REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV No. 2007-02612

BETWEEN

THEODORE GUERRA **Claimant**

AND

TRINIDAD PUBLISHING COMPANY LIMITED

AND

NICOLE DUKE-WESTFIELD **Defendants**

Before the Honourable Mr. Justice Vasheist Kokaram

Appearances:

Mr. J. Phelps and Ms N. Milne for the Claimant
Mr. R. Martineau, SC and Mr. I. Benjamin instructed by Ms M. Ferdinand for the Defendants

JUDGMENT

Introduction:

1 Justice, it is said is not a cloistered virtue[1]. By extension the same can be said for attorneys-at-law in the conduct of their professional duties. The question of what is

[1] Ambard v AG of T&T per Lord Atkins [1936] (1) A.E.R. (P.C.) 704 at p. 709 "The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

fair criticism or comment of an attorney's conduct is raised squarely in this claim for damages for libel brought by Mr. Theodore Guerra S.C., a senior practitioner. Mr. Guerra ("the Claimant") contends that his reputation was damaged by a letter to the editor published by the Defendant ("the said letter to the editor[2]) entitled "He Does not deserve S.C." It was a letter published in the midst of an imbroglio he had found himself in, while acting in the capacity of counsel for the Commission of Inquiry into the Piarco Airport Development Project with the then President of the Law Association of Trinidad and Tobago, Mr. Karl Hudson-Phillips QC. The Inquiry itself was conducted under the full glare of public scrutiny, and subject to intense public comment and debate. It was in that context that a member of the public used the "Letters to the Editor" platform afforded by the Defendant in its Trinidad Guardian to voice criticism of the Claimant's conduct in those proceedings calling for the powers that be to revoke his appointment.

2 Attorneys are enjoined at all times by the Code of Ethics to maintain the honour and integrity of the legal profession and to refrain from conduct that tends to discredit it.[3] While their reputation is their stock and trade, they will be the first to acknowledge that their behaviour in the eyes of the public can equally draw criticism and that it is one of the hazards of the duties and responsibilities of an attorney-at-law to be criticized by members of the public in the carrying out of his or her duties.

3 The extent to which public criticism of the Claimant is to be protected, however, brings into sharp focus the delicate balance between freedom of expression facilitated by media houses in their letters to the editor and the reputation of the attorney-at-law. Senior Counsel for the Defendant correctly observed during his cross-examination of the Claimant that this claim is about the conduct of an attorney-at-law. Equally, it is about the limitation that the law will impose on public commentary or criticism of that conduct.

4 The defence of fair comment strives to strike that balance between the public interest in promoting the fundamental right to free speech to comment and evaluate matters in the public domain, with the public interest in the protection of the character and reputation of men and women in our society from unjustified attacks. It is a defence, once properly made out, which is open to all[4]. It provides a greater degree of latitude for the publication of personal opinions and comments,

[2] Published 26th February 2003

[3] Legal Profession Act, Ch.90:01 Third Schedule Pt A, r.1- An Attorney-at-law shall observe the rules of this Code, maintain his integrity and the honour and dignity of the legal profession and encourage other Attorneys-at-law to act similarly both in the practice of his profession and in his private life, shall refrain from conduct which is detrimental to the profession or which may tend to discredit it.

[4] In contrast to the defence of qualified privilege

recognizing the vital role played by reviewers and commentators and critiques in a society.

5 Not all observations will be positive and some can be positively vitriolic. In our society it is important that we understand that fair comment is a fundamental feature of our democracy. Lord Denning's remarks in 1967 are still relevant today and provide the signpost for fair comment when he said:

> "… the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to "write to the newspaper": and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions."[5]

6 The law has expanded with the nature of the society which formed the backcloth to seminal judgments of the past such as **Kemsley v Foot** [1951] 2 KB 34. The most recent treatment of fair comment in the modern era referred to the Court by attorney for the Defendant is **Spiller and another v Joseph and others** [2010] UKSC 53. The Supreme Court in that case, advocating reform of the defence, re-examined the role of the defence of fair comment and confirmed the concept in simple terms. The defence is available to one who has done no more that express his honest opinion on publications put before the public. It is sufficient that the comment in general terms identifies what it is that led the commentator to make the comment, so that the reader can understand what the comment is about. This is the fair balance struck between the freedom of expression and requiring the person to identify to others, why he or she is making the comment or criticism. The writer had to be expressing his honest opinion on a matter of public interest.

7 This simplification of the test is, however, by no means a get-out-of-jail-free card for the media, as the defence of fair comment is no licence for the media to disseminate irresponsible publications of commentaries either in print or electronic format that can be construed as malicious. The writer must still get his facts right. The law now underscores this right to comment with the touchstone of an honesty of belief. Comments made on the pubic platforms provided by the media must not

[5] Slim and Others v Daily Telegraph Limited [1968] 2 Q.B. 157 at p. 170

therefore be abused by members of the public who publish defamatory statements of fact or comment which does not pass "fair comment" muster.

8 I have considered the agreed documents and the testimony of the three witnesses in this case and I make the following findings:

(a) The words used in the article are defamatory of the Claimant. They convey the meaning that the Claimant is unfit to be a senior counsel in the legal profession and so are defamatory of him in imputing to him an unfitness to hold a very prominent and responsible position in the profession.
(b) This is however, in my view, no more than a comment and not a statement of fact. It was in general terms identified by the writer that her comment was referable to the matters emerging from the Piarco Commission of Inquiry which was a matter of keen and intense public debate.
(c) The Defendants were not actuated by malice in publishing the words and the writer held an honest belief in the comment made.
(d) The defence of fair comment is therefore made out and has not been defeated by proof of malice in the publication of the words.

9 In the circumstances the claim is dismissed with prescribed costs to be paid by the Claimant to the Defendant.

The backdrop

10 The Claimant is an attorney-at-law, called to the Bar of England and Wales as a barrister on 15th December 1959 and the Bar of Trinidad and Tobago in 1960 and appointed a member of the inner Bar.

11 At the time of the said publication the Claimant was the lead counsel in a public inquiry into the construction of the Piarco airport. The Commission of Inquiry into the Piarco Airport Development was chaired by former Chief Justice Clinton Bernard. It is common ground that the public inquiry was the subject of daily reports published by the Defendant and the matters "touching and concerning the said public inquiry were the subject of intense and prolonged public debate contemporaneously with and at the time of the publication of the words." It was closely followed by all the media houses and was televised. It was described by Mr. Arthur Dash, Public Affairs Editor of the Defendant, as a "matter of intense public interest." This is an unchallenged proposition in this case and is borne out by the several publications which formed part of the agreed bundle of documents.

12 It will be sufficient for the purposes of this judgment merely to recite the headlines of articles "making the news" in the first Defendant's daily newspaper "The Trinidad Guardian," in the days leading up to the alleged offending letter to the editor to demonstrate the public flavour of the proceedings at the Inquiry:

> 10th February, 2003 – *Accused in Airport Inquiry get their turn-* by Sasha Mohammed
>
> 11th February, 2003- *Bernard: We want QC – Piarco Airport Probe* – by Annabelle Brasnell
>
> 12th February, 2003 – *Sadiq, Ish summoned before the Commission*
>
> 20th February 2003 – *Airport inquiry wasting money*
>
> 21st February 2003 – *Baksh writes another letter to Commission*
>
> 21st February 2003 – *Ish appears, Sadiq declines –Piarco Airport Inquiry* – by Annabelle Brasnell
>
> 22nd February 2003 – *Gopee was hindering progress witness* – Piarco Airport Inquiry by Annabelle Brasnell
>
> 22nd February 2003 – *Unwarranted attack on Karl* – by Anand Ramlogan
>
> 25th February 2003 – *Where is the fairness in Piarco inquiry?*
>
> 25th February 2003 – *Piarco inquiry – Lawyer claims Cateau feared Jearlean John* – by Annabelle Brasnell

13 The immediate backdrop to the letter to the editor was a statement made by the Law Association of Trinidad and Tobago issued by the then president, Mr. Karl Hudson-Phillips, QC on 9th February 2003. The full text was published in the newspapers by the Defendant. The press release challenged the fairness of the procedures adopted by the Commission of Inquiry and queried certain procedures being adopted in reference to persons who may be the subject of the inquiry. It pointed out inter alia that:

> "The Commission of Inquiry is not for the ventilation of private matters or for the satisfaction of oblique or purely political agendas...
> The practice has grown up of issuing what are known as-'Salmon letters' …ideally Salmon letters are issued before any oral proceedings begin on the

basis of the memoranda submitted to the Commission…In this case fairness dictates that the person affected be immediately alerted to the adverse evidence and invited to appear with counsel and respond…
The Commission of Inquiry does not appear on its own admission to have followed these basic rules of thumb".

14 The Claimant responded to that publication by making what he described in cross examination as "adding my 2 cents worth" at the next sitting of the Inquiry. What appears in the transcript of the proceedings is a vigorous and unkind attack on the President of the Law Association, who himself, was at that time a sitting Judge of the international court. On 13th February 2003, at the resumed hearings of the inquiry, the Claimant stated inter alia:

> "Mr. Chairman, with all due respect to you, Sir, and the Commission, I am really fed up this morning, particularly when I observe the press release which has been released by the Law Association of Trinidad and Tobago, and some television and radio interview being conducted by the President of the Law Association.
>
> I read from the press release and I am appalled that some one who is about to assume high judicial office would make the sort of mistakes that is contained in the press release…
>
> This is where I get to the part of the press release where it shows that – I hope that this is not a forerunner of the sort of decisions which would emanate from the International Criminal Court later on…
>
> I loathe to think that anyone who will be exercising judicial discretion would make himself aware of what the status of the law is before making pronouncements on it. And this pronouncement here in this press release about the Salmon letters being issued to persons before the evidence is given is wholly erroneous and totally misleading on the part of the President of the Law Association and the Law Association…
>
> I take exception when he talks about "The Commission of Inquiry is not for the ventilation of private matters or for the satisfaction of oblique or purely political agendas". When he appeared in the gas station racket inquiry did he have a political agenda? Because at that time he was a member of a political party with him…
> Sir, I do not want to really express my ire and anger this morning at the interview which he gave to the electronic media yesterday, but I think that

having enjoyed the fruits of this country, and leaving for greener pastures, one should not behave in a manner so as to mislead the public of Trinidad and Tobago."

15 There followed intense public debate on the contents of the Claimant's response and the inquiry. Appearing in the press on the next day, 14th February 2003, was an article "*Now Guerra attacks Hudson-Phillips*" repeating some of the statements made by the Claimant. The article described the response of the Claimant as a scathing attack. It read in part:

> "Theodore Guerra SC lead attorney for the Commission of Inquiry into the Piarco Airport Development Project expressed concern about the decisions Law Association president Karl Hudson-Phillips QC would make an International Criminal Court Judge.
> Both Guerra and Commission chairman retired Chief Justice Clinton Bernard launched scathing attacks on Hudson-Phillips at yesterday's sitting of the inquiry….
> 'I am appalled that someone who is about to assume high office would make the sort of mistakes that is contained in the press release' said a visibly upset Guerra. This is wholly erroneous on the part of the Law Association and its president. I hope that this is not a forerunner of the sort of decisions that will emanate from the International Criminal Court later on."

16 On 22nd February 2003, the first Defendant published comments of columnist and attorney-at-law Anand Ramlogan, who "chipped in" with his comment on this new development in the inquiry. In reference to the Claimant he quipped:

> "The condescending tone of Mr. Guerra towards the president of the Law Association is in keeping with the rum shop and pan yard attitude of this inquiry. Counsel to the commission wasted no time in jumping on the bandwagon; his was a personal attack that was equally disdainful... ."

17 The commentary on the conduct of the Claimant at the Inquiry, again found itself in "The Trinidad Guardian" the following day in the letter to the editor which is the subject of this claim.

The letter to the editor:

18 The letter to the editor was published on 22nd February 2003, in the Letter to the Editor page of the Trinidad Guardian. It was a short and cryptic letter:

"**HE DOES NOT DESERVE SC**

For some time now I had cause to wonder how an attorney becomes designated "Senior Counsel". I was especially concerned when I learned that Theodore Guerra was made or designated Senior Counsel by a body of people (the Law Association perhaps) sometime ago.

Having regard to his recent behaviour which was on television for all the country to see, and given his disrespect for Karl Hudson-Phillips, Q.C., I respectfully appeal to the body of people who named Mr. Guerra Senior Counsel to revoke same.

There is nothing I have ever read or heard about him or ever seen him do which would entitle him to stand shoulder to shoulder with other leading attorneys in Trinidad and Tobago such as Martin Daly, S.C.; Tajmool Hosein, QC; Selby Wooding, QC; Michael de la Bastide, SC (former Chief Justice) and of course Karl Hudson-Phillips, QC".

A letter before action was issued on 27th February 2003. There was no proposal or response to this letter.

The pleadings

19 The Claimant in his amended Statement of Case, alleged that the words in the letter in both the natural and ordinary meaning and innuendo meanings were defamatory. In his amended Statement of Case the Claimant set out his plea as to defamatory meanings as follows:

> *"In their natural and ordinary and/or inferential meaning the said words printed and published in the issue of the Trinidad Guardian newspaper dated the 26th February 2003 meant and were understood to mean that the Plaintiff had acted improperly as a Senior Counsel and/or had acted unprofessionally and/or incompetently as a Senior Counsel and/or is incompetent and/or unprofessional and/or lacking in professional skills and/or had acted in breach of the letter and/or spirit of the Legal Profession Act and/or was not fit to be a Senior Counsel and/or ought not to have been appointed by the President of the Republic of Trinidad and Tobago to be a Senior Counsel and/or behaved in a manner unbecoming of a Senior member of his profession and/or had behaved in a manner unbecoming of a Senior member of his profession and/or had behaved in a manner which was disrespectful to the public and/or the President of the*

Law Association and/or had behaved in such a manner to justify the President of the Republic of Trinidad and Tobago in revoking his appointment to the Inner Bar and/or had not performed in his professional calling in such a way as to deserve his appointment to the Inner Bar.

Further or alternatively, by way of innuendo the said words printed and published in the issue of the Trinidad Guardian newspaper dated the 26th February, 2003 meant and were understood to mean in the context in which they were published that the Plaintiff was incompetent and/or had acted improperly and/or had acted unprofessionally and/or incompetently as a Senior Counsel and/or had acted in breach of the letter and/or spirit of the Legal Profession Act and/or was not fit to be a senior counsel and/or ought not to have been appointed by the President of the Republic of Trinidad and Tobago to be a Senior Counsel and/or behaved in a manner unbecoming of a Senior Counsel of his profession and/or had behaved in a manner which was disrespectful to the public and/or the President of the Law Association and/or had behaved in such a manner to justify the President of the Republic of Trinidad and Tobago in revoking his appointment to the Inner Bar and/or had not performed in his professional calling in a manner to deserve his appointment to the Inner Bar and/or was incompetent.

PARTICULARS

(a) *On or about the 9th day of February, 2003 the Law Association issued a statement touching and concerning a Public Inquiry into the construction of the Piarco Airport, Trinidad (the Airport Inquiry);*
(b) *The President of the Law Association at the time of the said statement was Mr. Karl Hudson-Phillips, Q.C.;*
(c) *The Plaintiff was at the time of the said statement the lead counsel assisting the Commissioners appointed by the President to conduct the said Public Inquiry;*
(d) *On the 13th February, 2003 the Plaintiff was asked by the Chairman of the said Public Inquiry to assist the Inquiry with the matters raised in the said statement which he did;*
(e) *The full text of the said statement as well as extracts therefrom were published or caused to be published by the Defendants in the Trinidad Guardian during the period 9th February, 2003 to 25th February, 2003;*
(f) *The Public Inquiry was the subject of daily reports published by the Defendants in the Trinidad Guardian;*

(g) *Reports of the appointment of the President of the Law Association to the International Criminal Court as a Judge thereof were published by the Defendants in the Trinidad Guardian contemporaneously with the words complained of;*

(h) *In the premises the said facts and matters would have been known to a substantial but unquantifiable number of unidentifiable readers of the Trinidad Guardian and these readers would have understood the words complained of herein to bear the meaning set out above;*

(i) *The said statement and matters touching upon the said Public Inquiry were the subject of intense and prolonged public debate contemporaneously with and at the time of the publication of the words complained of;*

(j) *The said words were published prominently at the very top of the Trinidad Guardian letter page 1, under the headline in bold "He does not deserve S.C."; and*

(k) *The phrase "There is nothing I have ever read or heard about him or ever seen him do" is widely understood to mean "he is incompetent" or "he is unknown".*

20 The claim as to special damage was not pursued at the trial. The Claimant also relied upon particulars in support of his claim for aggravated damages, which in essence was that the Defendant, after the fact, sought to obtain copies of the transcripts of the proceedings. Additionally that the publication was made without affording the Claimant the opportunity to comment on the proposed publication.

21 The Defendant in its amended Defence contended that the words were not defamatory, and if they were, they were published on an occasion of fair comment on a matter of public interest. The plea of fair comment was formulated as follows:

> *"If and in so far as the words made or contained the following comment or expression of opinion, namely that the Plaintiff, as Lead Counsel to the Commission of Inquiry into the Piarco Airport Project ("the Piarco Airport Inquiry"), had behaved in a manner unbecoming of a Senior Counsel, the Defendants will contend that the said words constituted fair comment on a matter of public interest, namely the propriety or otherwise of the Plaintiff's unwarranted and unseemly conduct, in particular his denunciation of Karl Hudson-Phillips QC, President of the Law Association.*

Particulars of Fact upon which Comment is based

(i) As pleaded in paragraph 1 of the Statement of Claim the Plaintiff is a Senior Counsel appointed by His Excellency the President.

(ii) As a senior and established member of the profession the Plaintiff is expected to provide an example of restraint, decorum and respect in his conduct, tone, speech, manner and attitude.

(iii) The following Lead Counsels are generally thought to embody such standards in their conduct: Tajmool Hosein QC, Selby Wooding QC, Karl Hudson-Phillips QC, Michael de la Bastide QC and Martin Daly SC.

(iv) The plaintiff was appointed as Lead Counsel to the Piarco Airport Inquiry, the proceedings of which have been televised and closely monitored and reported upon by all of the electronic and print media.

(v) On or about January 2003 Karl Hudson-Phillips QC as President of the Law Association wrote an open letter to the Prime Minister, Patrick Manning, making certain criticisms about the fairness of the Inquiry's procedures and asking that the appointment of the Piarco Airport Inquiry be revoked.

(vi) On or about 5 February 2003 Karl Hudson-Phillips QC was elected as a Judge to the International Criminal Court.

(vii) In response thereto on or about 13 February, 2003 the Plaintiff, as Lead Counsel to the Piarco Airport Inquiry vigorously objected to such criticism and went on to voice the strongest criticism of Karl Hudson-Phillips and cast aspersions about his future performance as a judge of the International Criminal Court.

Further and alternatively, in so far as the words contained, the comment or expression of opinion set out in paragraph 7 above, they were fair comment upon a matter of public interest i.e. they were comment upon a part of the proceedings before the Piarco Inquiry that took place on or about 13 February 2003, which proceedings have been televised and the subject of close consistent and repeated electronic and print media coverage throughout and a fair and accurate report of which was published on page 15 of the First Defendant's newspaper on 14 February 2003."

22 In his re-amended reply, the Claimant alleges that the Defendant published the words maliciously. His plea of malice rests on two main pillars: first, that the intention of the publication was to embarrass and hurt the Claimant rather than to engage in criticism or comment. Second, that the Defendant had no sufficient

grounds for an honest belief that the facts as stated or the criticisms of the Claimant were fair. I must note at the outset that the cross-examination of the Defendants' witnesses failed to deal with this aspect of the Claimant's case adequately, if at all.

The evidence

23 At the trial an agreed bundle of documents was tendered into evidence. The Claimant gave evidence and the Defendants led their evidence through Arthur Dash, Senior Associate Editor and Nicole Duke Westfield who was at the time the Editor employed with the Defendant.

24 The agreed documentation set out the public statements and comments that were generated by the inquiry. It confirms that the Commission of Inquiry did generate intense public debate and interest.

25 The Claimant in his evidence-in-chief complained that the said publication was made by the Defendants without any attempt to verify the facts with him. As a result of the publication his personal reputation was damaged and he never had his conduct at the Bar impugned in almost 50 years. He was subject to public and humiliating "picong" as a result of the article. In cross-examination the Claimant confirmed the following:

(a) That the Claimant was a member of the legal profession which is characterized by fairness, courtesy and good faith. He is bound to follow the code of ethics set out in the Legal Profession Act.

(b) That as an attorney-at-law he needed to conduct himself with decorum and restraint. He went on to admit its importance in this exchange:
"Q: This standard of conduct is all the more important because those who are members of the inner bar are very often looked upon by junior members as exemplars of the profession?
A: That is so, sir".

(c) It was quite proper for the Law Association to comment on matters involving the Commission of Inquiry.

(d) The Inquiry was one of tremendous public interest, so too was the issue of the appointment of members of the profession to the Inner Bar.

(e) It was clear that the Claimant still carried a sting in his tail of his own for the former President of the Law Association, Mr. K Hudson-Phillips, as he was unapologetic for the remarks he used to deal with the press release and was insistent in his disregard for Mr. Hudson-Phillips QC., as an attorney who over the years conducted himself with restraint and decorum.

"Mr. Martineau SC: I am suggesting that your comment there I am saying it is not the language of restraint that one expects in commenting on one professional colleague like Mr. Karl Hudson-Phillips?
A: If that is not an example of restraint then I take it from television interviews which I saw of Mr. Hudson-Phillips when talking about the statement of the law association to that I had before the examples of Mr. Hudson-Phillips standing on the steps of the Hall of Justice.
Q: Your language and your tone is not the language of restraint of one member of the Inner Bar of the profession to colleagues in Inner Bar?
A: Given all the circumstances, yes it is.
Q: I am also suggesting to you Mr. Guerra it is not a statement that exhibits the kind of decorum that one expect in Inner Bar to show ?
A: This statement measures up to all the requests of decorum required in the circumstances.
Q: And Mr. Guerra I am suggesting to you that in fact it was unseemly conduct to be saying that of your professional colleague?
A: I cannot agree with you on that.
Q: It was a totally unwarranted comment because it had nothing to with the commission of inquiry?
A: It is not unwarranted.

(f) He acknowledged that Mr. Daly SC, Mr. Tajmool SC and Mr. de la Bastide conducted themselves with decorum and restraint in their practice at the Bar.

26 Ms Nicole Duke Westfield was familiar with the Claimant and covered the cases conducted by the Claimant over the years. She explained in her evidence-in-chief that after selecting letters to be published, they are subject to editing, carefully read to ensure that they are accurate and do not give offence and contain no libelious or damaging statements against anyone. "Letters to the editor are an opportunity for the general public to have a voice and so express their views." It gives the newspapers "a sense of its demographic". The Inquiry she stated was a major story and she was familiar with the coverage of the Inquiry. With respect to the letter to the editor, she explained her view was that "the letter was her layman's opinion or view of the Plaintiff's behavior as a senior member of the profession, in the full glare in a public inquiry as not befitting the particular accolade of Senior Counsel". Under cross-examination she admitted that:

(1) The Claimant conducted several high profile cases.
(2) She sought to obtain the transcripts of the proceedings as a matter of standard procedure.

27 Mr. Arthur Dash was the person who actually edited the letter to the editor. The initial letter and his draft with corrections were exhibited to his witness statement. He edited the letter about one week after its arrival and he explained the process of receiving and editing letters to the editor. He stated in his evidence-in-chief, which remained untested in his cross-examination:

> "The letter writer in her view was expressing an opinion about what she saw on television and the appropriateness of that conduct that she witnessed. I am familiar with the names of the lawyers she mentioned in her letter. Though I do not know them personally I have read of their cases as reported in the newspapers in court cases over the years. From that I got the impression a certain high moral and ethical standard was expected from these gentlemen in their professional conduct and that was expected from anyone who aspired to be senior counsel. In my professional view her opinion as expressed in the letter was one that she was entitled to hold and in deciding to publish it the Trinidad Guardian gave voice to that opinion. I should stress that this was her view and not mine or that of the newspaper. One of the purposes of the newspaper was to permit the expression of a variety of views".

28 He was also familiar with the high standard of work and conduct of the senior counsel named in the article. Under cross-examination he admitted that the contents of the letter were serious in relation to Mr. Guerra. He did not know what aspect of his behaviour specifically the writer was referring to.

The issues

29 The parties are in agreement with the main issues to be decided:

(a) Whether the words in their natural and ordinary meaning or innuendo meaning convey a defamatory meaning of the client;
(b) If it does were the words published fair comment on a matter of public interest?
(c) Were the words published, comment as distinct from fact?
(d) Did the writer of the words honestly hold the opinion expressed; and
(e) Were the words published maliciously so as to defeat the privilege?

Whether the article is defamatory-The meaning of the words

30 Diplock LJ lamented in **Slim v Daily Telegraph** that in libel cases a great degree of time is expended reviewing words to determine their defamatory meaning. The words must be examined in context and to determine whether this letter to the

editor is defamatory, one cannot take a pedantic or microscopic approach but look at the article as a whole. See **Charleston et al v News Group Newspapers Ltd** [1995] 2 A.C. 65, and **Kayam Mohammed et al v Trinidad Publishing Co. Ltd et al** HCA No. 3552 of 2003. The starting point in determining whether this article tends to lower the Claimant in the estimation of right thinking members of society is to determine what the words convey to the ordinary man. Such an analysis is not a task of statutory interpretation but to consider the words as objectively as possible to determine what meaning they would convey to the reasonable man. The classic judgment of Lord Reid in **Lewis v Daily Telegraph** [1964] A.C. 234, at pp. 258-260 conceptualized the ordinary man as one that:

> "…does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs. What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves…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…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".

31 From a review of the following authorities **Lewis v Daily Telegraph Ltd** [1964] AC 234 at 277; **Lucas-Box v News Group Newspapers Ltd** [1986] 1 WLR 147 at 152H**; Skuse v Granada Television Limited** [1993] EWCA Civ 34, **Slim v Daily Telegraph Ltd**., **Bonnick v Morris** [2002] UKPC 31, **Jeynes v News Magazines Ltd v Anor** [2008] EWCA Civ 130, HCA 1728 of 1994 **Eden Shand v CCN Ltd**; **George Umbala Joseph v Harry Partap and Ors** CV 2005-0437; **Basdeo Panday v Gordon** CA 175 of 2000, **Rajkumar v Ali and T&T Newscentre Limited** CV 2009 -1044 the following principles emerge:

(1) The principle of reasonableness governs the Court's review of the article. It is an objective test without regard to the intention of the publisher.

(2) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader and to decipher the single or right meaning of the words.

(3) Who is this hypothetical reader? This hypothetical reader is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. He is not one who has scant regard for reputation and places some value on restraint, reputation and civilized behaviour.

(4) The court should be cautious of an over-elaborate analysis of the material in issue. As the Court is sitting in the chair of the reasonable hypothetical reader, it will avoid straining the language of words used while limiting its attention to what the publisher has actually said or written.

(5) The court should not be too literal in its approach.

(6) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would be likely to affect a person adversely in the estimation of reasonable people generally.

(7) In determining the meaning of the material complained of the court is not limited by the meanings which either the plaintiff or the defendant seeks to place upon the words. It is taken in context the bane and the antidote**.**

(8) The defamatory meaning pleaded by a plaintiff is to be treated as the most injurious meaning the words are capable of bearing and the questions a judge sitting alone has to ask himself are, first, is the natural and ordinary meaning of the words that which is alleged in the statement of claim and, secondly, if not, what (if any) less injurious defamatory meaning do they bear?

32 The Defendants submit boldly that these words used are not defamatory. They contend that the article is to be read in its context and the Claimant must take the bane with the antidote. Taken in its proper context, the Defendants contend that the whole of the words say no more than the Claimant in local parlance, is not in the same class as other named persons and that he should not be there. The words do not cross the threshold of seriousness and can be lightly dismissed as someone's opinion and nothing more.

33 The words according to the Defendants are harmless "just as it could not be defamatory for a disappointed West Indies cricket fan, after losing yet another match, to say of the world record holder, Brian Lara 'He is a waste of time. He never win a series yet'. It is not defamatory to say of a barrister that he does not deserve the status of Senior Counsel.

34 I disagree. I have read the letter guided by the above mentioned principles and the overall impression of the article has been cross-checked with the arguments advanced by the parties. An imputation which may tend to injure a person's reputation in a business, employment profession or calling is defamatory. See **Duncan** and **"Law of Defamation**" paragraph 2.26.

35 The words used are to a complaint about the conduct of the Claimant. They convey the reasonable impression that the Claimant was incompetent and unfit to hold an office which carries a high degree of respect in this country. The headline "HE DOES NOT DESERVE SC" is grabbing and is tied with the content of the article which calls for the revocation of his designation as a senior counsel. I take the view that, like the Defendant's witnesses, many members of the public reading the article would know of those members of the Inner Bar such as Martin Daly SC, Tajmool Hosein QC and Michael de la Bastide SC. In fact, these persons were identified by the Defendant as leading attorneys and the clear imputation is that the Claimant is a lesser mortal and undeserving to be in the class of elite lawyers in this country.

36 Fitness of office for an attorney-at-law and Senior Counsel is a delicate matter. As I alluded to at the beginning of this judgment, the reputation of the attorney-at-law is his stock and trade. Unlike a sportsman in the heat of battle who could be rowdy and notorious, a filibusterer of sorts, but so long as he performs there is a demand for his skill. In that context questions of character are not as important when compared to an attorney-at-law where his/her character and reputation rank highly and form the basis for the demand for his/her services. Indeed, in the Code of

Ethics[6] it recommends that an attorney's reputation should be his best form of advertisement.

37 In this article the writer claims that the Claimant does not deserve to be Senior Counsel and the words used cast doubt on his competence as part of the elite lawyers and member of the Inner Bar. It is a serious matter and cannot be trivialized. The single clear defamatory meaning is that the Claimant is unprofessional and unfit to be a Senior Counsel.

38 The article is defamatory of the Claimant.

Fair Comment

39 The defence of fair comment or as it is now referred to as "honest opinion" applies to comment and not fact. If the words complained of are in reality allegations of fact then the Defendant must seek recourse in some other defence such as justification or privilege.

40 In **Gatley on Libel and Slander** (11th Ed.) 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.

Fair comment and the media

41 The defence of fair comment is as important a defence to the media as is qualified privilege. Both defences protect the media and by extension the individual's freedom of speech on matters of public interest. Fair comment is regarded as the "bulwark of free speech". Lord Denning MR. was alive to the importance of the defence to press freedom in **Slim v Telegraph Ltd**: The right of fair comment has been said to be "one of the fundamental rights of free speech and writing" – per Scott LJ in **Lyon v The Daily Telegraph Ltd** [1943] 1 KB 746, 753, [1943] 2 All ER 316, 112 LJKB 547. Lord Denning MR. echoed that comment in **Slim v Daily**

[6] Legal Profession Act Chap. 90:03 Third Schedule Part X rule 7:"The best advertisement for an Attorney-at-Law is the establishment of a well merited reputation for personal integrity, capacity, dedication to work and fidelity to trust."

Telegraph Ltd. and described the right of fair comment in terms which emphasized the importance of the subjective appreciation of the writer.

42 A similar vigorous view was expressed by Chief Justice Li in **Albert Cheng v Paul Tse** (2000) Part 7 Cas5 (Hong Kong):

> "In a society which greatly values the freedom of speech and safeguards it by a constitutional guarantee, it is right that the courts when considering and developing the common law should not adopt a narrow approach to the defence of fair comment. The courts should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in full vigor."

43 The right of comment which the press and broadcaster have is one which they share with members of the public. The press is the vehicle through which the public articulates its views. For this reason Gatley at paragraph 12.5 states:

> …"the special position of the media as a vehicle for the expression of opinions by members of the public may, however, be said to be given some recognition in the fact that where a newspaper or broadcaster publishes the apparently bona fide opinion of a member of the public it may rely on the defence even though it does not share the opinion and (probably) even though the author was in fact actuated by malice".

44 Letters to the editor provide a useful function in free speech. They support or oppose an editorial stance, respond to another writer's letter to the editor, comment upon a current issue being debated, urge elected officials to make their decision based on his/her viewpoint, comment or remark upon material (such as a news story) that have appeared in a previous edition; correct a perceived error or misrepresentation. However, of course the defense of fair comment is restricted to genuine comment.

Genuine Comment

45 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?"

46 Difficulties are usually encountered in identifying fact from comment and this case highlights the point. What constitutes comment? The following provides some guidance:

(a) Comment is something which is or can be reasonably inferred to be a deduction, inference, conclusion, criticism, remark or observation. See **Branson v Bower** [2001] EWCA Civ 791.

(b) The first step is to deduce the meaning of what has been said in the proper context. **Associated Newspapers v Burstein** [2007] EWCA 600.

(c) Comment can consist in a statement of fact if the fact appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by them or in the common knowledge of chaperons speaking and those to whom the word are addressed. The conclusion must be readily inferred.

(d) To simply describe conduct as dishonourable is a statement of fact. For it to constitute comment there must be an allegation of specific things and that his conduct was dishonourable. To write that someone is "a disgrace of human nature" is a defamatory allegation of fact. But to say that "he murdered his wife and therefore is a disgrace to human nature" the latter word appears from the content to be comment. There must be a substratum of fact to support the comment. See **Telnikoff v Matusevitch** [1992] 2 AC 343, **Kemsley v Foot** [1952] AC 345 **Crawford v Albu** [1917] App. D. 102 (s. Af.)

(e) If a statement in words of fact stands by itself "naked without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom it was addressed" it may be understood as a statement of fact.

Honest Opinion- a modern approach

47 Lord Denning MR. in **Slim** had hinted to honesty of opinion as the touchstone of the defence of fair comment.

> "The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this he has nothing to fear even though other people may read more into it-Slim v Daily Telegraph".

48 In a modern statement of the law, the elements of the defence of honest comment were authoritatively examined in the judgment of the Supreme Court in **Spiller v Joseph** [2010] UKSC 53, [2011] 1 All ER 947. Importantly, for the present case the Supreme Court referred to **Campbell v Spottiswoode** (1863) 27 JP 501, (1863) 3 B & S 769, 3 F & F 421 as perhaps the most important foundation stone of the modern law of fair comment. The Plaintiff was a dissenting Protestant minister who had a scheme for advancing the propagation of the gospel in China by promoting the sales of a newspaper containing a series of letters emphasizing the importance of this. The Defendant published an attack on the Plaintiff in a rival newspaper alleging that the Plaintiff's motive was not to take the gospel to the Chinese but to make money out of the sales of his newspaper, and that the names and descriptions of subscribers published in the newspaper were fictitious. The publication made it plain that these allegations were no more than inferences, albeit that they were inferences of fact. The court drew a distinction between attacking the scheme and attacking the character of its proponent. Cockburn CJ's observation is pertinent and applicable to an assessment of the fact serial in the present case on the imputations of conduct of the Claimant. Cockburn CJ said at page 777:

> "I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest".

49 In **Spiller**, quoting Lord Nicholls of Birkenhead in Tse Wai Chun Paul v Albert Cheng [2001] MLR 777 Lord Phillips summarized the principles to make out the defence of fair comment:

> (i) …" the comment must be on a matter of public interest . . . .
>
> (ii) …the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege. Much learning has grown up around the distinction between fact and comment. For present purposes it is sufficient to note that a statement may be one or the other, depending on the context. Ferguson J gave a simple example in the New South Wales case of **Myerson v Smith's Weekly** (1923) 24 SR (NSW) 20, 26:
>
> 'To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment.'
>
> (iii) Third, the comment must be based on facts which are true or protected by privilege: see for instance **London Artists Ltd v Littler** [1969] 2 QB 375, 395. If the facts on which the comment purports to be founded are not proved to be true or published on a privilege occasion, the defence of **fair comment** is not available.
>
> (iv) Next the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made… .
>
> (v) Finally, the comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views: see Lord Porter in **Turner v Metro-Goldwyn-Mayer Pictures Ltd** [1950] 1 All ER 449, 461, commenting on an observation of Lord Esher MR. in **Merivale v Carson** (1888) 20 QBD 275, 281. It must be germane to the subject-matter criticised. Dislike of an artist's style would not justify an attack upon his morals or manners. But a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism: see Jordan CJ in **Gardiner v Fairfax** (1942) 42 SR (NSW) 171, 174."

50 These therefore comprise the outer limits of the defence. The burden of establishing that a comment falls within these limits and hence within the scope of

the defence, lies upon the Defendant who wishes to rely upon the defence. "A Defendant is not entitled to rely on the defence of fair comment if the comment was made maliciously."

51 Lord Phillips' quoting Lord Denning MR in **Slim v Daily Telegraph Ltd**. emphasized the need for a genuine belief in the opinion given for it to obtain the benefit of the protection of the law.

"The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendos into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view." (p 170) He described the right of fair comment in terms which emphasized the importance of the subjective appreciation of the writer. The concept was a simple one. The writer had to be expressing *his* honest opinion on a matter of public interest. He had to get *his* facts right. The area of inquiry was relatively limited. What were the facts on which the writer had made his comment? Were they matters of public interest? Were they accurate?

52 **In Cook v Telegraph Media Group Ltd** [2011] EWHC 763 (QB), HQ10D01492, (Transcript) following **Spiller**, the Court endorsed the view that the defence is available in respect of unreasonable, offensive and prejudiced viewpoints and that it is not necessary for a Defendant to persuade a judge or jury to agree with them. All that is required for a defence of fair comment to survive is that the relevant opinion, comment or inference, should be one it is possible to express honestly in the light of the facts. For this reason the defence tends increasingly to have the label "honest comment".

The future of fair comment

53 Lord Phillips opined on the need for reform and the future of fair comment. He certainly hinted towards a more liberal view of fair comment in the future. His comments are worthy of note:

> **"**In recent cases the area of inquiry in relation to the defence of fair comment has been expanded. The scope of public interest has been greatly widened. If **Cheng** [2001] EMLR 777, is accepted as correctly setting out the test of malice, the scope of malice has been significantly narrowed. The fact that the defendant may have been motivated by spite or ill-will is no longer material. The only issue is whether he believed that his comment was justified. In practice this issue is seldom likely to

be explored, for the burden is on the claimant and how can he set about proving that the defendant did not believe what he said? The subjective nature of the defence of fair comment has diminished. The issue is no longer the subjective one – did the defendant honestly believe that the facts on which he commented justified his comment? Instead the focus has been on the objective question: could an obstinate and prejudiced person have honestly based the comment made by the defendant on the facts on which the defendant commented?....

Would it not be more simple and satisfactory if, in place of the objective test, the onus was on the defendant to show that he subjectively believed that his comment was justified by the facts on which he based it? The Faulks Committee Report on Defamation 1975 (Cmnd 5909) recommended the retention of the objective test, but the New Zealand Defamation Act 1992 has placed the burden on the defendant of proving "honest opinion" (s 10).

There may be a case for widening the scope of the defence of fair comment by removing the requirement that it must be on a matter of public interest.

Careful consideration needs to be given to the suggestion that the defence of fair comment should extend to inferences of fact. Jurisprudence both in this jurisdiction and at Strasbourg – see **Nilsen and Johnsen v Norway** (1999) 30 EHRR 878, para 50 – has held that allegations of motive, which is inherently incapable of verification, can constitute comment. Prejudiced commentators can draw honest inferences of fact, such as that a man charged with fraud is guilty of fraud. Should the defence of fair comment apply to such inferences? Allegations of fact can be far more damaging even if plainly based on inference, than comments on true facts. Eady J has twice held that the defence of fair comment cannot apply where the defamatory sting is a matter of verifiable fact – **Hamilton v Clifford** [2004] EWHC 1542 (QB) and **British Chiropractic Association v Singh** [2009] EWHC 1101 (subsequently reversed by the Court of Appeal)."

54 However, it is sufficient to have restated the defence of fair comment to that of honest comment. There is no need at this stage to expand the ambit of fair comment or dilute the requirements that must be fulfilled before it is made out. In analyzing the facts of this case, I am satisfied that the defence has been properly made out by the Defendant.

A matter of public interest

55 I accept that the subject matter of the letter was generally a matter of public interest. The conduct of lead counsel for the Commission of Inquiry and the conduct of the proceedings at the Inquiry were admitted in this proceeding as a matter of high public profile and public debate. The public had a legitimate concern in my opinion when the controversy began. The question that will loom large for any reasonable person following the Inquiry is the manner in which such an important Inquiry was being conducted. The public would have held a legitimate concern on the conduct of a member of the Inner Bar and administration of justice generally.

The sting of the article was truly comment

56 I also accept that the words complained of were comment. It is the view held by the letter writer that the Claimant did not deserve SC. It was not a statement made "out of the blue". Admittedly, had the letter writer said that the Claimant did not deserve SC and that he is incompetent without more, then those are to be regarded as assertions of fact and not comment. There is no general reference to any facts to support that statement.

57 However, in this case there is a substratum of fact referred to in the article which will answer the reasonable reader's question "why do you hold that view?" In this case the letter writer holds the view of the Claimant's unsuitability as a senior counsel in light of his conduct at the Commission of Inquiry "for the world to see" and his behavior towards another senior member of the Bar. The letter writer states: "Having regard to his recent behaviour which was on television for all the country to see and given his disrespect for Karl Hudson-Phillips." The Claimant also admits to the majority of the pleaded facts that support the comment.

58 These facts were sufficiently notorious to form the basis of debate, criticism and a value judgment.

The facts are true

59 This is relatively easy as there is no contest that the fact on which the comment is based is true. There is no contest on the content of the proceedings at the Inquiry and the conduct of the Claimant. During cross examination I also noted that he did not hide his vigorous disapproval and criticism of Karl Hudson-Phillips QC.

Linkage between fact and comment

60 I am also of the opinion that the letter generally and the comments specifically implicitly indicate in a manner so as to enable a reader to judge how far the comment was well founded.

Honest comment

61 The letter makes it clear that the writer is commenting on the conduct of the Claimant rather than making a statement of fact. There is no malice on the part of the Defendant to defeat the defence. It was an honest opinion of the letter writer and it does not matter if the opinion was not shared by the editor.

62 The opinion was honestly held by the letter writer and it is not for the media house to show that it was a comment that was an honest expression of its views. The onus is on the Claimant to demonstrate that the views were not honestly held or they acted with malice. It is the honesty of the letter writer that must be impugned. See **Slim v Daily Telegraph**. Indeed Lord Porter in **Turner v Metro Goldwyn** stated:

> "The comment must be one which could have been made by an honest person, however prejudiced he might be and however exaggerated or obstinate his views. A critic need not be mealy mouthed in denouncing what he disagrees with."

No malice

63 There was no serious challenge on the defence on the question of malice. The most that can be said is that they did not have the transcripts. This hardly makes out a case of malice against the Defendants.

Conclusion

64 The comment and criticism made by this letter to the editor were made against clear references to admitted facts. The comment may have been an unkind one to the Claimant. However, it was germane to the topic of discussion and pinned to the Commission of Inquiry which continued to receive the full glare of the media. The Defendant was measured in its careful approach taken in publishing the letter and did no act maliciously.

65 One can understand that the Claimant feels aggrieved and hurt. However, one cannot simply by filing a libel claim and cry "character assassination," silence those

who hold divergent views no matter how diverse they are to his interests. To this extent, his feeling of disappointment and embarrassment stand no higher than the poet whose poem is ridiculed, the playwright whose play is given a bad review or the scientist whose formula is criticised by other experts. It amounts to fair comment on a matter of public interest.

66 In this case the Defendant's right to give voice to the expression of members of the public fits into the lexicon of fundamental rights and satisfies the requirement of honest opinion. The platform of the "letter to the editor" was not abused and in this instance, the voice of the member of the public trumps the individuals desire to keep his reputation immune from criticism.

67 The Claim is dismissed with prescribed costs to be paid by the Claimant to the Defendant. The Court shall quantify these costs in default of agreement.

68 The Court expresses its gratitude to counsel for both parties for their helpful submissions.

Dated this 20th day of April 2011

Vasheist Kokaram
Judge