TRINIDAD AND TOBAGO

THE HIGH COURT OF JUSTICE

C.V. 2006-03714

BETWEEN

KAYAM MOHAMMED

DAVID LEWIS

RAFFIQUE SHAH

ETIENNE MENDEZ

PATRICK KELLY

DAVID THOMPSON

KHALID HASSANALI

LLOYD WALTERS

JUNIOR JOSEPH

POINT LISAS INDUSTRIAL PORT DEVELOPMENT CORPORATION LTD

Claimants

AND

BLAST PUBLICATIONS COMPANY LIMITED

FAZEELA RAMPERSAD

Defendants

Before: The Hon. Mr. Justice Bereaux

Appearances: P. Deonarine and R. Jagai for the claimants

R. Maharaj S.C. and V. Maharaj for the Defendants

JUDGMENT

The History

[1] This is an action in libel in respect of an article published in the Blast newspaper for the period 22nd to 28th October, 2005. The article, entitled "*Plipdeco is serious cause for concern now*", has prompted claims by claimants one to nine, that there was injury to their character, credit and reputations particularly in their respective offices and professions which have been brought into public scandal, odium and contempt. They further allege that they have suffered considerable embarrassment and distress because of the contents of the disputed article. The tenth claimant has claimed severe injury to its business and trading character, trading reputation, goodwill and credit. It also alleges that its share price has been brought into public contempt, odium and ridicule as a result of the disputed article. The claimants claim damages against both defendants and an injunction to restrain the further publication of the libelous article.

[2] The tenth Claimant (Plipdeco) is a publicly traded company incorporated under the laws of Trinidad and Tobago in which the Government of Trinidad and Tobago is the majority shareholder. The company's shares are listed on the Trinidad and Tobago Stock Exchange. The first to ninth claimants were directors of Plipdeco at the time of publication of the disputed article. They are prominent members of Trinidad and Tobago and able professionals in their respective disciplines.

[3] The first defendant is the proprietor, printer and publisher of the Blast newspaper. The second defendant is its editor. They contend that the meanings ascribed by the claimants to words in the disputed article are untenable and cannot be supported and consequently, the claimants have failed to make out a case that they have been defamed.

[4] The disputed article was written by an anonymous writer who goes by the assumed title of *"Blastbroker"*. The *"Blastbroker"* based his article, on statements given to him by an anonymous newspaper contributor calling himself *"The Patriotic Whistle Blower"*.

<u>The disputed article</u>

[5] The specific paragraphs of the disputed article with which the claimants take issue are as follows:

> ***a.*** ***"So the books are cooked by imaginary and illusory profits while the real results are dismal, in fact a decline for the first six months of this year and more bad results to come, according to the Patriotic Whistle Blower"*** (the subheading of the disputed article).
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> ***b.*** ***"Well sorry to say this to Plipdeco shareholders but you have been misled and manipulated into a mirage of serious potential losses by indiscriminate people including stockbrokers who have failed their clients miserably."***
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> ***c.*** ***"According to the Whistle Blower, [with] which Blastbroker totally agrees, creative accounting which led to the dismissal/resignation of a large established audit firm has caused Plipdeco to portray results that are not real and which will one day be fatal."***
>
> ***d.*** ***"The Whistler has also blown the lid on the purchase of the Fantuzzi Crane which is now pushed under the carpet for reasons unknown and where it is alleged that substantial millions of dollars were overpaid for a piece of second hand junk which may have to be retired soon since it is uneconomical for further use."***

e. ***"The Whistleblower alleges ghost companies being created for the siphoning of large sums for directors fees for the boys, first class travel for Board members and huge other payments, as much as an un-authorized (by the Articles) quarter million dollars to support a Caroni football Club in Central that has no "bank account"."***

f. ***"The Whistle Blower alleges a maxi taxi hiring at a rate of $400,000 a year, forklift rentals (why?) at twice the market rate, overtime payments at over $1 million per month, cellular bills at $10,000.00 per month per phone, accumulated obsolete stock worth several millions etc. These are but a few of the allegations."***

g. ***"As Blastbroker said before, the Plipdeco share is considerably overvalued on the Stock Exchange and right now, you couldn't sell a Plipdeco share for even half of the present price. So who is really propping it up now? And why?"***

Nataural and ordinary meaning of the words of the article

[6] The claimants allege that the words were naturally and ordinarily understood to mean:

a) The first to ninth claimants have misled the shareholders of Plipdeco and that each of them, acted corruptly with other un-named professionals, to manipulate investors.

b) The first to ninth claimants and each of them, have disregarded and dismissed an audit firm, thereby causing the accounts of the company to be false.

c) That the first to ninth claimants have deliberately misrepresented the profits of Plipdeco and the finances of

Plipdeco are in decline as a direct result of this and will continue to decline indefinitely.

d) That the first to ninth claimants and each of them, have deliberately caused Plipdeco to procure a used crane ("the *Fantuzzi* crane") at a substantial sum more than it was worth and in addition, the crane is too expensive to maintain and will not be used any more.

e) That the first to ninth claimants and each of them, corruptly caused Plipdeco to pay illegitimate directors' fees to companies specially created for that purpose.

f) That the first to ninth claimants and each of them, allow the management of Plipdeco to illegitimately travel abroad on first class tickets at Plipdeco's expense.

g) That the first to ninth claimants and each of them, corruptly and in direct contravention of the by-laws of Plipdeco, donated a quarter of a million dollars to a sports club for illegitimate purposes.

h) That the first to ninth claimants and each of them, caused Plipdeco to hire maxi-taxis at an exorbitant rate of four hundred thousand dollars ($400,000.00) per year for no legitimate reason and rental of forklifts are done at twice the market rate.

i) That the first to ninth claimants and each of them, corruptly make overtime payment to management to the tune of over one million dollars ($1,000,000.00) and allow management to abuse cellular telephone privileges costing Plipdeco ten

thousand dollars ($10,000.00) per month, per cellular phone.

j) That the first to ninth claimants caused the procurement of obsolete stock and equipment and cost Plipdeco several million dollars and that the first to ninth claimants and Plipdeco knew the equipment to be obsolete and caused them to still be purchased at an inflated price.

k) The first to ninth claimants and each of them, acted corruptly or dishonestly or engaged in acts of financial impropriety or are reasonably suspected of having acted so in relation to the leasing of lands by Plipdeco.

l) The first to ninth claimants and each of them were reckless or indifferent to the interests of Plipdeco and its shareholders.

m) The first to ninth claimants and each of them, corruptly caused equipment to be rented at more than the cost of the equipment.

n) Plipdeco is operating or trading with less than competent or efficient or suitably qualified managers or management staff.

o) Plipdeco trades or operates its business in an unethical, or unprofessional and non-businesslike manner.

p) Plipdeco is financially unstable or potentially financially unstable.

Inferential and innuendo meaning of the words of the article

[7] They also allege that the inferential and innuendo meanings of the words of the article were:

a. The claimants are all conspiring with other professional accounting firms to defraud Plipdeco shareholders and to decimate the real property, which it holds.

b. The reference to creative accounting is analogous to using ordinary accounting methods to cover up illegitimate and illegal expenses incurred by the first to ninth claimants.

c. The first to ninth claimants and each of them, knew that the *Fantuzzi* crane was unsuitable or inadequate for the purpose which it was intended but nonetheless approved or sanctioned its purchase by Plipdeco.

d. Plipdeco will sustain and/or is likely to sustain unfavourable financial results than it enjoyed in 2005.

e. Plipdeco is uncompetitive in its area of business, is losing business and will continue to lose or is likely to lose business.

f. The actions and conduct of the first and ninth claimants in relation to the discharge of their function as directors of Plipdeco merits review and investigation.

g. The first to ninth claimants and each of them are incompetent as directors of Plipdeco.

h. The first to ninth claimants are only appointed as directors of Plipdeco by virtue of their political affiliation with the ruling political party.

[8] By letter dated 7th December 2005, the claimants wrote to the first defendant about the allegations in the disputed article, stating that the claimants had suffered injury to their reputations. They called upon the First defendant to publish a

retraction and an apology and to give an undertaking to not repeat the allegations in any publication.

[9] By letter dated 24th February 2006, the first named defendant responded to the claimants' letter and stated that the disputed article was neither libelous nor defamatory and that it constituted fair comment. It did accept that some statements published in the disputed article, which were the opinion of the *"Patriotic Whistle Blower"*, may not have been true and also may have not been verified. The first defendant went on to apologise to the 10th claimant, its officers and staff, for any injury caused by the publication of the disputed article and also extended an invitation to the claimants to use the Blastbroker column to issue their side of the story. There was never any public apology.

[10] By letter of 26th April 2006, the claimants' attorneys at law sent a pre-action letter to the defendants setting out the details of the claim. The defendants' attorneys at law responded by letter dated 25th May 2006, in which they maintained that the disputed article was not libelous and that its statements were fair comment. They too acknowledged that certain statements contained in the disputed article may not have been verified and offered to publish an apology in terms to be agreed by the parties. The claimants never responded to this offer and proceeded to file this action.

[11] Throughout the progress of this matter, the defendants have maintained that the words complained of, were not defamatory but were in fact fair comment on matters of public interest, those matters of public interest being the financial results and share price of the 10th named Claimant, which is a publicly quoted company.

<u>The issues:</u>

[12] The following issues arise for consideration:

i. whether the disputed article, when considered as a whole, could be said to be defamatory.

ii. whether the first to ninth claimants were personally identified by the words complained of in the disputed article.

iii. whether the defence of fair comment was applicable and had been established on the facts.

iv. if the article is in fact found to be defamatory, and if additionally, the defense of fair comment is not found to be applicable, what (if any) damages should the claimants be entitled to receive.

The evidence

[13] Patrick Kelly, David Thompson, Khalid Hassanali and Junior Joseph did not tender witness statements, it appeared that they were no longer interested in pursuing this matter. Ettienne Mendez and Lloyd Walters each tendered witness statements but were not cross-examined. Plipdeco, being a corporate personality, its evidence was given by Roger Traboulay, its president. Mr. Peter Simon Morales, the writer of the article in question and Mr. Rabindra Maharaj tendered witness statements on behalf of the defence. Fazeela Ali took no part whatever in the trial and was ultimately excused from attendance.

Evidence on behalf of the claimants

[14] Witness statements of the claimants were similar in form and content except when the first to ninth claimants spoke of their respective professional qualifications. They are all quite distinguished citizens of Trinidad and Tobago. I shall summarise their evidence in an effort to shorten what threatens to be a rather long judgment.

Kayam Mohammed

[15] Kayam Mohammed, chairman of the board of directors at the time of publication of the article, served for twenty-eight (28) years in the Coast Guard, retiring as its Commanding Officer. He is a graduate of the Britannia Royal Naval College and

the Royal Naval Staff College, England. During his military career, he was awarded the Defence Force Efficiency Medal and the Defence Force Efficiency Decoration for loyal and distinguished service. In his witness statement, he denied the contents of the article and sought to explain Plipdeco's accounting practices, as did his co-claimants Lewis, Shah, Mendez and Walters. His denials are repeated by his co-claimants who gave witness statements and it will be sufficient for me to speak of his denials, in so far as they are common to all the claimants'.

[16] Mr. Mohammed said that his reaction to the article was one of *"disbelief and disgust"*. The contents of the article *"were false and misleading"*. He was privy to all matters raised in the article because, as chairman of the board of directors, he was part of the decision making process.

[17] There was no manipulation of the board nor was there creative accounting, such as to portray unreal results. The contract of the company's external auditors is executed on a three year basis *"to ensure good corporate governance"*. The last such contract expired prior to the financial year December 31, 2003 – December 31, 2004 and the process of open tender was engaged for the execution of a new contract. The tender process, which was transparent and fair, resulted in the firm of Ernst & Young being selected for the years 2004, 2005, 2006. (In effect there was no resignation or firing of the previous auditor, Price Waterhouse Coopers, as suggested in the disputed article).

[18] He said that at all material times, Plipdeco's accounting practices were legitimate and adhered to *"International Standards on Auditing"* as set out in the company's annual report for the year ending 31st December, 2005. He added that:

(i) at all material times, Plipdeco maintained established practices with respect to leases as well as other property, plant and equipment. Page 24 of Plipdeco's 2003 annual report, page 27 of Plipdeco's 2004 annual report, pages 27 and 28 of Plipdeco's 2005 annual report, and page 31 of

Plipdeco's 2006 annual report, record that all monies collected are reflected within the income statement in the year of sale. He said that these annual reports confirm the practice and procedure maintained by Plipdeco in the course of trading.

(ii) Plipdeco's annual report of 2003 was prepared by Price Waterhouse Coopers and the accounting procedure for dealing with leases and other property, plant and equipment were identical to the procedures used by Ernst and Young in 2004. The accounting procedure for the year 2003 and 2004 can be found on pages 24 and 27 of Plipdeco's annual reports of 2003 and 2004 respectively;

(iii) Plipdeco adopted the International Accounting Standard (IAS) 40 Investment Property, effective 1st January, 2002. In so doing, investment properties were stated at fair value, which was determined by a firm of Independent Professional Valuators;

(iv) International Accounting Standard (IAS) 40 was acknowledged in Plipdeco's annual report of 2003 by the chairman's and president's reports, which are to be found on pages 7 and 8 respectively. At the time when the International Accounting Standard (IAS) 40 was adopted, Price Water House Coopers were the external auditors;

(v) the procedures for the valuations undertaken were based on an open market value supported by market evidence; namely, the manner in which assets could be exchanged between a knowledgeable willing buyer and knowledgeable willing seller in an arm's length transaction at the date of valuation, in accordance with international valuation

> standards. The procedure by which investment properties are determined and recorded is evidenced on page 34 of Plipdeco's annual report of 2004.

[19] All the annual reports referred to have been put into evidence in an agreed bundle. Mr. Mohammed denied that the *Fantuzzi* Crane *"was a piece of second hand junk"* or that it was uneconomical to use. It was fully operational. Other allegations made with respect to *"directors fees for the boys",* the hiring of maxi taxis, forklift rentals overtime payments or cellular phone bills, were also denied. None of these denials was disputed by the defendants. He said that in the weeks following the article, he was approached by many friends and family members, co-workers and acquaintances with their concerns about the content of the article. He had to explain to several *"stakeholders"*, and associates in some of the organizations to which he belonged namely; Petrotrin Trinmar Operations, Kosmos Club (where he is the president), St Augustine Tennis Club, Trinidad and Tobago Coast Guard. He was frequently asked whether he was going to resign from his position as chairman.

[20] Each time the contents of the article were mentioned, he felt highly embarrassed, violated and deeply humiliated. His wife and children repeatedly complained that they felt humiliated in public and especially at their respective places of employment. His wife's complaints especially affected him, as the humiliation she suffered on more than one occasion, had affected their otherwise happy relationship and disrupted the harmony of their home. Soon after the article was published, a decision had been taken to reconstitute the board of Plipdeco and he was replaced as chairman.

[21] Mr. Mohammed said that since the publication he has *"suffered immeasurably"*. There was never an apology published by the defendants and this has further disturbed him. He is annoyed that no attempt was made to contact Plipdeco for its version of the content of the article (prior to publishing) which would have permitted Plipdeco and its board of directors and management the opportunity to answer the unfounded allegations. The article created an erroneous impression,

namely that Plipdeco's board of directors and its management, employed corrupt practices in the exercise of their respective duties at Plipdeco. He believes that the article was aimed at destroying the good name of Plipdeco and all associated members of management, including the board of directors.

Roger Traboulay

[22] Roger Traboulay, in his witness statement, stated that Plipdeco was not contacted by the first defendant for comment on the veracity of the article's contents prior to its publication. Had that been done, an interview would have been scheduled to facilitate such comments. He added that in the weeks that followed, *"there were many calls from shareholders of Plipdeco and trading partners with their concerns about the contents of the article*" and as a result of the article, the company's *"trading reputation had been severely infringed"*.

[23] The company was viewed with suspicion by shareholders and trading partners. He added that since the publication, the company had suffered a reduction in trading confidence and had also suffered an overall reduction in shareholdings between 6th April, 2006 and 24th April, 2007. Since the publication, Plipdeco's share price had tumbled continuously. He produced copies of the weekly list of the Trinidad and Tobago Stock Exchange for the week ending November 10, 2005, 30th December, 2005, 24th December, 2006 and 12th October, 2007. He said that valuable members of Plipdeco's then board of directors refused to offer themselves for re-election and that some senior managers have resigned.

Rafique Shah

[24] Rafique Shah deposed to being a former Member of Parliament and journalist and to being a well known citizen. He first came to prominence in 1970 when, as a soldier of the Trinidad and Tobago Regiment, he was involved in a mutiny which occurred during very serious social disturbances in Trinidad and Tobago. He was charged with treason and mutiny but was acquitted of both charges. He said that his speech in defence of those charges has been highly acclaimed and has left him with a reputation of someone who is firmly against incompetence and corruption.

[25] He said he was shocked at *"the number of unsubstantiated allegations made"* in the article, adding that:

> ***"In the aftermath and more specifically the weeks following the article of the 22nd – 28th of October, 2005, I was approached by many persons who knew I was a Director of Plipdeco namely; friends, family members, members of unions to which I belong, colleagues, professionals in my fields of expertise remarking about my perceived role in fraudulent and/or negligent actions that I purportedly participated in. Predominantly, persons expressed their surprise that given that I have for decades stood up against corruption and waste of public funds, that I would be now involved in a series of questionable decisions and actions that were tantamount to fraud."***

[26] Mr. Shah said he was taunted about the possibility of being arrested *"for stealing Plipdeco's money"* by people who knew of his directorship on the Plipdeco board. His children were ridiculed by persons *"known and unknown"* to them. He observed many letters published in the newspapers commenting about Plipdeco and its board of directors, which were based on the article. He was forced on two occasions, to write to the Express newspaper, in order to respond to several inaccurate allegations, made by a senator, regarding the operations of Plipdeco. These allegations were based primarily on the article. He said that his executive posts in other organisations *"automatically"* came under scrutiny.

<u>David Lewis</u>

[27] David Lewis is the managing director of a company known as Label House Limited. He is a graduate of Fanshawe College, Canada and is the co-founder and director of Digi Signs, Package House and Promotion Gaming Systems. He confessed to being completely taken aback by the article. He was *"disturbed and annoyed about the false allegations of corruption that were publicly stated about the operations of Plipdeco"*. He would not socialize at several prominent member clubs *"for several months"* because *"I was not emotionally prepared to*

face other members". When he eventually did return he was jeered with comments about *"making jail for Plipdeco"*. He was forced to answer questions in order to defend himself. He viewed the allegations in the article as *"scandalous"*. He added that his confidence levels and pride have been severely diminished and he has refrained from public service at Plipdeco.

Ettienne Mendez

[28] Ettienne Mendez was a technical consultant to the Ministry of Community Culture and Gender Affairs. He has a B Sc degree in engineering and civil engineering, from Mc Masters University, Canada. He is a member of the Board of Engineers for Trinidad and Tobago, the North American Geo-synthesis Society and the International Geo-synthesis Society. He has worked with many companies, organisations and governmental bodies.

[29] Mr. Mendez said he *"experienced fluctuating emotions of indignation, rage, annoyance, dismay, despair, chagrin and helplessness"* when he read the article. In the weeks that followed, he was approached by friends, family members and fellow professionals about the contents of the article. He was viewed with suspicion by his family and neighbours, adding that *I believe that there is and will continue to be a diminution in the levels of esteem in which people hold me, regardless of the outcome of any court proceedings"*. According to Mr. Mendez, a direct consequence of the article was a diminution in his self esteem and confidence levels. He has refrained from further public service at Plipdeco.

Lloyd Walters

[30] Lloyd Walters is a graduate of Louisana State University, United States of America and East Ham College of Technology, London, United Kingdom. He is an entrepreneur with over twenty years experience in the sugar and communication based industries and a member of the board of directors of the Sugar Manufacturing Company of Trinidad and Tobago. He said that upon reading the article he *"immediately felt hurt by such false and misleading assertions being associated to me as a director of the board of Plipdeco"*. In the

weeks following the article of the 22nd – 28th October, 2005, he was approached by many friends, family members, colleagues and professionals in his fields of expertise enquiring about the veracity of the article's contents. He became more and more infuriated each and every time he was approached about the allegations, because, despite his numerous attempts to explain that there was no merit to those claims, *"my experience taught me that persons would still assume guilt"*.

[31] He added that *"the article has caused me high levels of distress as the defamatory allegations have greatly embarrassed my immediate home circle. I was present on many occasions when persons taunted my wife and other family members about the said article and its association with me"*.

Cross-examination of the claimants

[32] These deponents, with the exception of Mr. Mendez and Mr. Walters, were cross-examined by Mr. Maharaj, who sought to show that the article was not directed at nor did it identify the claimants. He also put to them that the Blast newspaper, in an effort to mitigate any damage to the claimants, offered to publish the claimants' side of the story.

[33] All the deponents were asked on whether they were aware of the newspaper's offer. Mr. Mohammed could not recall seeing any such letter of apology or any offer to publish Plipdeco's side. He added that if such an apology had been offered, he would have remembered, had it been brought to his attention. He did not think that a published apology would have minimized his hurt but he denied not being interested in an apology.

[34] Mr. Mohammed was also challenged as to whether the hirings of maxi-taxis and forklifts were matters for the board of directors or the managers. He answered that the board delegated functions, more so, the day to day operations of the company to the management of the company but only up to a certain level of expenditure. He added that, in any event, the board remained collectively responsible for decisions taken by senior managers.

[35] Mr. Mohammed was also challenged on the allegation that the share prices of Plipdeco were adversely affected by the publication. He acknowledged the accuracy of his own statement in the company's annual report for the year 2005 (published in 2006) that *"our share price … suffered dramatically, as that of many other companies, from adjustment in the stock market before stabilising at its current value of ten dollars ($10.00)"*.

[36] Mr. Maharaj suggested to Mr. Mohammed that legitimate concerns were raised about the reliability of the *Fantuzzi* Crane in Parliament, as well as about the tendering process by which the crane was purchased. One of the issues raised in Parliament, he suggested, was the rejection by Plipdeco's board of directors of the recommendations of management with respect to the purchase of two cranes by Plipdeco.

[37] Mr. Mohammed's evidence in response (which was unchallenged) was that the management's recommendations were rejected because they were not consistent with what Plipdeco required both in regard to cost and delivery time. He acknowledged that the crane had malfunctioned but said that the cause of the malfunction was a broken shaft, which occurred while it was being moved from one site to another. This, he said, was the only malfunction and the crane has given consistent and reliable service since then. As to the question of directors' fees, Mr. Mohammed stated that directors' fees were decided upon by the Ministry of Finance. He denied that fees were increased during the period 2003 to 2005. He added that the practice of appointing external auditors every three years was a practice which he had met when he was appointed chairman of the board of directors.

[38] In re-examination, Mr. Mohammed stated that a forensic report was done in respect of the purchase of the *Fantuzzi* Crane. He was interviewed by the investigator on several occasions. No action was ever taken against him or any other member of the Board.

[39] Mr. Traboulay was challenged by Mr. Maharaj on three aspects of his evidence. The first related to his assertion that the share prices of Plipdeco tumbled as a result of the article. He too, was shown the chairman's comments in the annual report for 2005. He conceded that there was no comment by the chairman about the article being the cause of fluctuations in the company's share price. He was also challenged about statements he made in the printed media regarding efforts at improving Plipdeco's efficiency, the suggestion being that the company was not efficient before and the article's comments were thus fair and justified. Mr. Traboulay did concede that there were significant unrealised profits for the period 2002 – 2005 and that real profits remained static during the period but he denied that the fact of high unrealised profits and high turnover meant that the company was operating inefficiently. Rather, he asserted that financial reports did not necessarily reflect the operational details of the company.

Mr. Traboulay also conceded that he did not have first hand knowledge of some of the evidence he gave in his witness statement because he was not with the company at the time the article was published.

[40] Raffique Shah and David Lewis were both briefly cross-examined by Mr. Maharaj. Mr. Shah said he was aware of *"an offer of an apology to be published"* but was unaware that the Blast newspaper had offered to publish Plipdeco's side of the story. He said that in so far as the letter of 24th February, 2006 was brought to the attention of the board of directors, the board discussed the matter and rejected the offer set out in that letter because it found unacceptable, the contention that the article was *"not libelous"*. Mr. Shah added that in rejecting the offer, the board expected that the newspaper *"would have accepted liability and would have made not just an apology but a complete offer which would have brought some justice to the corporation and its officers"*.

[41] Mr. Lewis also was not aware that the Blast newspaper offered to publish Plipdeco's side of the story. He said that he would have wanted a published apology. He added that he would not have asked the Blast for the opportunity to

publish this side of the story. In re-examination, Mr. Lewis stated that he was not aware that the Blast ever apologized.

Evidence on behalf of the defendant

[42] Rabindra Maharaj deposed to having received a letter from Plipdeco complaining about the unfounded and misleading allegations made against Plipdeco in the article. He said Plipdeco sought an apology, a retraction and an undertaking that the Blast newspaper would not repeat publication of the article. Mr. Maharaj said that the newspaper sought advice from its attorneys at law and responded by letter of 24th February, 2006, in the following terms:

> ***"Blast Publications has discussed the above captioned matter with our attorneys at law and although the general content of the article 'Plipdeco is serious cause for concern now', published in the Blast dated Saturday October 22 – 28, 2005, is not libelous and that we consider that the contents of the article are not defamatory and constitute fair comment. However, we do realize that certain statements published in the article, which were the opinion of the 'Patriotic Whistle Blower', may not have been true and it was clear in our article that these statements were not the opinion of 'Blastbroker', but that of the 'Patriotic Whistleblower' and that some of the statements were not verified.***
>
> ***Without prejudice to our rights, we apologize to Plipdeco, its officers and staff, if any part of the article caused any injury to you and would like to issue an open invitation to you to use our Blastbroker column to give your side of the story, both of the fair comments made by us and the statements made by the 'Patriotic Whistle Blower''***
>
> ***We do apologize for the inconvenience and/or distress caused by the article.***
>
> ***Sincerely.***

[43] Mr. Maharaj said that they received a pre-action letter from the Plipdeco's attorneys at law by which Plipdeco sought:

(i) an unqualified withdrawal of the allegations and an apology, in terms to be agreed to be published, on the front page of the Blast newspaper;

(ii) an undertaking not to repeat the allegations or similar allegations;

(iii) the payment of a substantial sum of damages to each member of the board of director;

(iv) the payment of legal costs.

The letter ended with the comment that *"if you are prepared to withdraw promptly the allegations and apologise, our client[s] acknowledges that this will mitigate damages to which they are entitled. If, however, they are forced to go through a long and drawn out action in order to clear their names, their only vindication will be an award of very substantial damages"*.

[44] He stated that attorneys at law for Blast Publications, by letter of 25th May, 2006, responded to Plipdeco's pre-action letter in these terms:

"Your letters dated the 26th April, 2006 and 3rd May, 2006 addressed to the Editor of the Blast Publications Company Limited was passed to us by Blast Publications Company Limited with instructions to respond as follows:

1. Our client responded to your client's letter of the 7th December, 2005 by letter dated the 24th February, 2006 in which it stated that the contents of the article at caption was not libelous or defamatory and were of fair comment. However, our client has recognised that certain statements

which were published in the article may not have been true and it was also clear that some of the statements were not verified.

2. In this letter of the 24th February, 2006, our client offered an apology to Plipdeco, its officers and staff if any part of the article caused any injury to them and invited Plipdeco to use the Blastbroker column to give its side of the story. (A copy of this letter is enclosed for your ease of reference).

In an effort to resolve this matter our client is prepared to publish an apology in the Blast newspaper in terms to be agreed by both parties.

We look forward to hearing from you.

Yours sincerely"

[45] Mr. Maharaj concluded his witness statement by stating that Plipdeco never responded to the letter of 25th May, 2006 and instead filed this action on 17th November, 2006. He filed a subsequent witness statement attesting to the authenticity of the records of the Public Accounts (Enterprises) Committee and reports of the proceedings of the Senate on 31st March, 2004, 6th April, 2004, 15th June, 2004 and 26th January, 2006, which the defendants wished to adduce in these proceedings.

Simon Peter Morales

[46] Mr. Simon Peter Morales was the writer of the article in question. He deposed to being on accountant by profession. He is also a director of Blast Publications. He said that *"over the last twenty-two (22) years"* he was the author of numerous articles published in the Blast newspaper *"which [were] based on my extensive reviews and research of the published accounts of various companies listed on the Trinidad and Tobago Stock Exchange"*. He stated that *"these articles [were]*

published to advise investors of the profitability of any holdings they may own or be considering too purchase or sell in listed companies" adding that *"I often write under the pen name of Blastbroker"*.

[47] He said that he examined Plipdeco's accounts and he had noted the following:

(i) profits before tax for 2002 were $26.9 million which included fair value gains of $5.8 million;

(ii) profits before tax for 2003 were $58.4 million, including fair value gains of $36.8 million before tax;

(iii) profits for 2004 were $57.2 million which included fair value gains of $28.9 million;

(iv) for the first six months of 2005, profits before tax were $26.7 million including fair value gains of $15.0 million.

When unrealised fair value gains were removed the profitability of the company fell significantly and when expressed as a percentage of turnover, the figures for 2002 to 2005 were 20%, 15.4%, 14.4%, 15.1% and 12.1%

[48] He came to the following conclusions:

(1) that legitimate accounting techniques or creative accounting were used to present a flattering picture of Plipdeco's true operating performance and the financial results were not reflective of the real profits of the company.

(2) as a result of the accounting practices used, the accounting techniques reported in the financial results of Plipdeco did not reflect the real profits of the business.

(3) as a result of the accounting practices used, the profits reported in the financial results of Plipdeco were illusory when compared to the real profits earned by Plipdeco's

business operations, which were poor and likely to remain so.

(4) the share price of Plipdeco was considerably overvalued.

[49] Based on the analysis, he wrote an article *"Plipdeco worth only $4.50 per share"* which was published on the 10th to 16th September, 2005 issue of the Blast newspaper, in which he highlighted the conclusions which he had derived from his examination of the published accounts of Plipdeco. He then wrote the article now in dispute, which he described as a *"follow up article"* and which *"repeated and expanded on my analysis of the published accounts of Plipdeco and included allegations made by an anonymous whistleblower"*.

[50] He said that the circumstances under which the *Fantuzzi Crane* was purchased had been *"the subject of numerous parliamentary questions* which had been widely reported in the media. On 31st March, 2004, the Government had admitted that the crane had been purchased contrary to the recommendations of the senior managers of Plipdeco and that it had directed an independent investigation into all aspects of the crane's procurement.

[51] The purchase had been the subject of parliamentary questions on 6th April, 2004 by the Opposition over its concerns that the crane might have been *"foreign used"* and that it was unreliable. On 15th June, 2004, questions were again raised in Parliament that the crane had cost some forty-eight million United States dollars (US $48,000,000.00), full payment of which had been made despite the fact that the specified caterpillar engine had not been supplied.

[52] The Public Accounts (Enterprises) Committee, a Parliamentary Committee comprising members of parliament, had investigated the matter and stated in its report that the chairman and board of directors of Plipdeco had bluntly refused to supply it with the internal auditor's report on the purchase of the crane, nor did the auditor's appear before the committee. These matters reported in the media.

[53] Mr. Morales then stated as follows:

Based on the above reported matters, I came to the following conclusions upon which my statements in respect of the Fantuzzi Crane contained in the article entitled "Plipdeco is serious cause for concern" were made and were understood to mean:

(a) Plipdeco had overpaid when buying the Fantuzzi crane which cost millions of dollars.

(b) the Fantuzzi crane was not new and turned out to be defective.

(c) the Fantuzzi Crane was proving uneconomical to use, so that there was a chance it would be retired from use.

(d) the circumstances surrounding the purchase had been kept hidden from the public scrutiny.

Mr. Morales, in a supplemental witness statement, went on to highlight to subsequent discussions and proceedings in Parliament concerning the circumstances surrounding the purchase of the *Fantuzzi* Crane, including the proceedings of the PAEC.

Cross-examination of the defendant's witnesses

[54] Mr. Maharaj made a number of concessions in cross-examination. He accepted that Blast Publications never published an apology. As to the absence of the editor, who never participated in these proceedings, (although she is named as a defendant) Mr. Maharaj said that the editor is not responsible for the determining whether the article was libelous or not. The editor's function at the *"Blast"* was *"more likely the function of a production person responsible for the layout of the newspaper and for proof reading the article"*.

[55] He also conceded that what was said by the *"Patriotic Whistleblower"* may not have been true and had not been verified. He went on to assert however, that the allegations were criticisms of Plipdeco in *"certain areas of expenditure"* and did

not constitute libel. He added that he formed this opinion subsequent to the publication. Mr. Maharaj said that Mr. Morales, the writer of the article, had the responsibility for vetting it for libel, although it was the editor who was responsible for publication. Mr. Maharaj further conceded that given his ignorance of the truth of what was said, it would have been prudent, as well as good and proper journalism, for the *Blast* to have contacted Plipdeco to get their side of the story. He also conceded that part of the reason for offering to publish Plipdeco's account, (albeit after the fact) was because Blast Publications could not verify the truth of what had been said by *"Patriotic Whistleblower"*.

[56] Another concession was that the publication of the "*Guardian"* article meant that the article (and the issues raised), were in the public domain since December 2003. He was aware of the *"Guardian"* article before Blast Publications published its own article. He contended (unpersuasively) that he had only seen Mr. Shah's picture featured in the *"Express"* article when it was shown to him in court during cross-examination.

[57] Mr. Maharaj was also questioned about a request for information, consisting of some fifty-one (51) questions, made by Blast Publications to Plipdeco, under the Freedom of Information Act (set out at tab 8 of the agreed bundle). By that request, Blast Publications had sought information on matters which were the subject matter of the articles. That request for information came long after the impugned article was published. He stated that he needed answers to these questions in order to perfect the newspapers' defence.

[58] Mr. Morales was unimpressive in cross-examination. He said that the article in dispute was for information only. He did not consider that he was giving advice to anyone. He said that while he could not prove that some of the things *"Patriotic Whistleblower"* said were in fact true, he, Morales, believed that they were true. This answer was in response to questioning about the following statement in the article.

> ***"if half of the above things spewed by the Patriotic Whistleblower [are] true there must be cause for concern."***

The statement speaks for itself and suggests that Mr. Morales did not himself verify before publishing, whether any of the allegations were true. Asked by Mr. Deonarine to explain what he meant when he said *"if half of the above things are true",* he said (unpersuasively) that he meant that *"there were quite a lot of things said here that were quite serious and it only requires me to look at two or three things to conclude that Plipdeco was a cause for concern"*. Mr. Morales also denied that *"cook the books"* meant false accounting. Rather, the term "*cook the books*" referred to the use of legitimate accounting practices, which portray unreal results and were also used to embellish the results of companies.

[59] He was referred to paragraph 10(c) of his witness statement. In that paragraph Mr. Morales had purported to summarise what was said in the disputed article about land owned by Plipdeco and had tried to suggest that what the article had said was, *"that land is revalued at inflated real estate values and the difference is expressed as profit in the form of fair value gains"*.

The article however said no such thing. Rather, at the third column, it said this:

> ***"profits have been "inflated by the sale of lands reflected as revenue and this deception is compounded as the already sold land is revalued at inflated real estate values …***

That of course was a palpable misrepresentation of the ISO 40 system of accounting which does not involve the sale of land. Mr. Morales was forced to concede that the paragraph gave an inaccurate account and that he could not *"off hand"* find anything in the annual reports to show that land was specifically sold by Plipdeco.

[60] He was also questioned about his statement in column three of the disputed article that *"creative accounting which led to the dismissal/resignation of a large established audit firm has caused Plipdeco to portray results that are not real"*.

He responded that what was *"to be inferred is that disagreements over use of creative accounting led to dismissal/resignation of a large accounting firm.* It appeared that he came to that conclusion because *"the auditors left in 2004 and a new firm [was] appointed"*. It was apparent that that conclusion had nothing to do with what actually occurred but as based on his impression gleaned from the mere fact of the auditor's departure.

He was then confronted with Plipdeco's annual report for 2003 in which the directors' report noted that a policy decision was taken, *"in accordance with good corporate governance practices",* that *"requests for proposals be sought every three years for the provision of external audit services for the company"*. The note also stated that *"this process was engaged this year and has resulted in a change to the external auditors at this time"*.

[61] This of course meant that there was no resignation/dismissal of the external auditors as the article contended. Mr. Morales stated that although he was familiar with the annual report, he had not seen the note before. But he was unwilling to concede that his statement was wrong. He said he was not sure he would have referred to the note in his article, because, one could not infer from that note that disagreement may not have taken place. It was a pathetic response.

[62] Mr. Morales was also questioned about the PAEC proceedings. He contended that the PAEC report on its inquiries into the *Fantazzi Crane,* was laid in Parliament on 12th May, 2006 after the article was published. He sought to persuade me however that he was aware of *"two or three things in that report at the time of writing my article"*. (He did not say what these *"two or three things were").* He became aware of them because the PAEC proceedings were publicly conducted and information derived from it was published in the media. He conceded, however, he did not refer in the article to getting that information from the PAEC proceedings but denied that this was because he only became aware of the PAEC's proceedings subsequent to the article. He said, subsequently, in 2007, he got a copy of the PAEC's report from the Leader of the Opposition.

[63] At paragraph 11 of his first witness statement, Mr. Morales had attested that the circumstances surrounding the purchase of the *Fantuzzi Crane* had been *"widely reported in the print and electronic media and that the Government had admitted in proceedings in the Senate on 31st March, 2004 that the crane had been purchased without the recommendation of management; and that the Government had directed an independent investigation into the procurement of the crane"*. He then stated that he had come to the conclusions, to which I have referred at paragraph 53, based on reported matters in the press. Asked by Mr. Deonarine what were these *"reported matters",* he answered vaguely that they were *"matters reported in the newspapers"*. He denied that one of those reports included the Guardian article of 14th December, 2003, (although he had admitted to seeing that report before he wrote the disputed article). He said he never saw the Express report of 29th December, 2003. Rather, *"The reported matters"* were the published reports of the Senate proceedings in 2004. He did not produce these published reports in these proceedings but *"had them in his mind"* at the time he wrote the report. As far as he was concerned, he was reporting the concerns of people, about the crane, because *"they"* were not getting answers.

Findings of fact

[64] Ultimately, the article itself and its tenor will determine the issue of liability but there are some issues of fact which I must determine, since some of them bear on the defendant's liability in this case, particularly on the defence of fair comment. Having heard and seen all deponents in this case and having read the documentary evidence, I find as follows:

(i) It was evident that much of what was reported in the article as fact was untrue. There was no resignation or dismissal of a large established audit firm. The three year term of the appointed auditors had come to an end. Indeed, the reason for the three year term limit per appointment was *"good corporate governance"*. The allegation in the article of the dismissal/resignation of the external auditors, was not

based on fact at all but on a misapprehension by Mr. Morales of the fact that the tenure the external auditors had come to an end and new auditors appointed. The reason for the change was easily accessible from Plipdeco's annual report for 2003.

(ii) The *"Fantuzzi"* crane was not a *"second hand piece of junk"* or *"foreign used"* but brand new. The tender process by which it was purchased was not shown or proven to have been corrupt by any forensic investigation, nor by the PAEC investigation. Nor was it proven to have been overpriced or unreliable. According to Mr. Mohammed's uncontradicted evidence, it had given more then reliable service since it acquisition. The cause of its lack of proper functioning was a broken shaft which occurred while the crane was being moved within the Plipdeco port area. Nothing about its purchase had been *"pushed under the carpet"*

(iii) Plipdeco's system of accounting was a legitimate one of accounting (but one which was open to quite serious criticism). The company was not involved in the business of buying and selling land. The comment in the article that *"profits have been inflated by the sale of lands reflected as revenue"* was a misrepresentation of the system of accounting. Verification of how the system worked was easily available from the company's annual reports.

(iv) there were no ghost companies created nor was there any siphoning of large sums towards directors' fees. Mr. Mohammed's uncontradicted evidence was that directors' fees in respect of Plipdeco were set by the Government.

No evidence was brought by the defendant to show that any ghost companies had been created or even existed

(v) there were no other *"huge"* payments made to board members or any quarter million dollar contribution to a Caroni football club, or any hiring of maxi taxis at a rate of four hundred thousand dollars ($400,000.00) per year. Neither were there forklift rentals at twice the market rate nor overtime payments of over one million dollars ($1,000,000.00) per month, nor cellular phone bills of over ten thousand dollars ($10,000.00) per cell phone.

(vi) Neither Mr. Morales, Mr. Maharaj nor the editor, Fazeela Rampersad made any effort at all to properly verify the allegations of the *"Patriotic Whistleblower"*, or at least to hear Plipdeco's version before publication of the article.

(vii) There was no policy by the publisher or the editor, by which Mr. Morales' story was itself the subject of oversight and verification, independently of Mr. Morales. Mrs. Rampersad appeared to have absolutely no power (or inclination) to edit the contents of any article.

(viii) This lack of verification policy by Mr. Morales and his publisher/editor was reflected in their flailing efforts to obtain information from Plipdeco, long after the damaging article had been published, in order to prepare their defence in this matter.

The law and conclusions

[65] As concerns the underlying legal principles governing the law of defamation, guidance can be gleaned from the statements of Cave J. in **Scott v Sampson**

(1882) 8 Q.B.D. 503, where he said, "*The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit.*" Thus in arriving at a conclusion as to whether or not the disputed article contained defamatory statements, one needs to ascertain whether the statements were false, and whether they had the effect of discrediting the claimants and thereby affected the opinion other persons held of them.

Issue 1 Whether article defamatory

Pursuant to the decision in **Charleston v News Group Newspapers Ltd** [1995] 2 A.C. 65, this question must be answered by reference to the article as a whole. And as noted by Rajkumar J. in **Kayam Mohammed et al v. Trinidad Publishing Co. Ltd et al** HCA No. 3552 of 2003, it is not necessary to analyse each word in detail but rather to consider the overall impact of the article. It is the meaning which the words convey to the ordinary man which determines its defamatory nature.

[66] As explained by Lord Reid in **Lewis v Daily Telegraph** [1964] A.C. 234, at pp. 239-260:

> ***"Ordinary men and women have different temperaments and out-looks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question…What the ordinary man, not avid for scandal would read into the words complained of must be a matter of impression."***

Later at pp. 258-260 he said:

> ***"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…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…*"**

Inferential meanings are thus included in the natural and ordinary meaning of the words used. It is the impression to an ordinary person on first reading, not later analysis: **Hayward v Thompson** [1981] 3 All E.R. 450.

[67] I have no doubt that the ordinary reader, having read the article as a whole, would have concluded that the persons who were in fact the subject of the article were involved in mismanagement and corruption at Plipdeco. The article is defamatory. I have already referred at paragraph 5 above to the paragraphs of the article to which the claimants take offence. But there are other paragraphs in the article which, because of their tone, heighten the effects of the offending paragraphs and must therefore be mentioned here, in order to put the entire article in its proper context.

[68] I start at the initial seven paragraphs of the article:

(i) ***"These are most serious revelations and finally someone has sent a written letter to "Blastbroker" to confirm the nonsensical situation down at Plipdeco and truthfully, if even a few of the things said are true, the shareholders Plipdeco must have some serious problems on their hands now.***

(ii) ***The "Patriotic Whistleblower" has been at it again. Who the "Patriotic Whistleblower" is, nobody knows, but there are serious consternation about his revelations which "Blastbroker" as a decent citizen must bring into the public focus.***

(iii) ***The first one is that he has access to a helluva of a lot of information, some of which "Blastbroker" will reveal in this …, the other is that he, just like "Blastbroker" is hell bent on rocking the boat whenever and ever, regardless, in the interest of what is right for the country.***

(iv) ***The country needs many more democratic fighters like him (or her) and whether his submissions to the authorities and the opposition will bring any results, knowing this country's political attitudes, now immersed in oil and gas euphoria, "Blastbroker" has serious doubts.***

(v) ***Firstly, he has agreed unanimously with "Blastbroker's" article of September 10 – "Plipdeco worth only $4.50 per share" quote. The only person to publicly pick lup on the poor result was the 'Blastbroker'.***

(vi) ***Well, sorry to say this to Plipdeco shareholders, but you have been misled and manipulated into a mirage of serious potential losses by indiscriminate people including stockbrokers who have failed their clients miserably and who appear to serve their own interests when placed in positions of trust and responsibility.***

(vii) ***This has been the unfortunate situation all over in this country for years and it is no wonder that a lot of crime stems from the fact that the exemplars in the society are setting the wrong examples for the simple folk. "If they can get away, then what do you leave for the poor man" has now become a very famous catch phrase among the common folk.***

(viii) According to the "Whistleblower" which "Blastbroker" totally agreed creative accounting which lead to the dismissal/resignation of a large established audit firm has caused Plipdeco to portray results that are not real and which will one day be fatal.

(ix) Profits have been inflated by the sale of lands reflected as revenue and this deception is compounded as the already sold land is revalued and inflated real estate value and the difference expressed as profit, in the form of fair value gains.

(x) So the books are cooked by imaginary and illusory profits while the real results are dismal. In fact, a decline for the first six months of this year and more bad results to come, according to the "Whistleblower".

[xi] Well, "Blastbroker's" simple analogy has been that if you are making big, big, profits and the shareholders simply cannot and will not be able to collect a damn cent of the almost one billion retained profits in the Plipdeco's business, then the whole question about the published profitability is that it is a sham and a mirage that deceives stupid investors."

The article then continues as at paragraph 5(d) and (e) and there follows the following two paragraphs in the article:

[xii] Truthfully, nothing may be wrong with this if Plipdeco was making millions and could afford such generosity but this is certainly a large amount to pay to a non-entity football club while Caroni at the same time is closing down, so really, what is going on here.

[xiii] ***Has Plipdeco received a proper discharge from the football club, bills etc to ensure that their shareholder's cash property was not pocketed. "Blastbroker" asks? This matter must certainly come up at their next Annual General Meeting. And if there is no proper and substantiated discharge to the company, naturally, other folks should be brought in.***

The article continues as at para. 5(f) herein and thereafter states as follows:

(xiv) ***"The "Patriotic Whistleblower" was kind enough to remind members of Parliament of cover ups and caps being the order of the day in the country too. To name a few, there is a Petrotrin contract with a one hundred million ($100m) overrun on a twenty million dollars ($20m) job that has been laid to rest now, there is the twenty-five million ($25m) Piarco runaway job poorly done, the really big one is at TSTT where thirty-four million dollars ($34m) has suddenly disappeared in a fax machine – no action here, no fraud squad etc. and the man who could solve the problem has gone like a flash. It seems that nobody is really interested in protecting the taxpayer.***

(xv) ***This is the story of Trinidad and Tobago in the new millennium, while heading for an illusory Vision 2020 which will never be attained if things continue the way they are going.***

(xvi) ***It is a pity that nobody really seems to care about the situation down at Plipdeco which seems like a time bomb ready to blow anytime and don't doubt this, when you cover up and cover up, then there is another cover up to cover up the cover up, then one day the shxx will hit the***

fan and all hell will break loose. By that time, it is always too late.

(xvii) Well don't say that "Blastbroker" who is the only fearless financial journalist in the country didn't put out the warning flag for his readers and Plipdeco shareholders."

[xviii] If half of the above things spewed by the "Patriotic Whistleblower" is true, there must be cause for concern; also Plipdeco shareholders must have serious worries on their hands now and perhaps, they should consider taking legal action against whoever and ever for misleading them about the true value of their shares and don't forget those uncaring people who caused this in the first place.

The article's penultimate paragraph is as set out at para 5(g) and ends with the writer praising the *"Patriotic Whistleblower for his concern and bravado"*.

[69] When taken in its entirety, the article conveys, inferentially, the following defamatory meanings:

(1) persons who purchased Plipdeco's shares were deliberately misled and manipulated into serious potential losses by indiscriminate people (including stockbrokers);

(2) these indiscriminate people (including stockbrokers who have miserably failed their clients) had been placed in positions of trust and responsibility but have served their own interests rather than the shareholders;

(3) these persons are exemplars who have engaged in criminal activity at Plipdeco and *"gotten away with it"* and by getting away with it *"have set bad examples to ordinary people;*

(4) such manipulation has been effected by:

(i) false accounting which have portrayed false Plipdeco financial results;

(ii) profits which have been inflated by the sale of lands reflected as revenue which lands are then revalued (although sold) at inflated real estate values and expressed as profits in the form of fair value gains.

Mr. Morales had contended that the term *"creative accounting"* was a reference to legitimate accounting practices which are used to portray results more favourably than they actually are. I reject the contention. Ultimately, it is the meaning the article conveys to the ordinary man and, the use of that term along with the phrase *"cook the books"* would have conveyed to the ordinary man, reading *"between the lines",* that there was a clear and deliberate misrepresentation of the true results at Plipdeco by the use of false accounting. The consequence is that the *"real"* results which are *"dismal"* have been hidden. The *"cooking of the books"* has misled and deceived members of the public into purchasing over priced Plipdeco shares.

(5) There is wastage, mismanagement and corruption at Plipdeco, perpetrated by members of the board of directors as evidenced by:

(a) the purchase of the *Fantuzzi* Crane by which substantial millions of dollars were overpaid because it is *"a piece of second hand junk"* which is uneconomical for further use and may have to be retired;

(b) The *"siphoning of large sums"* for directors fees for the boys" by the creation of companies which exist

in form only, *"first class travel for board members and huge other payments";*

(c) The unauthorized payment of a quarter of a million dollars to support a non-descript football club (at a time when Plipdeco could not afford such generosity) without any safeguards to ensure that such money is not misappropriated;

(d) the hiring of maxi-taxis at a rate of four hundred thousand dollars ($400,000.00) a year;

(e) forklift rentals at twice the market rate;

(f) cellular phone bills at ten thousand dollars ($10,000.00) per month per phone;

(g) accumulated obsolete stock worth several million dollars.

(6) The situation at Plipdeco is quite explosive but is being *"covered up"*. It is comparable to several scandals at other state companies including a *"really big one at TSTT where thirty-four million dollars ($34m) have disappeared"* and no action taken.

[70] The use in the article of a number of phrases and its references to other scandals are key to the meaning conveyed here. I refer to the following phrases in particular:

> **"…** *indiscriminate people …who appear to serve their own interests when placed in positions of trust…"*
>
> *"it is no wonder that a lot of crime stems from the fact that the exemplars of the society are setting the wrong examples…"*

"The books are cooked by imaginary and illusory profits while the results are dismal."

"…The whole question about published profitability is that it is a sham and a mirage which deceives stupid investors."

"…If there is no proper and substantiated discharge to the company, naturally, other folks should be brought in."

"…cover ups and caps being the order of the day…"

"…when you cover up and cover up, then there is another cover up to cover up the cover up…"

These phrases when taken in their context, give the article its overall defamatory character suggesting deception, misrepresentation and fraud. Reference to other folks being brought in clearly means the police. In the event that I am wrong in my interpretation of the article, I find to be proven, the meanings pleaded by the claimants and set out at paragraphs 6(a), (d), (e), (g), (j), (l), (o), (p), 7(f) and 7(g) of this judgment.

Identification of the first to ninth claimants

[71] I turn to the second issue; whether the first to ninth claimants were identified. This does not affect the tenth claimant. Both sides produced compelling arguments. The leading decision is that of **Knupffer v London Express** [1944] A.C. 116 where it was held that there is no publication if those who have read and understood the words to have defamatory do not identify the plaintiff as the person referred to. In order to be actionable defamatory words must be understood to be published of and concerning the plaintiff. Mr. Maharaj submitted that the article did not identify the claimants by name and there was no identification at all. He also contended that the claimants did not plead special facts on which they could rely in support of identification.

[72] Mr. Deonarine contended that the defendant ought to have applied to strike out the action if they considered that there had been no proper identification. I do not

agree. In my judgment, identification is an essential ingredient of the claim of defamation and the defendants can, in their substantive defence, make such a contention without any application to strike. Mr. Deonarine also submitted that the claimants exhibited documents to their pleading which formed part of the pleading. He relied on the letter of 26th April, 2006 from the claimants' attorneys at law to Blast Publications which was exhibited to the claimants' statement of case, as evidence of the particulars in which the claimants rely, submitting that the change in the rules of procedure has permitted such reliance.

[73] At page 4 of that letter it is alleged that *"the article… levels a number of serious libelous charges against Plipdeco and its board of directors",* and gives it the impression that *"Plipdeco conspired with other professionals to mislead Plipdeco shareholders'.* I do not consider that to be a pleading of special facts upon which Mr. Deonarine can rely. But in my judgment, no such special pleading is required. What is stated in the letter can itself be reasonably inferred from the article. Moreover, it is for the claimants to show that they were defamed. Identification is an important element in the process. It is for the claimants to show that *"there are people who could reasonably interpret the article as referring to him in a defamatory way because of special knowledge which they possessed".* (Per Lord Donovan in **Morgan v Odhams Press Ltd** [1971] 1 WLR 1239 at 1263).

[74] That is a matter of proof. If the defendants were in doubt as to whom publication was made, they ought to have applied for particulars.

[75] In any event, the appellants relied in their witness statements on the fact of their identification as members of the board of directors in the Guardian newspaper article of December 2003 and a report of the Express Newspaper of 29th December, 2003 which latter publication reported on the fact that the board had sued the Guardian in respect of the Guardian report. While these witness statements were not themselves pleadings, the defendants would have been put on sufficient notice of the basis of the claimants' case when these witness statements were filed on 14th January, 2008. We are no longer in the era in which perfectly

valid causes of action and defences are excluded on purely technical grounds. Such an approach went out with the old Supreme Court Rules.

[76] In any event, there was identification of the claimants by the article for which no special pleading was required. It is a reasonable inference to draw from the article that the persons, to whom the article referred, were members of the board of directors of Plipdeco. The article spoke of persons *"when **placed** in positions of trust and responsibility",* appearing to serve their own interests. It also speaks categorically of "*the siphoning of large sums of moneys for directors fees for the boys and first class travel for board members"*. There is the clear imputation that the board of directors was the body responsible for the payments of directors' fees and first class travel to its members. Further, the board of directors bears ultimate responsibility for the decisions taken in respect of the company and the tone and direction of the article point to the board members as the persons responsible for the problems identified by the article.

[77] As to the bigger question whether claimants one to nine would have been individually identified by the article to particular members of the public, the answer is in the affirmative. The names of the claimants were in fact the subject of previous articles in the Guardian and Express newspapers in late 2003. The Guardian article itself purported to be an exposé on Plipdeco and referred in large detail to the *Fantuzzi* crane. The Express report referred to the libel action brought by the claimants against the Guardian in respect of the article but names only seven of the claimants (including Plipdeco). This would have affixed in the minds of particular members of the public who had read those articles, particularly those who knew the claimants, that they were members of the board of directors of Plipdeco.

[78] Additionally, the claimants produced evidence that their names and photographs were published in the company's annual reports. It can be reasonably expected that most of the company's employees and shareholders would know who its directors were, as well as some members of the general public who may have had access to the reports. I am satisfied that the specific references to *"siphoning of*

large sums of moneys for directors" fees for the boys, first class travel for board members", to sufficient to tie these board members to the articles, and that those persons who were acquainted with them, as well as those members of the public, including shareholders and employees who had read the newspaper articles and the annual reports, would have been able to connect them as subjects of the article in dispute. The dictum of Lord Denning in **Hayward v Thompson** [1982] QB 47 at 61 is instructive:

> ***"One thing is of the essence in the law of libel. It is that the words should be defamatory and untrue and should be published 'of an concerning the plaintiff'. That is, the plaintiff should be aimed at or intended by the defendant. If the defendant intended to refer to the plaintiff, he cannot escape liability simply by not giving his name. He may use asterisks or blanks. He may use initials or words with a hidden meaning. He may use any other device. But still, if he intended to refer to the plaintiff, he is liable. He is to be given credit for hitting the person whom he intended to hit. The law goes further. Even if he did not aim at the plaintiff or intend to refer to him, nevertheless, if he names the plaintiff in such a way that other persons will read it as intended to refer to the plaintiff, then the defendant is liable."***

[79] The very graphic and unchallenged evidence of the first, second, third, fourth and eight claimants as to the comments made to them by the persons with whom they came into contact was sufficient to prove that identification. Additionally, Mr. Deonarine is right that even without the Guardian and Express articles, the claimants were at all material times known as board members of Plipdeco by its shareholders and employees because their names and pictures were published in the company's annual reports which are exhibited in evidence.

Issue 3 – Fair comment

[80] **Gatley on Libel and Slander** (11th Ed.), at paragraph 12.2, states that in order to succeed in a defence of fair comment, the defendant must show that:

- The words are comment, and not a statement of fact;
- There is a basis of fact for the comment, contained or referred to in the matter complained of;
- The comment is on a matter of public interest, one which has expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern;
- The comment was made honestly and was not actuated by malice.

[81] The central question is whether or not the statements made in the disputed article were comments or statements of fact and if they were comments, whether there were factual bases supporting any of those 'comments'. In **Charmaine Forde v Raffique Shah and T&T Newspaper Publishing Group Ltd HCA 4709 of 1988** Hamel-Smith J. (as he then was) at page 27, quoted from Gatley on Libel and Slander (8th Ed.) at paragraph 710 that in order for the comment to be fair:

> ***"The defendant must state the facts on which he is commenting. Often, these facts will be set out in the publication, but this is by no means necessary. If, however, the facts upon which the comments purport to be made do not exist, the defence of fair comment must fail and comment based on matters of opinion only, which may or may not be true equally affords no defence. The question, therefore in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject matter of the action… [or] Is there subject-matter indicated with sufficient clarity to justify the comment being made?"***

[82] Mr. Maharaj submitted that the statements complained of did in fact constitute fair comment. He stated that comment may be fair even if it is expressed in

language which is violent, exaggerated or even unjust or prejudiced: **McQuire v Western Morning News** [1903] 2 K.B. 100 at 109,110. He added that a comment may be fair even if it is irrational, stupid or obstinate: **Turner v MGM** [1950] 1 All E.R. 449. What is required to constitute fair comment is that it be an honest expression of an opinion or an honest factual inference, which is based upon supporting facts. He submitted that the facts on which the comments were based were the financial results and dealings of Plipdeco, which were facts either set out in the disputed article or which could be easily ascertained from Plipdeco's published reports.

[83] In my judgment, the defence of fair comment has not been made out. I do not agree with Mr. Maharaj that the facts upon which the comments were based were *"the financial results and dealings of Plipdeco"*. That is true of the first article written by Mr. Morales, an unimpeachable article which quite correctly pointed to the weaknesses inherent in the IAS 40 accounting system adopted by Plipdeco. The comments of Mr. Morales in that article, could not be termed a libelous and can reasonably be described as fair comment.

[84] The same cannot be said of the article in dispute. As I have found at paragraph 69, the factual assertions upon which the article was based were untrue. The IAS 40 system of accounting did not involve the sale of land. Indeed, that was a misrepresentation of how the system worked. Mr. Traboulay, President of Plipdeco, conceded that there were significant unrealised profits for the years 2002 to 2005 and that real profits remained static but that cannot justify the misrepresentations made in the article.

[85] The *Fantuzzi* crane was bought brand new and functional. The cause of the malfunctioning was a broken shaft which occurred at Plipdeco. There was nothing in the tender process which was proven to be corrupt. There were no ghost companies for the siphoning of directors' fees. All the factual assertions in the article were denied by the claimants and absolutely no evidence was brought by the defendants to prove the contents of the article. The questions raised in Parliament and at the PAEC about the crane, appear to have been simply that.

There was no evidential basis to show any form of corruption in the tender process which led to the purchase of the *Fantuzzi* crane. Mr. Mohammed explained the reason why the management's recommendation was not accepted. No effort was made by Mr. Morales, the publisher or editor, to ascertain the Board's position. The fact that the defendant's belatedly sought to detain information from Plipdeco under the Freedom of Information Act compounds the error.

[86] It follows the defence of fair comment was not made out since the facts upon which the article purported to comment were either untrue or a misrepresentation of the true facts, that is to say, there was no basis of fact for the allegations made in the article. Further, I do not consider that the article was a comment at all. The article appeared to be primarily concerned with reporting these erroneous facts rather than making any comment.

[87] The defence of fair comment has not gotten past the first two limbs of the criteria set out at paragraph 80 herein and it is unnecessary for me to proceed beyond those first two limbs. Mr. Maharaj submitted that Plipdeco being a public traded company, should be slow to take action in respect of articles published in the newspaper about it. I do not agree. It is entitled, like any other person, corporate or human, to take action to protect its good name. If the article is fair, objective, in the public interest and made without malice, the writer has no cause for concern but it cannot be that companies such as the defendant can be subject to the most baseless and vicious of attacks and both company and board of directors are hobbled and unable to respond merely because the company is publicly owned or publicly funded. I reject the submission as untenable.

[88] Mr. Maharaj (the witness), asserted that the allegations were criticisms of Plipdeco in *"certain areas of expenditure"* but such criticisms must be based on fact not untruth or misrepresentation. Mr. Morales' ready admission of his failure to verify the truth of the allegations of the *"Patriotic Whistleblower"*, his conclusion that there was a firing/resignation of the auditors because of the fact that the auditors had been changed, his failure to properly read the annual report

of 2003 which stated the true reason for the change and the lack of any independent verification policy by the publisher or editor of the *Blast,* show an irresponsible, almost cavalier, approach to journalism. In my judgment, the article reported allegations which were false statements and which had the effect of discrediting the claimants in the eyes of the other members of the public and they are entitled to damages.

Damages

[89] **Gatley on Libel and Slander (11th Ed.)** at para. 9.2 states that:

> ***"The purpose of general damages is to compensate the plaintiff for the effects of the defamatory statement, but compensation…is a more complex idea than it is in the case of injury to person or property by negligence….General damages serve three functions: to act as a consolation to the plaintiff for the distress he suffers from the publication of the statement; to repair the harm to his reputation (including, where relevant, his business reputation); and as a vindication of his reputation."***

The author went on to quote the following dictum of Windeyer J in **Uren v John Fairfax & Sons Pty Ltd** (1966) 117 CLR 115, 150 which was approved by Lord Hailsham in **Broome v Cassel & Co. Ltd** 1972 A C 1027 at 1071:

> ***"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public, and as a consolation to him for the wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."***

See also the dictum of Peason L J in **McCarey v Associated Newspapers (No.) 2** [1965] 2 Q B 86 at 104-105, where he said:

> ***"Compensatory damages…may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings - the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behavior by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, these are proper elements to be taken into account in a case where the damages are at large."***

[90] I am also mindful of the comments in **South Hetton Coal v North Eastern News** [1894] 1 Q.B. 133, that, "…*where a trading corporation has suffered no actual financial loss any damages awarded should be kept strictly within modest bounds*." and of the observations of **Lord Hoffman** in **The Gleaner Co Ltd v. Abrahams**, Privy Council Appeal 86 of 2001, the assessment of damages in defamation is a daunting task.

[91] Actual damage does not have to be proven but where not proven, damages should be modest. The court, however, is entitled to take into account the highhandedness and insulting nature of the article. In this case, Plipdeco was clearly identifiable to all the public as the corporation which was the subject of the article. Mr. Traboulay contended that the result of the article was a serious drop in the value of the shares of the company but conceded in cross-examination that the statement of the chairman, Mr. Mohammed, that such fall in value may have been from an adjustment in the stock market which also affected other companies. I am not satisfied therefore that the fall in share value was proven to have been solely caused by the article.

[92] Mr. Traboulay also conceded that he was not at the company at the time of the article and could not speak first hand of what actually occurred. I do not consider

that concession to have been of any moment. Mr. Traboulay is the President of the company and has access to its records. His evidence of calls from shareholders of Plipdeco and trading partners about the article and their concerns would found from what is lodged in the company's records and would be matters of record. His evidence was that the company's *"trading reputation has been severely infringed"*. It is a publicly traded company. Its reputation is important to the value of its goodwill. An article alleging mismanagement and corruption in the course of its operation is bound to affect its goodwill and to have some effect on its share price. The article's innuendos as to mismanagement, corruption and waste were quite damaging. I award the sum of one hundred thousand dollars ($100,000.00) damages to Plipdeco.

[93] As to first to fourth named claimants and the eighth named claimant, I consider that their evidence as to comments they received from friends and associates and family, is evidence of the public knowledge of their directorships in the company which goes to their injured reputations and of their injured feelings. This is mitigated, however by the fact that their directorships would have been known to particular members of the public including its shareholders and employees. The Guardian article and the Express report were written some two years earlier and their names would have been remembered only by specific members of the public who may have read them. It was not a matter of general public knowledge.

[94] The allegations were also quite damaging. The first to ninth claimants claim injury to their reputations, particularly in their respective offices and professions. They were all appointed to the Plipdeco board of directors, based on their competence in their respective disciplines. The allegations would have reflected adversely on them as professionals and a suggestion of corruption or mismanagement on anyone's part, can last a lifetime. The comments of Lord Nicholls of Birkenhead in **Reynolds v Times Newspapers Ltd** 1999 4 All E R 609, 622 are apt. He said:

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

democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, and 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…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…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 reputation of others.

See also the words of Bray CJ in the Australian case of **Potts v Moran (1976) 16 SASR 284**, where he said at page 303:

"It is clear that it is defamatory to impute to a man inefficiency or incapacity in his occupation unless that occupation is unlawful. To do so defames him, not only in the eyes of those of the same occupation or those connected with him in his occupation, but in the eyes of the community generally, or the reasonable members of it. In Alexander v. Jenkins [1892] 1 Q.B. 797, at p. 800, Lord Herschell said (in an action for slander but the difference between libel and slander is not material for the present purpose):

> ***"It is quite clear that as regards a man's business, or profession, or office, if it be an office of profit, the mere imputation of want of ability to discharge the duties of that office is sufficient to support an action."***

[95] The fact that Mr. Walters and Mr. Mendez were not cross-examined is a question of weight. Their business experience and qualifications were not matters which could have been seriously challenged. Neither could their evidence of what was said or told to them. Indeed, none of these matters was challenged by Mr. Maharaj in his cross-examination of Mr. Mohammed, Mr. Lewis or Mr. Shah. The claimants were all quite distinguished citizens engaged in public service, they are entitled to have their reputations vindicated by this court with an appropriate award. In making the award, I also take into account the irresponsible and cavalier approach taken by the defendants and Mr. Morales to what is an important democratic function. I grant claimants one to four and claimant number eight the sum of fifty thousand dollars ($50,000.00) damages

In so far as the defendant sought to publicly apologise and that offer was refused by the claimants, I do not consider that it affects the quantum of damages in any way. The defendants offered a public apology, while maintaining that the defamatory article was fair comment. I do not consider that to have been a proper offer of an apology and I consider that the claimants had no choice but to reject it. I am of the view that the defendants cannot therefore avail themselves of section 4 of the Libel and Defamation Act.

[96] The fifth, sixth, seventh and ninth claimants did not give witness statements, neither did they attend court on any occasion. That does not disentitle them to damages, since libel is actionable per se but I consider that they have not prosecuted and proven their case and for these reasons I dismiss their claims with costs. The defendant will pay the costs of the first to fourth claimants, the eight claimant and the tenth claimant.

NOLAN P.G. BEREAUX

Judge

8th April, 2009.