd and others** [2001] 2 AC 127 at page 194 quoting Diplock J. in **Silken Beaverbrook Newspapers Ltd** [1958] 1WLR 743, 747.

(b) **Qualified privilege**

20. Whereas the defence of fair comment seeks to protect statements of opinion the defence of qualified privilege covers defamatory statements of fact.

“It is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part of the maker to communicate them to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory, so long as they are made without malice, that is to say honestly and without

any indirect or improper motive.”: per Lord Carswell in **Edward Seaga v Leslie Harper Privy Council Appeal No. 90 of 2006 at paragraph 5.**

21. The test of responsible journalism established in *Reynolds v Times Newspapers Ltd. and Others* was expanded in *Seaga’s* case to include statements made by politicians in circumstances where the politician knew and intended at the time of publication that his words would receive wide publicity. It is accepted that this is the test appropriate here.

22. With respect to responsible journalism, according to Lord Bingham of Cornhill in **Jameel and others (Respondents) v Wall Street Journal Europe Sprl (Appellants) [2006] UKHL 44**: “the rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify” and quoting from Lord Hobhouse in the *Reynolds* case at page 238 he continues: “No public interest is served by publishing or communicating misinformation” But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.” : **paragraph 32.**

23. In **Reynolds** Lord Nicholls listed matters to be taken into account in determining whether the publication is privileged:

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

1. The seriousness of the allegation. The more serious the charge the more the public is misinformed and the individual is harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff 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 statements of fact. 10. The circumstances of the publication, including the timing.”: **at page 205.**

24. In this regard it is important to note that the list is not exhaustive. Neither is it a check list in which all the circumstances have to be present for the defence to be established. Rather the list is intended as a pointer “which might be more or less

indicative, depending on the circumstances of a particular case,”: per **Lord Bingham of Cornhill in Jameel at paragraph 33.**

25. According to **Lord Hoffman in Jameel** in dealing with Reynolds:

“Although Lord Nicholls uses the word “privilege”, it is clearly not being used in the old sense. It is the material which is privileged, not the occasion on which it is published. There is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged. The burden is upon the defendant to prove that those conditions are satisfied I therefore agree with the opinion of the Court of Appeal in *Loutchansky v Times newspapers Ltd* (nos 2-5) [2002] QB 783, 806 that “Reynolds privilege” is “a different jurisprudential creature from the traditional form of privilege from which it sprang.” It might be more appropriately called the Reynolds public interest defence rather than privilege.”: **at paragraph 46.**

(c) Reply to attack

26. In addition both Elias and Singh rely on the privilege that arises where the words complained of were spoken in response to attack by the other. This is a specie of qualified privilege, it is defeated by proof of malice. In this defence a person whose

conduct or character has been attacked is entitled to answer such attack. If during the course of such a reply statements defamatory of the attacker are made these statements will be privileged providing that they are made bona fide and are generally relevant to the accusations which they purport to answer.

“The law justifies a man repelling a libellous charge by a denial or an explanation. He has a qualified privilege to answer the charge; and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge, and not with malice, it is privileged, though it be false.”: **Brewer v Chase, 80 NM 575 at 577 (Mich. 1899).**

“There is, it seems to me, an analogy between the criminal law of self defence and a man’s right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively, and he only loses the protection of the law if he goes beyond the defence and proceeds to offence. That is to say, the circumstances in which he defends himself, either by acts or by words, negative the malice which the law draws from violent acts or defamatory words. If you are attacked with a deadly weapon you can defend yourself with a deadly weapon or any other weapon which may protect your life. The law does not concern itself with niceties in such matters. If you are attacked by a prize fighter you are not bound to adhere to the Queensberry rules in your

defence.”: per Lord Oaksey in **Turner v MGM Pictures [1950] 1 All E.R. 449 at pages 470 to 471.**

27. The defence only extends to such facts as are necessary “to repel the charges brought against him-not to bring fresh accusations against his adversary.”: per May CJ in **Dwyer v Esmonde (1878) 2 L.R.Ir. 243 at page 254.** While the defender is entitled to some considerable latitude in the defence unnecessary allegations or charges wholly irrelevant to the attack are not covered by the privilege: **Watts v Times Newspapers Ltd.[1997] QB 650.**

28. As with the defence of fair comment this privilege, whether based on duty and corresponding interest or reply to attack, is defeated by proof of malice that is where the maker of the statement has abused the privilege by acting from an improper motive. However in cases where the Reynolds public interest defence is raised since the propriety of the conduct is already “built into the conditions under which the material is privileged” there is no need to examine malice as a separate factor defeating the privilege: **Lord Hoffman in Jameel at paragraph 46.**

The Claimants’ case

29. The claims are brought in respect of two articles appearing on the same day in the same newspaper written by the same reporter. It is not in dispute that these articles were the result of a telephone interview by Chan Tack with Singh. Nor is it in dispute that in

that interview Chan Tack sought a response from Singh as to allegations made by Elias in his media conference and published in the media in the first to fourth articles.

(a) The words used

30. In the slander action Singh admits that he said the following words:

“Emile Elias is trying to avoid questions about his company’s involvement in the Scarborough Regional Hospital project and the Mason Hall development project”

“He has to deal with the material allegations. He cannot escape the fact that his company is involved in two projects, one involving a government minister and that there are allegations of corruption over both projects.”

“NHIC’s staff was busy over the weekend sanitizing their files so that no incriminating evidence could be found.”

“This situation was just cause for implementing whistle blowing legislation...”

31. In the second action, “the republication action”, the Claimants plead that Singh spoke the following words or words of like effect:

“NH International (Caribbean) Limited’s Emile Elias was attempting to avoid questions about his company’s dual involvement in the Scarborough Regional Hospital project. The latter being owned by Housing Minister Dr. Keith Rowley.”

It is clear from the article however there was a typographical error in the pleading in that the words “and the Mason Hall development project” were left out.

“Public funds were being siphoned from the Scarborough Hospital Development Project to a private development at Mason Hall owned by the Rowley family”

“Emile Elias has to deal with the material allegations and could not escape the fact that his company was involved in two projects, the latter involving a sitting government minister and there were allegations of corruption over both projects.”

“Over the weekend staffers at NHIC’s Long Circular offices in St. James were busy sanitizing their files so that no incriminating evidence could be found pertaining to the matter.”

“Staff at NH International (Caribbean) Limited was busy over the weekend shredding documents.”

32. In this action Singh denies that he used the words:
- (i) “NH International (Caribbean) Limited’s” with reference to Elias;
 - (ii) “The latter being owned by Housing Minister Dr. Keith Rowley”;
 - (iii) “Public funds were being siphoned from the Scarborough Hospital Development Project to a private development at Mason Hall owned by the Rowley family”;
 - (iv) “So that no incriminating evidence could be found pertaining to the matter” or
 - (v) “Shredding”.

33. The first step therefore is to identify the words used by Singh. In this regard Chan Tack gave evidence for the Claimants. His evidence in chief does not deal with any of the actual words used by Singh except the use of the word “shredding”. In chief he states that in response to his question as to what was meant by the words “sanitizing” Singh said “shredding”. In his cross-examination however Chan Tack accepts that Singh never used the words “NH International (Caribbean) Limited” with reference to Elias nor did he say the words “the latter being owned by Dr. Keith Rowley” or the words “so that no incriminating evidence can be found.” Nor, according to Chan Tack, did Singh say that public funds were being siphoned from the Scarborough Hospital Development Project to a private development at Mason Hall owned by the Rowley family. Further he could not

recall Singh using the word “shredding”. According to him it was possible that this word could have been inserted by his editor.

34. With respect to the words “so that no incriminating evidence can be found” Singh however admits using these words and I find as a fact that these words were said by him. It would seem to me that it is more likely that Singh would remember the words used by him. Further it is unlikely that Singh would admit to the use of words not said by him. I do not accept Chan Tack’s evidence in chief with respect to the use of the word “shredding” by Singh and in this regard, and with regard to his evidence as to the reference to Dr. Keith Rowley, I accept his evidence given in cross-examination.

35. I also accept the evidence given by Chan Tack in cross-examination with respect to the introduction of the words “NH International (Caribbean) Ltd’s” with reference to Elias and the reference to the siphoning of public funds. With respect to the latter statement, in the fifth article in which these words were found, these words are introduced by the words: “Last Thursday UNC MP Ganga Singh alleged that...”. In my opinion this supports my finding that these words were not used by Singh on the occasion of the interview. It would seem to me that from a reading of the article Chan Tack was there referring to the allegations made by Singh in Parliament.

36. With respect to the other statements attributed to Singh in the articles the question is, given the fact that those specific words were not used by Singh, do those words in fact express the substance of what was said by Singh to Chan Tack?

“Where a man makes a request to another to publish defamatory matter, of which, for the purpose he gives him a statement, whether full or in outline, and the agent publishes that matter adhering to the sense and substance of it, although the language be to some extent his [the agent’s] own, the man making the request is liable to an action as is the publisher. If the law were otherwise, it would in many cases throw a shield over those who are the real authors of libels, and who seek to defame others under what would then be the safe shelter of intermediate agents.”: per Montague Smith J in **Parkes v Prescott (1869) LR4Ex.169 at179.**

37. Similarly in **Buchanan v Jennings [2004] UKPC 36** in dealing with the submission that the Plaintiff had been unable to vouch that the words used in the newspaper report were the precise words used by the defendant the Board stated:

“Where an oral statement is complained of, it is rarely possible (in the absence of a recording, a transcript or a very careful note) for a plaintiff to establish the precise words used by the defendant. But the law does not demand a level of precision which is unattainable in practice. The plaintiff must plead the words complained of, but is enough if the tribunal of fact is satisfied that those words accurately express the substance of what was said.”: paragraph 5.

38. I find as a fact therefore that the words used by Singh in the interview with Chan Tack are those words admitted by him in the slander action. The words referring to the siphoning of public funds were however a repeat by Chan Tack of an allegation made by Singh in Parliament in respect of which Singh enjoyed absolute privilege. The description of Elias with reference to the company; the use of the words: “The latter being owned by Housing Minister Dr. Keith Rowley”; “pertaining to that matter” and “shredding” were all additions made by the newspaper.

39. With respect to the words referring to Dr. Keith Rowley in my view the use of these words do not accurately reflect the substance of what was said on that occasion by Singh.

40. That said, in my opinion, the use of the other phrases accord with the sense and substance of what was said by Singh on the occasion of the interview. In my view the use of the word ‘shredding’ in the context used is not different from the use of the word ‘sanitizing’ in the context used. Both words in my view conjure up the impression of cleaning or removing from view. Similarly neither the addition of the words ‘pertaining to the matter’ with reference to the sanitized files or the association of the company with reference to Elias in my view change the substance of the words used by Singh. In my opinion, despite the fact that the words are the words of the newspaper, Singh is liable for them.

41. In the circumstances I find as a fact therefore that Singh spoke the following words or words of similar effect to Chan Tack:

“(a) Emile Elias is attempting to avoid questions about his company’s dual involvement in the Scarborough Regional Hospital Project and the Mason Hall development project.

(b) Emile Elias has to deal with the material allegations and can not escape the fact that his company was involved in two projects, the latter involving a sitting government minister and there were allegations of corruptions over both projects;

(c) Over the weekend staffers at NHIC Long Circular offices in St. James were busy sanitizing their files so that no incriminating evidence could be found pertaining to the matter.”

42. Further I find that the use of the words “NH International (Caribbean) Limited’s” with reference to Elias and the use of the word shredding with reference to the files did not change the substance of the words used by Singh and therefore Singh is responsible for any defamatory meaning which may be contained in the use of those words.

(b) The natural and ordinary meaning of the words used

43. The question here is what the ordinary reader, one who is “essentially fair minded and reasonable but who may be guilty of a certain amount of loose thinking and does not read a sensational article with cautious and critical care”, would have understood from the article: **Gatley on Libel and Slander 10th Edition page 103 paragraph 3.24.**

44. In order to determine the natural and ordinary meaning of the words the Claimants submit that the context in which the words were used includes a consideration of the statements made by Singh in Parliament. According to the submission the words complained of constitute a repetition of the allegations of corruption made by Singh and would be understood by the ordinary reader in that context. I do not accept the submission of the Claimants. In the first place in my view the only repetition of the words used by Singh in Parliament was in fact done by Chan Tack and not by Singh. Unlike the case of Buchanan no reference is made by Singh to his statements in Parliament so as to allow the Claimants to rely on them in this suit. In my opinion in order to ascertain the meaning the words are to be considered on a stand alone basis without any reference to the statement of Singh in Parliament unless such statement is to be considered a part of the general knowledge to be imputed to the reasonable reader.

45. Even so, in my view, given the contents of the fifth article itself the Claimants cannot rely on such general knowledge. In the instant case the reference to the statement made in Parliament was actually contained in the article and thereby specifically brought to the reader’s knowledge in that manner. It cannot be said therefore that this could have formed a part of the general knowledge of the reader. Not having been repeated outside

of Parliament by Singh or brought to the reader's knowledge by any action of Singh the words are however not actionable.

46. In my opinion that ordinary reader even without any general knowledge obtained from the other media reports made before the 19th October, given the context in which the words were used in the articles, would have inferred by those words that Singh was saying that:

- (i) With respect to the allegations of corruption against the Claimants concerning their involvement in a public project and a private project in which a government minister had an interest the Company had been in possession of documents which confirmed these allegations;
- (ii) The Company headed by Elias was therefore guilty of these allegations of corruption;
- (iii) The Claimants were dishonest in that in the light of these allegations of corruption they were deliberately destroying the documents which would have incriminated them in criminal and corrupt activities;
- (iv) Elias was a deceitful person whose word could not be trusted in that he was deliberately avoiding answering questions which would reveal the Claimants' corrupt practices while he and his members of staff were destroying the incriminating evidence with regard to the two projects.

In my opinion the words were defamatory of the Claimants.

The defences

47. Singh relies on the defence of fair comment and qualified privilege. The burden of proof with respect to these defences is on the person raising the privilege, in this case Singh. It is not in dispute that the general issue, the diversion of public funds in circumstances where a minister of government was alleged to be a beneficiary, was one which the public at large had a right to know. It was a matter of public interest. It seems to me as well that in his capacity as a Member of Parliament Singh had a duty to bring these matters to the public's attention.

48. With respect to the defences raised the first port of call therefore is to distinguish comment from statement of fact. With respect to comment, despite the general plea that the words used comprised comment, Singh's submission is that the comment is to be found at (a) and (b) above. Both of these statements are contained in the sixth article. I do not accept the submission with respect to (a). It seems to me that, in the context of the article, (a) is presented as a statement of fact from which the comment at (b) follows. In my view Singh is stating as a fact that Elias is attempting to avoid questions about his company's involvement in both projects. In my opinion the defence of fair comment does not apply to (a).

49. With respect to (b) in my opinion this represents mixed comment and fact. Insofar as the paragraph states that Elias has to deal with the material allegations and suggests that he is trying to escape these allegations this in my view represents comment and is recognisable as such. Insofar as that paragraph states that the Company was Elias'; it was involved in two projects, one of those projects involved a sitting minister and there were

allegations of corruption over both projects these, in my view, are presented as statements of fact.

Fair Comment

50. It is not in dispute that Elias was the executive chairman of the Company or that the Company was involved in both the Scarborough Hospital project and the Mason Hall project. An examination of the Hansard report of the statement made by Singh in Parliament reveals that the statement that the Mason Hall Development project involved a government minister was made by Singh as were the allegations of corruption. These facts are therefore either true or privileged or both. However these facts are not the subject of the comment made. The real comment is on the fact that Elias was attempting to avoid questions about his company's dual involvement. It is this fact which Singh is required to show is either true or protected by privilege.

51. The evidence is that immediately after the publication of Singh's contribution in Parliament Elias began giving interviews to the press. Singh's contribution in Parliament was made on the 14th October. Excerpts of the statement were broadcast over the television that night. The first interview by Elias was published in the media on in the 15th October. In that article Elias is credited with saying that he would be making a measured response later that day to the charges of cost overruns and impropriety. He denied the accusations that: (i) the company diverted state-purchased building materials lodged at the Scarborough building site to the Mason Hall Development site; (ii) all the

materials on the Scarborough site belonged to him; and (iii) the claim of cost overruns. He stated “if he had a site and he is doing two projects, the materials can go anywhere, internal accounting takes care of that.”

52. It is clear from the contents of the second, third and fourth articles that they were all reporting on a media conference called by Elias on the 15th October in which Elias again answered the allegations made against him and the Company. It is reasonable to assume that this is the ‘measured response’ referred to in the first article. It would seem to me that in so far as the comment was based on Elias avoiding dealing with the material allegations that fact was not true.

53. Neither in my view can it be said that Singh had an honest belief in the truth of the comment. Singh admits that prior to making the comment he read all the articles. It seems to me that given the contents of the first to fourth articles, even from a subjective viewpoint, it can not be said that Singh was genuinely of the view that Elias was trying to escape or avoiding dealing with the material allegations. According to Singh in cross-examination he was of the view that Elias was avoiding answering questions by focusing attention on the stolen files. It may very well be that Singh honestly held the view that Elias was seeking to obscure the issues by focusing on the stolen documents but, in my view, that is a far cry from avoiding answering the allegations. In my opinion no one, particularly a trained Attorney at Law, could after reading the first to fourth articles have come to the honest belief that Elias was avoiding dealing with the material allegations.

54. In the circumstances I am of the view that the defence of fair comment is not open to Singh. Insofar as the statement made contained comment it was not based on facts which were true. Further, even if the defence was open to Singh, it would be defeated by my finding that Singh did not honestly believe the truth of his comment.

Qualified privilege

The Reynolds public interest defence

55. There is no issue that the subject matter of the statement was one of which the public was entitled to know. Neither is there any dispute that the allegations were very serious. The issue here was the improper and corrupt use of public funds by the Claimants in circumstances where a minister of government was the beneficiary. In the circumstances that the newspaper was not a defendant the questions whether comment was sought from the Claimants or whether the article contained the gist of the Claimants' story on the facts of this Claim are, in my opinion, not applicable.

56. Following on Reynolds of some applicability is the tone of the statement in this regard it is necessary to bear in mind the fact that the general tone of the article itself was Chan Tack's and not Singh's. It is clear however from the words admittedly spoken by Singh that the tone was accusatory. The facts were presented as certain and confirmed. What is left to be examined therefore is evidence as to the source of the information; the

steps taken to verify the information; its status; the urgency of the matter and the circumstances of its publication.

57. According to Singh the information was received by him on the 17th October by way of a telephone call from Dave Debideen, a neighbour of Elias'. Singh describes Debideen as a reputable businessman and a person whom he knew socially and from Singh's being a customer of Debideen for over 15 years. According to Singh Debideen told him that he had heard from a senior member of the Company's IT department ("the informant") that computer equipment was being physically destroyed to ensure that no access could be had to any data on the Scarborough Hospital project. Debideen, he says, refused to identify the informant but vouched for the informant's integrity. He says Debideen put him into contact with another person whom, he says, was able to verify that he knew both the informant and his wife and that the informant had also confirmed the information to him. Under cross-examination it transpires that this other person was also known to Singh and known by Singh to be a friend of the said Debideen.

58. According to Singh he tried to establish the identity of the informant to no avail. The identity of the informant he says was being withheld to protect the informant's job. He said that he tried again since the proceedings had begun but was informed by both Debideen and the other person that the informant had since migrated to Canada.

59. Much is made of whether Debideen did or did not provide the information to Singh. Debideen gave evidence for Elias denying that he provided the information and

denying that he knew anyone working in the Company's IT department. Dharamchand Depoo gave evidence that Debideen had admitted to him that he had given the information to Singh. There was much cross-examination for and against. With respect to this evidence the most that can be said is that assuming the truth of Singh's evidence it is clear, in hindsight, that not much confidence ought be placed on Debideen as a reliable source.

60. But in my opinion the question as to the reliability of the source of the information is very simply answered by examining Singh's evidence on the assumption that it was true. On that basis therefore it can be seen that Singh relied on information given him by persons with no direct knowledge of the events, neither of which had any track record with Singh as reliable sources. Further the information was purported to have been given them from the same source. So it could not be that one could have been seen to corroborate the other with respect to the actual information. At best there would have been corroboration as to the fact that this was said to each of them by the actual informant whom they each confirmed to be an employee of the Company. There was nothing upon which Singh or indeed this Court could determine the reliability of the informant himself. The information, if given to Singh's sources might, for example, have been given by a disgruntled employee.

61. In Seaga's case the statement was made on the basis of information received from senior party members and members of the public. Seaga did not name his informants as he claimed that the information was given to him in confidence. He did nothing further to

verify the information. With respect to the sources of his information the opinion of the trial judge and accepted by the Privy Council was that the information did not rise above mere rumour and further, since Seaga was unaware of the sources of the information, the court was prevented by that lack of knowledge from determining whether or not they were reliable sources;

62. In my opinion given the seriousness of the allegation it was highly irresponsible to rely on information obtained from an unknown third party as the basis for making the statement to the press. Further I am not satisfied as to the steps taken to verify the information. Much evidence was given as to the steps taken to verify the statements made in Parliament. This however is not the issue. The issue is the verification of the second hand information received as to the destruction of incriminating evidence. The only steps taken to verify the information was to request a meeting with the informant, to seek to speak to the friend of Debideen who was also a friend of the informant and to attempt to obtain the name of the informant. As a result of these steps the only further information obtained by Singh was that Debideen's friend confirmed that he knew the informant and his wife and that the informant had told him the same thing. No attempt was made to verify the information from any other source. Further the information was received by Singh on the 17th and disclosed to Chan Tack on the 18th. In my opinion it could not be that the information was so urgent that Singh was obliged to reveal it without at least attempting to make proper investigation.

63. The end result is that the day after obtaining the information Singh publishes a statement defamatory of the Claimants on the basis of second hand information given by an unknown source. In my opinion Singh did not show the requisite care necessary to satisfy the Reynolds public interest defence. In my view therefore this defence fails.

The Counterclaims

64. There is no denial by Elias that the words were attributable to him. In particular he does not deny that the following words were said or could be attributed to him:

- (a) “The stolen goods are in the hands of Ganga Singh. The discussions are in the media and the parliament triggered an enquiry as to where the files were and they (the Scarborough Police) have promised to send an officer to the site to investigate.”: the second article;
- (b) “An indignant Emile Elias railed against UNC MP Ganga Singh demanding that he return the files “stolen” from his Scarborough office.....Every movement of men and material was documented in the transfer slips he said. And it was this comprehensive documentation which was pilfered from the Scarborough office and presumably handed over to Singh. ‘We are reliably informed who removed the files who couriered them to Trinidad and handed them over,’ he said, adding that the company gave the police information to this effect. ‘The police would want to talk to Ganga Singh he said...’.....Elias said Singh had all the documents indicating that this was a perfectly reasonable contract but he

preferred to throw mud under the protection of Parliament.....I look forward to Ganga Singh returning the stolen files. 'I welcome this enquiry and I suspect that it would last 30 minutes' he said.....:the third article;

- (c) "Contractor Emile Elias said opposition Chief Whip Ganga Singh quoted from stolen documents when he accused....'On Friday, all the company's files were lodged at the Scarborough offices were stolen,' Elias said yesterday.....At first Elias said, his staff thought that the files were misplaced and it was only Thursday he 'realised that the stolen goods were in the hands of Ganga Singh' ...: the 4th article.

The natural and ordinary meaning of the words used

65. Did these words in their natural and ordinary meaning convey a meaning defamatory of Singh? It is not in dispute that all three articles quoted above were written as a result of the media conference called by Elias. They were all written on the same day in three different newspapers. It is clear that the complaint by Singh surrounds Elias' claim that Singh used documents forming a part of files which had been stolen from the Claimants' offices.

66. Singh pleads that these words were spoken in an attempt to convince the public that he was a dishonourable and dishonest man who would stoop to unlawfully removing and/or stealing files and/or participate or condone the removal or stealing of them from

the Company's offices in order to make reckless or unjustified allegations of corruption against the Claimants.

67. Read in their context I am not satisfied that the words used suggest any participation by Singh in the theft of the files. At their worst, in my opinion, the words convey the impression that documents stolen from the Company found their way into Singh's hands and were used by him in support of his submissions in Parliament. In this regard it would seem to me that of general knowledge to the ordinary reader would be the fact that in this jurisdiction it is not unusual for documents, confidential or otherwise inaccessible to the general public, to mysteriously find their way to Parliamentarians, whether by way of letter box drops or otherwise, for disclosure in Parliament.

68. It is suggested that the use of the words "the stolen goods are in the hands of Ganga Singh" conveys the impression that Singh is guilty of the crime of receiving stolen goods. It is clear from the article that the words "stolen goods" refer to the missing files. I am not satisfied that our ordinary reader would have made the association with the crime of receiving stolen goods. In my opinion our ordinary, reasonable and fair minded reader armed with the general knowledge referred to above would not infer any improper behaviour on the part of Singh in this regard.

69. To my mind of more concern is the imputation contained in the words: "Elias said Singh had all the documents indicating that this was a perfectly reasonable contract but he preferred to throw mud under the protection of Parliament." In my opinion these are

the words that confer a defamatory meaning namely that despite having in his possession documents which would show no wrongdoing on Elias' part under the cover of Parliamentary privilege Singh dishonestly and dishonourably made allegations of corruption against Elias which he knew were unjustified.

70. Elias' defence here is that the words were legitimately spoken in defence to an attack made on him by Singh. The facts relevant to this defence are intricately intertwined with the similar defence raised by Singh it is appropriate therefore to deal with both defences at the same time.

Reply to attack

71. In the accepted chronology of events statements made by Singh in Parliament were published in the electronic media on the 14th October 2004. Singh here alleges corruption by the Claimants with respect to the siphoning of public funds to a private project in which a government minister has an interest. These statements are protected by Parliamentary privilege. The following day Elias gives an interview resulting in the first article and a press conference resulting in the second to fourth articles. It is not in dispute that both the interview and the media conference were specifically for the purpose of replying to the allegations made by Singh against the Claimants in Parliament. During the course of that press conference Elias claimed that documents presented by Singh in Parliament had been stolen from the company's offices and that despite having in his possession evidence to the contrary Singh, under the protection of the privilege afforded

to him in Parliament, alleged corruption. As I have found the former statement is not defamatory the latter is. Thereafter when asked to comment on Elias' accusations with respect to the use of stolen documents Singh accuses Elias of not dealing with the material issues and claims that over the weekend the Company's staff had been destroying incriminating evidence.

72. It cannot be disputed that the first attack came from Singh in Parliament. According to Elias he was entitled to respond to the attack made against him by Singh in Parliament. Singh submits that the privilege afforded statements made in Parliament is so wide that it precludes the right to answer such an attack. In this regard Singh relies on the statement of Lord Browne-Wilkinson in **Prebble v Television New Zealand [1994] 3 All ER 407 at page 417**, to the effect that while the Court was conscious that not to allow reliance on things said and done in Parliament could have a serious effect on the right of the public to comment on and criticise the actions of those elected to power in a democratic society, the need to ensure that the legislature can exercise its powers freely on behalf of its electors with access to all relevant information overrides such a right, and the case of **Church of Scientology of California v Johnson-Smith [1972] 1 All ER 378**. On the other hand in the case of **Adam v Ward [1917] AC 309** a reply to an attack made in Parliament was held to be privileged.

73. **Section 55 of the Constitution** provides for freedom of speech in the Senate and the House of Representatives. In particular **section 55(2)** states: "No civil or criminal proceedings may be instituted against any member of either House for words spoken

before, or written in a report to, the House of which he is a member or which he has a joint right of audience under section 62 or a committee thereof or any joint committee or meeting of the Senate and House of Representatives or by reason of any matter or thing brought by him therein by petition bill resolution motion or otherwise; or for the publication by or under the authority of either House of any report, paper, votes or proceedings.” It would seem to me therefore that, by the Constitution, the privilege prevents the bringing of proceedings in a court with respect to statements made in Parliament.

74. The real question here is the extent of the Parliamentary privilege enjoyed by Singh and the appropriateness of the response. In *Adam v Ward* the response was by letter published in the press. In the opinion of the Court such a response was appropriate to an attack made in Parliament. “..... a man who makes a statement on the floor of the House makes it to the world.”: **per Lord Dunedin at page 324**. It would seem to me that the medium chosen by Elias for his reply is not therefore inappropriate.

75. In the instant case the evidence is that while making the statements in Parliament Singh had in his hand documents which he claimed were the Company’s documents, copies or originals it matters not. In this regard however let me digress to note that I accept the evidence of the Claimants’ witness, Kamla Birbal. I found her to be a credible witness. In my opinion however nothing here turns on her evidence. In reply Elias was saying ‘those documents which you have in your possession are documents stolen from my office and these documents in fact prove that the allegations that you have made

against me are not true.’ It would seem to me that this statement is relevant to answer the accusations made. The fact that the documents were identified as documents stolen from the Company’s offices was important as it established that the documents and the contents thereof were known to the Claimant.

76. In the instant case the Court is not asked to question the motives intention or reasoning of Singh in Parliament. I am only asked to accept that the statement was made. It seems to me that in circumstances where it is not in dispute that the statement was made nor is it in dispute that the statements received wide media coverage it is open to me to acknowledge that a statement was made by Singh in Parliament and the contents of the that statement. At issue here is not whether the statement was true or the reasoning or the motives for making the statement but whether it was made. This I think is the distinction to be drawn between the cases of the Church of Scientology and Prebble and Adam v Ward. Indeed some assistance in this regard is to be drawn from the treatment of Adam v Ward by Lord Browne-Wilkinson in Preeble at pages 415 and 416.

77. In my opinion Elias’ response fell into the category of that protected by qualified privilege. Elias was entitled to respond to the attack made by Singh in the manner which he did. Further the response was relevant to the attack made on him. Further it would seem to me that in the circumstances there is no evidence of malice sufficient to defeat the defence of privilege by way of reply to attack. In my opinion there is no evidence of any other motive other than the need to defend himself from what Elias perceived as an unjustified attack. Neither is there any evidence that Elias did not himself believe that the

documents were stolen or that those documents proved his and the companies innocence of the charges of corruption. Indeed on the evidence presented I find as a fact that Elias had a positive belief in the truth of what he published.

78. Singh claims a similar privilege with respect to his response contained in the fifth and sixth articles. In my opinion the first question to be answered is whether the right to respond is in fact open to Singh. In my opinion this was not open to Singh he made the first attack, albeit in Parliament. Elias was only exercising his right to defend himself. It would seem to me that to allow Singh's reply to be protected by privilege in circumstances where he was the initiator does not fall within this principle. If this were so the battle could go on indefinitely.

79. In any event it would seem to me that the claim that the employees of the Company were destroying incriminating evidence was totally irrelevant to the attack made by Elias. Here, in my opinion, Singh went beyond the bounds of defence and impermissibly into offence. The attack by Elias related to stolen documents which had found themselves into Singh's hands and which according to Elias could exonerate him and the Company from the allegations of corruption being made by Singh. The documents or copies of them were already in Singh's possession. The fact that the employees of the Company were destroying incriminating evidence had nothing to do with those documents which had found their way into Singh's hands. Further according to Singh, and pertinent if the issue of malice becomes relevant, was the fact that according to Singh what was told him was that computers were being destroyed not

documents. The documents referred to by Singh in Parliament were documents in the nature of gate passes, material transfer slips and daily record slips not in my view documents which would in the usual course of business be stored in a computer. In my opinion these were fresh accusations by Singh with no bearing on the charges made against Singh by Elias. In the circumstances I find that the defence of privilege by virtue of the right to reply to attack is not open to Singh.

80. I find therefore that with respect to the Claim Singh is liable in defamation for the statements admittedly made by him. Neither the defence of fair comment or qualified privilege raised by him apply. In those circumstances the question of express malice is not relevant. With respect to the counterclaim while I am of the opinion that the statement made by Elias to the effect that Singh had in his possession documents which showed that the statements made by him were untrue was capable of a defamatory meaning I find however that the statements were legitimately made in defence to an attack made by Singh against him. In my opinion, for the purposes of this defence, it matters not that the attack was made in Parliament. In this regard the Court is not called upon to assess the merits of Singh's parliamentary contribution but merely to acknowledge that it was made.

Damages

81. In the circumstances of the republication of the words used by Singh damages are at large. That a person defamed is entitled to damages representing the injury to reputation is not in dispute. Similarly a company is entitled to damages representing

damage to it in the way of its business. I am satisfied that there is sufficient evidence before me to come to the conclusion that both Claimants have suffered damage. In assessing the damages however I must of course bear in mind that the statements made by Singh in Parliament although in the public domain are not actionable. In my view the sting of the actionable libel is the allegation that the Company led by Elias was destroying evidence which would have incriminated them. That said the libel was in my opinion a serious slur on the character of Elias. I accept his evidence that he has suffered embarrassment and humiliation. I am however not satisfied that either aggravated or exemplary damages are appropriate in this case. The statements made by Singh in Parliament are non justiciable. The making of the statements thereafter were fuelled by the press. While Singh is liable for them I do not think that aggravated or exemplary damages are applicable.

82. In all the circumstances of the case and taking into consideration the seriousness of the defamation and the medium of publication I am of the opinion that an award in the sum of \$ 200,000.00 to Elias and the sum of \$ 75,000.00 to the Company will meet the justice of the case.

Dated this 12th day of June, 2009.

.....
Judith A. D. Jones
Judge