THE REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

Claim No. CV2014-03990

JWALA RAMBARRAN

Claimant

AND

DR. LESTER HENRY

Defendant

Appearances:

Claimant: Anand Ramlogan SC leading Richard Arjoon Jagai and Douglas C. Bayley and instructed by Trishana Ramnath for the Claimant

Defendant: Gilbert Petersen SC leading/instructed by Ken Wright for the Defendant

Before The Honourable Mr. Justice Devindra Rampersad

Dated the 28th day of September, 2017.

JUDGMENT

Table of Contents

1. The defendant appeared on the radio talk show program "Afternoon Drive" on local radio station I95.5 FM on Monday 9th June 2014 at approximately 4:45 p.m. At that time, the claimant was the Governor of the Central Bank of Trinidad and Tobago [the Central Bank]. The claimant alleges that while being interviewed, the defendant falsely and maliciously uttered words which were defamatory of him. In his statement of case, he alleged a number of matters of concern and a number of complaints arising in the course of the interview but officially reduced those allegations, through counsel, to only focus on allegations made that the Central Bank's monies were spent to improve his private property. The alleged defamatory words were:

"The Defendant:	*Let me interrupt you, you should investigate who was the contractor that repaired the house of the Governor.*
Radio Announcer:	*SIS, I am asking, is it SIS?*
The Defendant:	*I believe so.*
Radio Announcer:	*well I really I don't want SIS to think as if I am picking at it, it's just that almost every time I hear about a contract, the name SIS comes up so I am asking.*
The Defendant:	*I have been told it's SIS.*
Radio Announcer:	*Alright, so the issue of moneys, if their situation where…*
The Defendant:	*sorry, before I leave that point, you should also try and find out the cost of that repair, think about the fire truck and you might have an idea.*
Radio Announcer:	*Who has to pay for that?*
The Defendant:	*The Central Bank.*
Radio Announcer:	*Is it his personal house? or?...*
The Defendant:	*Yes, his personal house.*
Radio Announcer:	*Was repaired?*

The Defendant:	*yeah.*
Radio Announcer:	*Isn't there a cap on what…?*
The Defendant:	*I do not know the exact figure, but I'm sure it's a lot,*
Radio Announcer:	*oh*
The Defendant:	*No, because this was in the papers you know, this was reported in the press that he did not want to live in the official Governor residence he decided to go back home, in his house.*
Radio Announcer:	*Where is this?*
The Defendant:	*In Valsayn.*
Radio Announcer:	*If that is so, he is just following the example of the Prime Minister.*
The Defendant:	*Yeah, but still, I mean, it should be …*
Radio Announcer:	*Investigated?*
The Defendant:	*yeah."*

2. According to the claimant, the said words in their natural and ordinary meaning were understood to mean and did mean that the claimant:

   2.1. Had improperly caused the Central Bank to spend millions of dollars on his private residence; that he opted to turn down the Official Residence of the Central Bank in favour of his own residence and then used the Central Bank's money to fix up his home to the tune of the same amount of money spent on recovering the fire truck, that is the sum of 6.8 million dollars;

   2.2. Had used SIS Ltd to do repairs to his home and in politicising the Central Bank, had sought to follow the Prime Minister by using SIS Ltd, one of the People's Partnership (the PP) Government's Election Financiers; and

   2.3. Had sought, in politicising the operations of the Central Bank, to provide financial benefits to DFL owned by Maritime, indirectly connected in the public's mind with Ferguson and in so doing was acting like the PP Government in providing indirectly, financial benefits to Ferguson and the Maritime Group. That he had also used

SIS Ltd for his home as they were connected with the PP Government and was rewarding them with financial benefits paid by the Central Bank.

3. In his defence, the defendant denied that the words bore or were understood to bear or were capable of bearing the meanings alleged or any meaning defamatory of the claimant. The defendant went on to seek the protection of the defences of fair and honest comment on matters of public interest along with qualified privilege.

4. Having heard and seen the parties give evidence and having listened to the recording of the program produced in evidence by the claimant and having read the pleadings and the submissions on both sides, the court rejects the defence and finds for the claimant.

Are the words defamatory?

5. Mendonça JA in ***Kayam Mohammed & Ors v TPCL & Ors***[1] re-iterated the established learning as to the factors to be considered by a court in determining whether the words are defamatory:

> *"10. There was no dispute as to the proper approach of the Court in determining the meaning of words alleged to be defamatory. The principles were recounted by Lord Nicholls in* ***Bonnick v Morris*** *[2003] 1 A.C. 300 (at para 9):*
>
> > *"Before their Lordships' Board the issues were reduced to two: meaning and qualified privilege. As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarized by Sir Thomas Bingham MR in Skuse v Granada Television Ltd. [1966] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the "Sunday Gleaner" reading the article once. The ordinary reasonable reader is not naïve; he can read between the lines but he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The*

[1] Civ App No 118 of 2008

court must read the article as a whole, and eschew over-elaborate analysis and, also too literal an approach. The intention of the publisher is not relevant. An appellate court should not disturb the trial Judge's conclusion unless satisfied he was wrong."

11. The Court should therefore give the article the natural and ordinary meaning the words complained of would have conveyed to the notional ordinary reasonable reader, possessing the traits as mentioned by Lord Nicholls, and reading the article once. The natural and ordinary meaning refers not only to the literal meaning of the words but also to any implication or inference that the ordinary reasonable reader would draw from the words. Thus in ***Lewis v Daily Telegraph Ltd****. [1964] AC 234, 258 Lord Reid stated:*

"What the ordinary man would infer without special knowledge is generally called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of the natural and ordinary meaning."

12. And Lord Morris in ***Jones v Skelton*** *[1963] 1 W.L.R 1363, 1370-1371 stated:*

"The ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words...

The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not filtered by any strict legal rules of construction would draw from the words."

13. It is also relevant to note that the words have only one correct natural and ordinary meaning. So that for example in ***Charleston v News Group Newspapers Ltd****. [1995] 2 AC 65 Lord Bridge, after referring to*

the fact that the natural and ordinary meaning of words may include any implication or inference stated (at p.71):

> *"The second principle, which is perhaps a corollary of the first, is that, although a combination of words may in fact convey different meanings to the minds of different readers, the jury in a libel action, applying the criterion which the first principle dictates, is required to determine the single meaning which the publication conveyed to the notional reasonable reader and to base its verdict and any award of damages on the assumption that this was the one sense in which all readers would have understood it."*

14. Where, as in this jurisdiction, the Judge sits without a jury, it is his function to find the one correct meaning of the words. Although when considering the defence of Reynolds privilege the Court must have regard to the range of meanings the words are capable of bearing as I will mention below, it is still the function of the Judge as regards the meaning of the words complained of to find the single meaning that they do convey. That does not mean that where an article levels a number of allegations as is the case here, that it has only one meaning. What it does mean is that where there are possible contradictory meanings of the words, the Court cannot recognize, what may be the reality, that some reasonable readers will construe the words one way and others another way. The Court must determine the one correct meaning out of all the possible conflicting or contradictory interpretations.

15. What meaning the words convey to the ordinary reasonable reader is a question of fact to be found by the Judge. …"

6. The issue was also helpfully summarized by Tugendhat J in ***Cooper and another v Turrell*** [2011] EWHC 3269 (QB):

> *"[33] In deciding at the trial of a libel action the meaning of the publications complained of, the court adopts the same test as it applies in deciding what meaning such words are capable of bearing. That test was most recently set out by Sir Anthony Clarke MR in* ***Jeynes v News Magazines Ltd*** *[2008] EWCA Civ 130 at para 14 as follows:*
>
> > *"The legal principles relevant to meaning . . . may be summarised in this way:*
> >
> > *(1) The governing principle is reasonableness.*

(2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read 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.

(3) Over-elaborate analysis is best avoided.

(4) The intention of the publisher is irrelevant.

(5) The article must be read as a whole, and any 'bane and antidote' taken together.

(6) The hypothetical reader is taken to be representative of those who would read the publication in question.

(7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation . . .'.

(8) It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense.'"

[34] It is not the function of the court simply to either reject or accept the meaning put forward by the Claimant. The court must reach its own conclusion. …."

7. This court has considered the words complained of as represented in the CD recording supplied by the claimant and is of the respectful view that the words are defamatory of the claimant.

8. The court finds that they suggest that the claimant refused to take up the Governor's official residence and, instead, remained in his private residence and caused the Central Bank, and ultimately the taxpayer since the Central Bank uses public funds, to pay for repairs done to his private home.

9. The words go on to suggest that these repairs were done by SIS Limited – a local contractor which was at the time widely alleged, acknowledged and or known to be a supporter of the political party in power i.e. the PP comprising substantially of the United National Congress (the UNC), the

Congress of the People (the COP), the National Joint Action Committee (NJAC) and the Tobago Organization of the People (the TOP).

10. The court also holds that the words went on to mean that this action of refusing to remain in the official residence and having SIS Limited do the repairs was following the example of the Prime Minister, thereby politicizing the claimant and his position as if he was in some way affiliated to the ruling political party at the time hence the reason for following the example of the Prime Minister. Further, the words meant that the cost of the repairs was outrageous, in line with the exorbitant cost of the removal of a fire truck which had run off the road the year before and which was alleged to have cost the government, and the people of Trinidad and Tobago, the ridiculous sum of $6.8 million – a national "scandal" which was widely publicized and commented on in the public domain the year before. As a result, in the words of the radio announcer, with which the defendant agreed, the words spoken inferred that the situation should be investigated.

11. To the court's mind, the ordinary person would be left with the inescapable impression that the claimant had misused his position to gain an unfair advantage for himself in his private property holding using public funds i.e. Central Bank funds, at an over-the-top and exorbitant price. The tenor of the statements, therefore, would have led the listener, the ordinary person, to come to the conclusion that the claimant was not an honest person and was not fit and or qualified to occupy the important office of Governor of the Central Bank - the latter being a sentiment which the defendant unabashedly confessed to in cross-examination. Further, that fitness or qualification for office carried with it political undertones as the words sought to link the claimant with the current party through his alleged employment of SIS Ltd and his following the example of the Prime Minister.

Is this a case in Libel or Slander?

12. Attorney-at-law for the defendant suggested that this is a case of slander and it is therefore necessary for the claimant to prove actual damages. In

the circumstances, since none was pleaded nor proven, the claimant would have no recourse in light of this failure.

13. On the other hand, attorney for the claimant has suggested that this case falls within one of the four exceptions to the slander rule and therefore it is actionable per se[2].

14. In any event, the claimant's attorney argued that the nature of the broadcast was such that it was recorded, as stated by the claimant himself and as referred to by the defendant who claimed to have heard an "official copy" of the program. Therefore, the program took on a permanent nature and amounted to libel[3].

15. The claimant's attorney relied upon *Gatley on Libel and Slander* (12th Ed.) at paragraph 3.6 which states as follows:

> *"3.6 The consequences of the distinction.*
>
> *Libel is committed when defamatory matter is published in a ''permanent'' form or in a form which is deemed to be permanent. Defamation published by spoken word or in some other transitory form is slander. In English law libel is always actionable per se, that is to say the claimant is not required to show any actual damage, and substantial rather than merely nominal damages may be awarded even in the absence of such proof, whereas in slander, with four exceptions, the cause of action is not complete unless there is ''special'' damage, i.e. some actual, temporal loss.45 The four exceptional cases are:*
>
> > *(1) Where the words impute a crime for which the claimant can be made to suffer physically by way of punishment.*
> >
> > *(2) Where the words are calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication.*
> >
> > *(3) Where the words impute to the claimant a contagious or infectious disease.*

[2] See CV2011-01810 ***Rueben Cato v Caribbean New Media Group (CNMG) Limited*** per Rahim J; ***Gatley on Libel and Slander*** (12th Ed.) at paragraph 3.6

[3] See Mohammed J in CV2008-00225 ***Jude Neil Ready and ors v Caribbean Communications Network Limited and ors*** at paragraph 31, Moosai J (as he then was) in the case of ***Eden Shand v Caribbean Communications Network Ltd and ors*** HCA 1782 of 1994 and CV2016-04456 ***Junior Sammy and ors v More FM Ltd and ors*** per Seepersad J at paragraph 7.

(4) By the Slander of Women Act 1891, where the words impute adultery or unchastity to a woman or girl."

16. The court has no hesitation in holding that the defamatory words would have been calculated to disparage the claimant in his office as Governor of the Central Bank, a position which the defendant admitted in cross-examination that he felt the claimant was not the best qualified for[4]. As a result, the second exception stated above quite clearly applies.

17. The court finds favour with the claimant's attorney at law's submission that the issue is one of libel rather than slander. There is no doubt that the words used in the program have not been lost in the breeze but have been retained for posterity in the permanent form of a recording **in at least three places**:

    17.1. On the servers or hard drives or recorded memory apparatus of the radio station; from which

    17.2. The "official" CD recording referred to by the defendant in cross examination which was "burnt"; along with

    17.3. The "burnt" CD presented to the court in evidence by the claimant. Obviously, this last recording, which forms part of the official record of the court, is a recording which is available to the public as part of the court record.

18. It is probably possible for other copies of the CD to be obtained "officially" from the radio station barring any time restriction with respect to them retaining recorded programs.

19. The time has long passed for the categorization of the transient nature of slander in the modern era to be revised. To my mind, especially in circumstances where radio stations are no longer limited by the strength of their broadcasting signal but now extend over the internet to an international audience via a multitude of online live streaming software[5], apps and other technology,[6] all with the capability of recording such

[4] See page 27 line 1 of the transcript
[5] As was used in the case of the claimant's program used – "Apowersoft" – to record the program online
[6] See for example http://www.androidauthority.com/best-radio-apps-for-android-393884/

programs, along with the requirements of the law and or lawful procedure[7] for the maintenance of recordings of radio programs, the court would be hard-pressed to accept that radio broadcasts are the sole domain of the category of slander. The transience of the spoken word in the golden age of radio has been replaced by the relative permanence in the current era of global information and technology. Therefore, the court finds that in this case the cause of action lies in libel and not in slander[8].

20. Therefore, and in any event, on either footing, the defamation is actionable per se.

Were the words uttered by the Defendant?

21. Despite the fact that the defendant pled that:

    21.1. He could neither admit nor deny that the words were broadcasted as alleged and or that the words were accurately reproduced in the statement of case[9]; and

    21.2. He did not admit that the words were spoken by him[10];

    He also pled in the alternative, in contradiction, that the words spoken by him constituted fair and honest comment on matters of public interest[11] and were spoken on an occasion of qualified privilege[12].

22. To my mind, the defendant did not seriously pursue his denial that it was he who spoke these words about the claimant on the program. In any event, his failure to admit or deny that the words were spoken by him was clearly

[7] See for example paragraph 2.3.1 of the "Broadcasting Content Complaints Handling Procedures" issued by the Telecommunications Authority of Trinidad and Tobago which provides, amongst other things, that:

> *"In accordance with the terms of its Concession, a broadcaster is required to keep recordings of broadcast material for a minimum period of twenty-eight (28) days after the date on which such material was broadcast."*

[8] See ***Cooper & Or v Turrell*** [2011] EWHC 3269 (QB) in which Tugendhat J held a recording of a voicemail was libel and not slander

[9] Paragraph five of the defence

[10] Paragraph seven of the defence

[11] Paragraph eight of the defence

[12] Paragraph 10 of the defence

contrary to the provisions of Part 10 (5) of the CPR as he failed to put forward any reasons for resisting the allegation[13]. He would have been in the best position to determine whether or not the words complained of were spoken by him, especially after listening to the CD recording. The court therefore disregards these pleas of failing to admit or deny or his denial as set out above in the preceding paragraph.

23. In any event, the claimant disclosed to the defendant the CD recording in the disclosure process and he never said in his witness statement that, having listened to the CD, the voice was not his. Further, counsel for the claimant took the defendant through a transcript of the recording almost line by line and he basically acknowledged the contents of the interview and his input as per the claimant's pleading.

24. The defendant's attorneys, in response to the pre-action protocol letter issued on behalf of the claimant, never complained about the identity of the maker of the alleged statements and seemed to have accepted that the statements were in fact made by the defendant.

25. In any event, the defendant's attorney at law did not raise this issue as a live one in the submissions in which he did not address it at all.

26. Therefore, the court rejects the defendant's attempt to neither admit nor deny that the recording was of him and that the words uttered were his words and, instead, having heard the recording and heard the defendant give evidence, accepts that it was the defendant responding to the radio announcer on the CD recording and that the words complained of in the statement of case were in fact spoken by the defendant.

The Defences raised

27. Having found that the defendant uttered the words complained of and that the words were defamatory of the claimant, the court will now consider the defences raised.

[13] See ***M.I.5 Investigations Ltd. v. Centurion Protective Agency Ltd.*** Civ. App. No. 244 of 2008

28. *Gatley on Libel and Slander* (12th edn, 2013) states at paragraph 12.7 under the rubric '**Centrality of recognisability as comment**':

> *"It is a fundamental rule that the honest comment defence applies to comment and not to imputations of fact. If the imputation is one of fact, the defence must be justification or privilege ..."*

29. DaCosta C.J. in the Bahamian case of ***Osadebay v Solomon*** Supreme Court of Bahamas No. 803 of 1979 (unreported) stated:

> *"Again, the comment must be an expression of an opinion and not an assertion of fact and the critic should always be at pains to keep his facts and his comments upon them severable from one another. For if it is not reasonably clear that the matter purported to be fair comment is such, he cannot plead fair comment as a defence. The facts themselves must be truly stated as Fletcher Moulton, L.J. observed in* ***Hunt v. Star Newsp. Co.*** *([1908–10] All E.R. Rep. at 517);*
>
> > *'In the next place, in order to give room for the plea of fair comment, the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it: see, for instance, the direction given by Kennedy J., to the jury in Joynt v. Cycle Trade Publishing Co. ...which has been frequently approved of by the courts. Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation.' [emphasis added]*

30. As a result, the court has to first of all look at the statements to determine whether they are comments or imputations of fact. Following on from that, if they are in fact comments, then the court has to consider the principle applicable at common law to this defence. That principle was set out in ***Ramlakhan v T & T News Centre Ltd*** CA Civ 30 of 2005 (15 February 2008, unreported), where Mendonça JA said:

> *"(40) The position at common law is that the defendant may rely on the defence of fair comment* ***only if he proves every fact on which the comment is based is true or is the subject of privilege****. The question of privilege is not relevant to this case. In [****Kemsley v Foot*** *[1952] 1 All ER 501], supra, Lord Porter stated (at [506]):*

"In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence.""

[Emphasis added]

31. The applicable statements made by the defendant are as follows:

31.1. <u>With respect to the work that was done and by whom:</u>

"The Defendant: *Let me interrupt you, you should investigate who was the contractor that repaired the house of the Governor.*

Radio Announcer: *SIS, I am asking, is it SIS?*

The Defendant: *I believe so.*

…..

The Defendant: *I have been told it's SIS*

…..

Radio Announcer: *Is it his personal house? or?...*

The Defendant: *Yes, his personal house.*

Radio Announcer: *Was repaired?*

The Defendant: *yeah.*

31.2. <u>With respect to the cost of the work and who had to pay for it:</u>

The Defendant: *Sorry, before I leave that point, you should also try and find out the cost of that repair, think about the fire truck and you might have an idea.*

.....

Radio Announcer: *Who has to pay for that?*

The Defendant: *The Central Bank.*

Radio Announcer: *Isn't there a cap on what…?*

The Defendant: *I do not know the exact figure, but I'm sure it's a lot,*

31.3. <u>With respect to the claimant's choice of residence and the example he was following:</u>

The Defendant:	*No, because this was in the papers you know, this was reported in the press that he did not want to live in the official Governor residence he decided to go back home, in his house.*
Radio Announcer:	*Where is this?*
The Defendant:	*In Valsayn.*
Radio Announcer:	*If that is so, he is just following the example of the Prime Minister.*
The Defendant:	*Yeah, but still, I mean, it should be …*
Radio Announcer:	*Investigated?*
The Defendant:	*Yeah."*

32. There is absolutely no evidence whatsoever from the defendant proving that SIS Limited repaired the claimant's private home at the expense of the Central Bank nor what the cost of it was. There was nothing pointing to any definitive corroborating information that SIS Limited had in fact done repairs to the claimant's home. He went on to say this was information that he was told but he failed to identify by whom and he definitely failed to identify that such information was in the public domain. Therefore, to my mind, he was asserting a hitherto unasserted fact or, at the very least, making an imputation of fact. The statement in this regard is an imputation of fact derived from an unknown source and not a fair comment.

33. Further, there was no empirical information or data which suggested what the cost of the alleged repairs to the claimant's private home was. In fact, the defendant admitted that he did not know the exact figure but he went on to say that he was sure that it was a lot and that was preceded by restoring the picture in the mind of the listener of the fire truck fiasco which had occurred the previous year and which was widely reported in the news as being in the vicinity of $6.8 million to give an idea of how much the cost of repairs to the claimant's private home was. Again, the costs of the repairs to the claimant's private home was not in the public domain and the

defendant did not go so far at that time as to identify that he was informed by anyone about what those costs were. Instead, he sought to assert that if one were to think about the costs involved in the fire truck fiasco, one would have an idea of what the costs in these circumstances were. He was, therefore, quite clearly drawing a parallel between the two incidents and imputing a fact in relation to the costs of the repairs rather than commenting on the same.

34. As a result, on these two counts, the court is of the respectful view that the defendant made imputations of fact and therefore the defence of fair comment is not available to him in relation to the same. Even if the court is wrong on that account, the defendant failed to establish the facts relied upon other than in relation to the example mentioned by him and set by the Prime Minister i.e. the political leader of the ruling party. He clearly had no facts whatsoever in relation to what he said and purported to assert so that, in any event, he could not be said to be commenting fairly or honestly on information received or imputations or inferences drawn where he has failed to show that he had any factual basis.

35. The court therefore rejects this defence out right.

Qualified Privilege

36. This common law defence has transformed dramatically since the decision in ***Reynolds v Times Newspapers & Ors*** 1999 UKHL 45. Its transformation was discussed at length by the Privy Council in ***Seaga v Harper***[14] where it was established that the defence of Reynolds privilege applied outside of the confines of the media arena and could apply to circumstances such as that before this court.

37. The most recent statement on the common law defence was as follows:

> *"It is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part of the maker to communicate them to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory, so long as they*

[14] [2008] UKPC 9; [2009] AC 1 at paragraphs 5 et al

are made without malice, that is to say, honestly and without any indirect or improper motive. It is the occasion on which the statement is made which carries the privilege, and under the traditional common law doctrine there must be a reciprocity of duty and interest: Adam v Ward [1917] AC 309, 334 per Lord Atkinson."[15]

38. To my mind, as in ***Seaga***, *"the element of reciprocity of duty and interest"* is lacking if one were to adopt the traditional common law approach. Even though the defendant is a senator and may feel a duty to make statements about matters of public importance, and the matter is one of clear public importance as recognized by the parties in cross-examination, there is no corresponding interest or duty to receive this information by the public. In particular, the public has no duty to receive false information. Further, the defendant was not speaking in that place where he is expected to speak of such matters i.e. in the upper house of the Parliament - the Senate, where the cloak of qualified privilege more aptly applies.

39. Instead, the defendant would have been on firmer ground by adopting the more liberal approach afforded him under Reynolds privilege which is a Privy Council sanctioned defence that he could have availed himself of, as he purports to do in his pleaded defence.

40. In that regard, the court bears in mind the 10 factors raised by Lord Nicholls in ***Reynolds*** which ought to be considered by a court and which were clarified in ***Jameel (Mohammed) v Wall Street Journal Europe Sprl*** [2007] 1 AC 359 as being 10 factors which are not hurdles to be surmounted but, rather, are to be borne in mind as part of the whole story before the court.

The Reynolds factors

41. The court will therefore consider those 10 factors in the context of these proceedings:

42. **The seriousness of the allegation**. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

[15] *Ibid* paragraph 5

42.1. The allegations were rather serious. Allegations relating to the integrity of a public official holding the office of Central Bank Governor and whose responsibility is defined by statute for the public interest strikes to the heart of the office and, by extension, to the person in charge and holding that office.

42.2. The Central Bank Act Chapter 79:02 of the laws of Trinidad and Tobago provides at section 3 (3):

(3) The Bank shall have as its purpose the promotion of such monetary credit and exchange conditions as are most favourable to the development of the economy of Trinidad and Tobago, and shall, without prejudice to the other provisions of this Act—

(a) have the exclusive right to issue and redeem currency notes and coin in Trinidad and Tobago;

(b) act as banker for, and render economic, financial and monetary advice to the Government;

(c) maintain, influence and regulate the volume and conditions of supply of credit and currency in the best interest of the economic life of Trinidad and Tobago;

(d) maintain monetary stability, control and protect the external value of the monetary unit, administer external monetary reserves, encourage expansion in the general level of production, trade and employment;

(e) undertake continuously economic, financial and monetary research;

(f) review—

(i) legislation affecting the financial system; and

(ii) developments in the field of banking and financial services, which appear to it to be relevant to the exercise of its powers and the discharge of its duties; and

(g) generally, have the powers and undertake the duties and responsibilities assigned to it by any other law.

42.3. Primarily, the Governor's duties are defined at section 10:

"10. (1) The Governor shall be the chief executive officer of the Bank and shall be entrusted with the day-to-day management, administration, direction and control of the business of the Bank with authority to act in the conduct of the business of the Bank in all matters which are not by this Act

or by the Rules and Regulations made thereunder specifically reserved to be done by the Board and shall be answerable to the Board for his acts and decisions."

42.4. Allegations impinging on the integrity of the claimant, being the Governor, at the time would obviously have very deep reaching consequences in light of his role as defined above in the core national and economic institution that is the Central Bank. Allegations such as the one made by the defendant i.e. that the claimant has used substantial Central Bank funds for his own private purpose against the background of some sort of political affinity undermines the claimant's independence and integrity in no small measure. Therefore, to this court the allegations are extremely serious ones.

43. **The nature of the information, and the extent to which the subject matter is a matter of public concern**.

43.1. Information of this type, if true, is definitely of great public importance and concern. However, the public is not interested and ought not to be interested in information that is not true. In this case, the defendant has not proven any of the elements to be true except for the fact that the claimant was occupying his personal residence as opposed to the official residence for the Governor and that the Prime Minister at the time had at one time occupied her personal residence instead of the official residence for the Prime Minister, which was a matter of public knowledge.

43.2. Therefore, the public would have no concern in unverified information.

44. **The source of the information.** Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

44.1. The defendant failed to provide any information in respect of the source of any of the matters he spoke of which had been complained about. There was one bit of information that he said that he got from someone else i.e. that SIS Limited had done the repairs on the claimant's home and even in that case the defendant did not disclose

the source of that information to suggest that the source was a credible one.

44.2. The court is therefore unable to place any weight on this information.

45. **The steps taken to verify the information.**

45.1. The answer to this is an emphatic none. It was drawn to the defendant's attention that, as a senator, he could have posed a question in Parliament but there was no evidence of him doing that. It was also drawn to his attention that he could have sought information under the Freedom of Information Act Chap. 22:02 but, once again, there was no such evidence. In fact, there was no evidence whatsoever of any investigation done by the defendant.

45.2. In cross examination, the defendant sought to raise for the first time that he had done some sort of investigation but the court does not believe that especially since it was not pleaded nor mentioned in his witness statement or anywhere else for that matter and was just mentioned in passing during cross examination.

45.3. Therefore, the defendant, who admittedly had resources available to him to investigate the allegations, did not and chose instead to make sensational statements in an absolutely reckless manner.

46. **The status of the information**. The allegation may have already been the subject of an investigation which commands respect.

46.1. The claimant alleged in cross-examination that the information with respect to work being done at his private residence would have been available from the Central Bank Annual Report. Other than that, there is no evidence of any investigation. Certainly, on the unverified information presented by the defendant, there would be no grounds for one.

47. **The urgency of the matter**. News is often a perishable commodity.

47.1. There was absolutely no information presented by the defendant in this regard in order to explain why he made these statements without verifying them first or even doing any basic investigation in relation thereto.

47.2. In any event, there was no urgency demonstrated by the defendant against the background of an event on which he was allegedly commenting on that had occurred quite some time before.

48. **Whether comment was sought from the claimant**. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

48.1. Obviously, no such comment was sought from the claimant.

49. **Whether the article contained the gist of the claimant's side of the story**.

49.1. In this category as well, the court has no evidence of this factor. Therefore, having listened to the recording, the broadcast of the interview mentioned nothing about the claimant's side of the story.

50. **The tone of the article**. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

50.1. The tone of the interview was antagonistic and hostile towards the claimant. There was no balance and no attempt was made at any balance. It was obviously a broadcast which was meant to highlight the claimant's shortcomings but had no factual basis in respect of the matters which this court has to deal with.

50.2. The defendant came across in the interview on the radio program as being very dissatisfied with the claimant and his position as Governor. It is that tone which the claimant's attorney at law requisitioned the court to construe as constituting malice.

51. **The circumstances of the publication, including the timing**.

51.1. The court can take notice that the radio program coincides with the after work traffic. It seemed geared towards catering to the traveling public at the time.

51.2. The defendant's attorney at law sought to argue that:

"9. It is the Defendant's submission that on the said date of the interview, the topic surrounding the Claimant was already controversial. Two days prior to the interview, an article published on the 7th day of June, 2014 by the Daily Express Newspaper was already being circulated in the

public's domain which spoke extensively on the lack of qualification of the Claimant. Thus, the public confidence in the Claimant had already been diminished days before the alleged defamatory remarks were made and the alleged statements named by the Defendant could not have affected the public's perception of the Claimant."

51.3. Firstly, the court will disregard this information and submission since there was no evidence before the court of any such article. Definitely, no such article was disclosed by the defendant so that, pursuant to part 28.13 (1) of the CPR, the defendant would not be able to rely on any such article.

51.4. However, this submission gives a hint as to the circumstances and timing of the publication as it is obvious that the radio program director may have wanted to capitalize on an alleged ongoing topic and it seems that the defendant was brought in to speak about it and he showed a disinclination towards the claimant's qualification for the post. Nevertheless, these circumstances and this timing were not such as to encourage the court to find the defendant to have been responsible in making the comments and statements that he made.

52. In the circumstances, the court finds that the defendant was reckless in making the statements which he did, statements which had no factual basis and which he did not even take the time to investigate or to speak to the claimant about prior to him making them on the radio. The court therefore rejects the defence of qualified privilege as, considering all of the 10 factors referred to above, not as hurdles but as important factors for the court's consideration, the court finds that the defendant is not entitled to rely on qualified privilege – whether in the traditional sense as modified under Reynolds privilege.

Conclusion on liability

53. For the reasons given above, the court finds that the defendant has not proven his defence on the grounds of fair comment and or qualified

privilege and he is therefore liable to the claimant for damages arising out of his defamation.

The failure to disclose the recording

54. The claimant's attorneys at law pointed out in submissions that the court ought to pay regard to the fact that the defendant acted improperly in failing to disclose the fact that he had what he termed the "official" recording of the program which he had received from the radio station.

55. It is more than just passing strange that the defendant failed to disclose this in discovery. Part 28 of the CPR requires a party to disclose all documents[16] which are directly relevant to the proceedings. Part 28.1 (4) goes on to define that a document is "directly relevant" if:

    55.1. the party with control of the document intend to rely on it;

    55.2. it tends to adversely affect that party's case; or

    55.3. it tends to support another party's case;

    with the exclusion of the "rule in Peruvian Guano"[17].

56. Having regard to the defence referred to above in which the defendant did not admit nor deny whether the words complained of were words spoken by him, he must have known that a recording of the program obtained from the radio station was directly relevant to the case since it would have identified his voice on it thereby dealing definitively with this issue. His explanation as to why he failed to disclose it was, to my mind, wholly unacceptable as he attempted to suggest that it would not have been admissible as evidence in court. Respectfully, that was not a decision for him to make but, really, it was one for the court. When one considers the scholarliness and academic background of the defendant who, amongst other things, teaches at the University of the West Indies and was a senator

[16] Part 28.1 (2) defines "documents" to mean anything on or in which information of any description is recorded and, in this case, would include a CD on which information is recorded

[17] See the case from which the rule gets its name ***Compagnie Financiere du Pacifique v Peruvian Guano Co*** (1882) 11 QBD 55

out of the Parliament of Trinidad and Tobago, this court does not accept that when the disclosure document was signed by the defendant, whether personally or upon his instructions, that he was justified in excluding and or failing to disclose the "official" recording. In fact, the court finds that he has not complied with the provisions of the rules in that the list of documents failed to disclose this recording and this impacts negatively upon his credibility. Further, his failure to do so gives the court the impression that he wilfully and deliberately chose to exclude vital evidence by omission and that he chose to suppress evidence which may have been helpful to the claimant's case or detrimental to his own.

57. The court deprecates this type of conduct and behaviour and confirms that it would have had a negative impact upon his credibility in this matter.

Damages

58. The court has considered the authorities referred to by the claimant's attorney at law. The court notes that the defendant's attorney at law made no submission in respect of the issue of damages and relied solely on the submission that the defendant was not liable to the claimant.

59. In coming to its decision on the issue of damages, the court considers the following unchallenged statements of the claimant[18]:

    59.1. At the material time, the claimant was the Governor of the Central Bank carrying out the important statutorily imposed economic function cited in that Act, as set out above, with effect from 17 July 2012;

    59.2. Prior to his appointment as Governor, he had worked for the Central Bank for 14 years in various capacities;

[18] The claimant was not cross-examined on his evidence in his witness statement relating to matters involving the effect that the program had on him i.e. on the issue of damages and the court relies upon its discussion at paragraph 7 et al. of its judgment in the case of HCA No. 66 of 2002:- ***Debbie Mohammed v Archibald Bellamy, The Attorney General of Trinidad and Tobago and Ramnarine Sookdeo*** with respect to the failure to cross examine.

59.3. He had built a career in the financial sector for over 2 years prior to becoming the Governor;

59.4. Over the years he was regularly contacted by the media to present his views to them on various matters pertaining the economy and financial sector including and especially in relation to the monetary policy of the Central Bank and fiscal policy of the government;

59.5. He has attained various academic qualifications including a BSC degree with upper second class honours in Economics and Mathematics from the University of the West Indies, St. Augustine, and MSc degree with honours in Financial Economics from the University of London. He is also a graduate of Executive Economic and Financial Training Programs of Harvard Kennedy School of Government, the IMF Institute and the Federal Reserve Bank of New York;

59.6. The talk show had a wide-ranging audience both nationally and internationally, via the Internet;

59.7. The claimant was faced with ridicule, embarrassment and contempt on various social media platforms along with some of the most vile and utterly disrespectful comments which were made about him including that he was politically motivated, that he was colluding with SIS and that he was a corrupt person using tax payers' dollars to renovate and improve his private home, all of which caused him great distress[19];

59.8. The claimant felt ashamed to face the employees at the Central Bank after the program and he was subjected to both grave public embarrassment and humiliation;

59.9. The defamatory remarks were the subject of local talk shows both on radio and television which were also accessible online to the international community;

[19] See paragraph 24 of his witness statement which was not challenged. There was no clinical diagnosis of depression and therefore that allegation was ignored by the court.

59.10. The defendant's position as an opposition senator in the Parliament of Trinidad and Tobago gave him certain credibility when he spoke;

59.11. The work done at the claimant's private residence entailed the installation of security cameras and a guard booth, both of which were sanctioned by the board of the Central Bank;

59.12. The defendant showed absolutely no remorse in the statements he made and never apologized or took any steps towards conciliation;

59.13. The claimant had, up to that time, an unblemished reputation, despite the defendant's disapproval of his qualification for the job.

60. This court discussed the law relating to damages in an action for defamation in its decision in CV 2007 – 00348 ***Kenneth Julien v Camini Marajh & Trinidad Express Limited***[20] and relies upon the same together with the authorities referred to therein without feeling the need to repeat the same here.

61. Having regard to all of the factors referred to in the preceding paragraphs, the court is of the respectful view that the claimant is entitled to compensatory damages along with an uplift for aggravated damages. The defendant's conduct has been less than would have been expected for someone of his stature and position. Mention was made of the wilful failure to disclose a most relevant item i.e. what he termed to be the "official" recording from the radio station which was the copy of the recording which he received directly from the station. When that type of conduct is added to the absolute recklessness of his statements made in such an expansive forum, nationally and internationally, based on absolutely no good foundation whatsoever and without an iota of investigation whatsoever, it is clear to the court that the defendant acted in a manner designed to undermine the claimant's political neutrality and reputation. He was dissatisfied with the claimant's appointment to the role and that dissatisfaction tainted his portrayal of the claimant in the program.

62. Consequently, the court awards the claimant the sum of $550,000.00 inclusive of an uplift for aggravated damages.

[20] See especially from paragraphs 121 et al.

Costs – Prescribed or Indemnity?

63. With respect to costs, the claimant's attorney at law relies on the decision of Kokaram J in ***Eshe Lawrence & Ors v The Attorney General of Trinidad and Tobago*** CV 2015 – 02257 to contend that an order for costs on an indemnity basis instead of the general rule of prescribed costs should be made.

64. The defendant's attorney at law did not deal with this issue in his submissions in response.

65. Essentially, the claimant's attorney at law has asked the court to show its deprecation of the defendant's conduct in relation to the failure to disclose, the procedural steps taken with respect to the appeal of this court's decision to refuse to strike out the claimant's homemade recording of the program, all the while putting the claimant to strict proof of whether or not the words were spoken by him. Reference was also made to the reasoning of the learned judge in the ***Lawrence*** case, Kokaram J, at paragraph 63 thereof which states:

> *63. Costs on indemnity basis has traditionally been awarded where 'there has been some culpability or abuse of process such as:*
>
> *(a) Deceit or underhandedness*
>
> *(b) Abuse of the Court's procedure*
>
> *(c) Not coming to court with open hands*
>
> *(d) Tenuous claims*
>
> *(e) Unjustified defences*
>
> *(f) Voluminous and unnecessary evidence*
>
> *(g) Extraneous motives for the litigation.*

66. It is the court's respectful view that this request is not wholly without merit. However, the court also bears in mind that this case was essentially a much broader one which was whittled down at the pre-trial review by senior counsel for the claimant to the sole issue which was identified in this judgment. The court bears in mind that attorneys for the claimant appearing at the trial were not the same as the filing attorneys. Therefore,

on the claimant's side there was certain distraction from what eventually turned out to be the central issue for determination.

67. Along with that, the court bears in mind that there was an application which was filed on 16 April 2015 to set a costs budget. That application attached a draft bill of costs with the clear intention of invoking the court's discretion under part 67.8. That application was not resolved by the court for some unexplained reason and it was not followed up by the claimant's attorney.

68. Having regard to the matters set out in the preceding paragraphs, the court is not minded to award costs on an indemnity basis but will hear the parties as to how the court should treat with the outstanding application for budgeted costs and what would be an appropriate order in the circumstances.

The Order

69. Judgment for the claimant against the defendant. The defendant shall pay to the claimant damages assessed by the court in the sum of $550,000.00 inclusive of an uplift for aggravated damages.

70. The court will hear the parties on the issue of costs, in particular reference to the outstanding application for budgeted costs filed on 16 April 2015.

…….
Devindra Rampersad
Judge