

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2016-04456

BETWEEN

JUNIOR SAMMY

JUNIOR SAMMY CONTRACTORS LIMITED

JUSAMCO PAVERS LIMITED

SAMMY'S MULTILIFT SERVICES LIMITED

Claimants

AND

MORE FM LIMITED (formerly known as MORE FM 104.7 LTD.)

ANDY WILLIAMS

LENNOX SMITH

Defendants

Before the Honourable Mr. Justice Frank Seepersad

Appearances:

1. Mr. R. Maharaj S.C., Mr. R. Bissessar instructed by Mr. V. Gopaul-Gosine for the Claimants
2. Ms. Hadeed instructed by Mr. C. Persadsingh for the 1st Defendant

Date of Delivery: 18th July, 2018

DECISION

Introduction

1. Before the Court for its determination is the Claim Form and Statement of Case filed on the 12th December, 2016 and amended on the 28th March, 2017. The Claimants claimed as against the Defendants damages for libel including exemplary and aggravated damages arising out of the allegedly defamatory words published on a weekday morning radio show called the “Ground Report” on the 28th November, 2016, the 1st December, 2016, the 2nd December, 2016 and the 8th December, 2016.
2. The Claimants have also claimed that by virtue of the alleged defamatory words they have been put into public derision and ridicule and that their business, trading reputations and their ability to successfully tender and bid for contracts have been compromised.
3. By its Defence filed on the 25th July, 2017 the 1st Defendant contended, inter alia, that the Claimants had no cause of action in libel and that the “Ground Report” was a radio program published by the 2nd and 3rd Defendants under a contractual agreement with the 1st Defendant whereby the 2nd and 3rd Defendants purchased airtime from the 1st Defendant. The 1st Defendant accordingly denied that it exercised control over the 2nd and 3rd Defendants in their preparation for their broadcasts or that it collaborated or participated in the selection and delivery of the content of their program. The 1st Defendant further asserted that the Claim Form and Statement of Case, as amended, disclosed no cause of action on the part of the 2nd, 3rd and 4th Claimants which said companies were not referred to or identified in the broadcasts. The 1st Defendant denied that the words were defamatory of the Claimants or any of them and that they were not capable of bearing the meanings ascribed to said words by the Claimants. The 1st Defendant also disputed that the Claimants suffered any financial loss or damage as a consequence of the said words and contended that the Claimants had not provided particulars of such loss.
4. The 2nd and 3rd Defendants filed a Defence on the 24th July, 2017 by virtue of which they disputed the meaning ascribed to the words complained of by the Claimants and otherwise raised the defence of fair comment.
5. The Claimants filed no Reply either to the Defence of the 1st Defendant or that of the 2nd and 3rd Defendants.

Brief Procedural History

6. The parties complied with all of the Court's directions and witness statements were filed, evidential objections were also filed and these were determined by the Court at the trial.
7. The Claimants and the 2nd and 3rd Defendants presented a Consent Order dated the 14th March, 2018 and the Trial proceeded as between the Claimants and the 1st Defendant.

The Evidence

Junior Sammy

8. The 1st Claimant is the Chairman of the various Corporate Claimants.
9. The 1st Claimant gave evidence in his witness statement of inter alia:-
 - (a) The history and the establishment of the members of the Group, that he is identifiable with the Group as his name is contained in the names of the members of the Group that he has received numerous awards on behalf of the Group and that he is often invited to attend functions and events as the Group's Chairman;
 - (b) The publication by the 1st Defendant of the words complained of;
 - (c) His complaints to Mr. Robert Amar and Mrs. Sharon Amar about the publication of the words complained of and Mrs. Amar's undertaking to desist from re-publishing and re-broadcasting the defamatory words;
 - (d) The meeting he attended with Mrs. Amar and the 3rd Defendant (Smith) on 26th November 2016 to discuss an on-air retraction and apology; and
 - (e) The continuation of the publication of the words complained of despite the assurances from Mrs. Amar. He also gave evidence of his understanding of the defamatory words and the damage he suffered as a result of the publication.

Shivonne Sammy

10. Shivonne Sammy is the 1st Claimant's daughter and a director of the Corporate Claimants. In her witness statement she gave evidence of listening to, recording and transcribing the words complained of which were published on the radio. She also gave evidence of what she heard and she said that the words were not only published on the radio but were also

streamed live by the 1st Defendant on its website. She also said that the Claimants' attorneys received a disc containing the audio recordings of the words complained of from TATT and that upon receipt of same, the statement of case was amended. She gave evidence of the alarm expressed by the Corporate Claimants' employees, clients, overseas clients, joint venture partners and bankers in relation to the words complained of.

Racquel Whittier

11. Ms. Whittier is a Court Transcriptionist who prepared a transcript of the broadcasts containing the words complained of. In her witness statement filed on the 21st February 2018 she said that she prepared the transcripts from the discs obtained from TATT was certified the truth of what was transcribed.

Robert Amar

12. Mr. Amar in his witness statement stated that:

- (a) He is the 1st Defendant's managing director and that the Ground Report is published by the 1st Defendant;
- (b) None of the programs which are broadcast by the 1st Defendant are published in a permanent form including the Ground Report. All of the programs are unscripted and they are not available for download on the website;
- (c) The producers of The Ground Report purchase airtime from the 1st Defendant at a cost of \$67,500.00 per month and he produced invoices for the monthly charges for airtime for the months of March, April, June, July, August, September, November and December 2016;
- (d) The hosts of The Ground Report are not employees of the 1st Defendant and the 1st Defendant does not exercise any control over the 2nd and 3rd Defendants in their preparation for the broadcasts or otherwise participates or collaborates in the selection and delivery of the content of their program;
- (e) The 1st Defendant ensured that a disclaimer is broadcasted in the following terms before The Ground Report:

“All views expressed are those of the callers and announcers. They are not views of More FM 104.7. It’s their opinion however they maintain that they could be wrong.”

- (f) The Claimants continue to receive major government and other private contracts and he has known the 1st Claimant for several years and 1st Claimant has been the subject of public enquiry, scrutiny and from time to time, derision. He exhibited certain Hansard reports and newspaper articles;
 - (g) In November, 2017 the 1st Claimant called him to complain about The Ground Report. He (Robert Amar) did not discuss the complaint with him but asked his wife Sharon to call him; and
 - (h) His wife Sharon did act as a liaison between 1st Claimant and the 2nd and 3rd Defendants but at no time did he (Robert Amar) or his wife issue any undertaking.
13. It was confirmed in cross examination that there was no written agreement between the 1st Defendant and the 2nd and 3rd Defendants and it was demonstrated that none of the receipts which were exhibited by the 1st Defendant expressly referred to any independent contractor relationship.

Sharon Amar

14. Mrs. Amar deposed in her witness statement that:
- (a) She is a Director and shareholder of the 1st Defendant. She is also the Human Resources Manager and deals with the 1st Defendant’s employees;
 - (b) The 2nd and 3rd Defendants lease airtime from the 1st Defendant to broadcast The Ground Report;
 - (c) There is a disclaimer which the producers of The Ground Report are required to play at the beginning and the close of the programme;
 - (d) Neither the 1st Defendant nor any of its staff members exercise control over the 2nd and 3rd Defendants or any other producer of The Ground Report in their preparation of the broadcasts or otherwise collaborates or participates in the selection and delivery of the content of their programme;
 - (e) Sometime in November, 2016 her husband Robert Amar informed her that he received a telephone call from 1st Claimant and that he referred the 1st Claimant to

her. She then called 1st Claimant and he said he wanted to speak to the person in charge of The Ground Report;

- (f) She spoke with the 2nd Defendant and Mr. Michael Kerr (a host of The Ground Report) and arranged for them to meet with 1st Claimant on 26th November, 2016; and
- (g) She was present at the meeting on 26th November, 2016 and she facilitated the meeting between 1st Claimant and the 3rd Defendant. At no point did she give any undertaking to 1st Claimant.

15. In cross examination Mrs. Amar:

- (a) Confirmed that the 1st Defendant is a broadcasting company;
- (b) Confirmed that the 1st Defendant complies with the procedures contained in TATT's Broadcasting Content and Complaints Handling Procedures which requires a broadcaster to make and retain recordings of broadcast material for a minimum period of 28 days after the broadcast date;
- (c) Confirmed that the 1st Defendant is required to keep a recording of all broadcasts including the Ground Report;
- (d) Confirmed that the 1st Defendant's broadcasts including the Ground Report are carried live on the 1st Defendant's website except when the website is under maintenance;
- (e) Agreed that the live stream had an international audience;
- (f) Said that the 1st Defendant was not liable for The Ground Report based on the disclaimer;
- (g) Said that she did not replay the recordings containing the words complained of but Mr. Amar did;
- (h) Said that she asked the 2nd and 3rd Defendants to refrain from speaking about 1st Claimant as she took the position that the 2nd and 3rd Defendants should not say what they had been saying, "Because if they were saying something that they had no backup source to, then they should not speak of it, because whatever is spoken on the talk programs, which I have made clear to all three programs, please, have your evidence. So if we have a problem, there is paperwork to go with it."

The Issues

16. The issues which fell to be determined are as follows:
- (a) Whether the words complained of gave rise to a valid cause of action in libel as against the 1st Defendant, and if so whether the 1st Defendant is liable for the words that were uttered by the 2nd and 3rd Defendants.
 - (b) Whether the 2nd, 3rd and 4th Claimants were identified in the words complained of and if they were, whether the Claimants established that the words complained of are defamatory.
 - (c) Whether the Claimants led evidence to establish an entitlement to damages and if so, under what heads and in what quantum.
17. **Section 2 of the Libel and Defamation Act, Chapter 11:16 of the Laws of the Republic of Trinidad and Tobago** (hereinafter, “**The Act**”) provides, “No action for defamation shall be maintainable in any Court of justice in Trinidad and Tobago in respect of words spoken, except in those cases in which an action would be maintainable in respect of the same words in England.”
18. The Act relates to the laws of England at the time of proclamation, that is, the 26th January, 1846.
19. Whilst the Act provides no definition of libel or slander, the terminology utilised commonly references libel as publications found in newspapers or other periodical publications. The Act has not to date been amended to provide that words spoken, may amount to libel. The legislation of the United Kingdom has since been amended to provide that radio broadcasts are actionable in libel and other Commonwealth jurisdictions have implemented similar legislative amendments.
20. **Gatley on Libel and Slander, Twelfth Edition**, Paragraph 3.6 provides that 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. The authors suggest that with the advent of new technologies the overriding consideration is a determination as to permanency.

21. In **Meldrum v Australian Broadcasting Co. Ltd [1932] VLR 425**, the Full Court of the Victorian Supreme Court applied the “mode-of-publication” test, that is, whether the defamatory words impinge upon the eyes, to determine whether a defamatory radio broadcast was libel or slander. Lowe J pointed out that publication in relation to a libel requires the conveying to the mind of a third person, not merely the defamatory matter but also the permanent form in which it is expressed and recorded.
22. In **Jude Ready and Another v CCN and Others CV2008-00225** Mohammed J. considered this issue in detail at paragraphs 24 to 47 of her judgment and ultimately held that the words spoken during broadcasts on TV6 were not actionable in libel and that in the absence of statutory intervention, the common law distinction between libel and slander applies. This Court is not bound by the decision of Mohammed J and is not inclined to follow same. The evidence is that the words uttered were recorded pursuant to regulatory requirements which also mandated that the recording of the programme had to be kept for a specified time period. The fact that anyone who heard the programme could have also recorded same as the ability to save and replay broadcasts, cannot be disregarded. The distinction as to the permanency being in the form of a visual display, appears to be artificial and archaic and nothing about the broadcast was transitory in nature.
23. In her witness statement, Shivonne Sammy indicated to the Court that two audio Compact Discs were received from the Telecommunications Authority of Trinidad and Tobago (TATT) containing audio recordings of “The Ground Report” which she then provided to a transcriptionist to prepare a transcription of the audio recordings. The fact is that the broadcast was recorded and this created a degree of permanency. The production of a transcript of the said recording further established the permanency of the publication.
24. In **Gatley on Libel and Slander**, 12th Edition at page 109 the commentators noted:

“Permanent here does not necessarily signify long lasting: it is defamatory to chalk a defamatory message on a wall and the nature of the tort cannot depend on whether it remains there for weeks or is washed away by the rain a few minutes later. Possibly the residual test of the Restatement is better: is that matter embodied in a physical form? It does not, however follow that there may not be additional tests of libel at common law, for example the transient publication of matter which is embodied in a permanent form, so

that it might be libel to play a record or radio-tape or to call up on screen words or images from a computer memory. The showing of a defamatory cinema film is libel at common law and this cannot turn on the fact that the images are permanently visible on the film, so the same should apply to the showing of a video-tape. Hence it is thought that that the showing of a film or video tape on television (would apart from statute) be libel at common law and perhaps the same is true of a recorded radio broadcast.”

25. In **Jwala Rambarran v Dr. Lester Henry CV2014-03990**, one of the issues which arose was whether the cause of action in respect of a radio broadcast was grounded in libel or slander.

26. Rampersad J at paragraph 17 held as follows:

“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.”

27. Further, at paragraph 19 Rampersad J also held:

“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, apps and other technology, all with the capability of recording such programs, along with the requirements of the law and or lawful procedure 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 in this case the cause of action lies in libel and not in slander.”

28. This Court agrees with the aforesaid statements in their entirety and is of the view that the approach suggested ought to be adopted and is prepared to adopt same.

29. Similarly, in **Eden Shand v Caribbean Communications Network Ltd & Others HCA 1782 of 1994** one of the issues determined by Moosai J (as he then was) was whether a television broadcast and the publication of words spoken by the interviewers, if defamatory, constituted a libel or slander at common law. The Claimant submitted that, as regards matter recorded on a record, tape or some other recording instrument, the publication of the recorded matter would be a publication in a permanent form and would amount to libel.

30. Moosai J at pages 42 to 43 held:

“It would therefore seem that in distinguishing libel and slander one of the tests to be applied is to consider the mode of publication. Publication of defamatory matter in a permanent form would be libel. Having regard to the facts and circumstances of this case, I am of the view that the application of that test would be sufficient for me to hold that, if defamatory, the television broadcast would amount to a libel.”

31. **In light of the advances of technology, libel and slander can no longer be viewed as strictly the spoken word versus the written word. This Court, in the injunctive proceedings in this matter, stated at paragraph 7 of its judgment:**

“The format into which statements can be reduced so as to be considered as being

in a permanent form has evolved and extended way beyond the sphere of written or typed text. Audio, visual and electronic forms inter alia are capable of having a degree of permanency and transcends geographical boarders. In this context, the law in relation to libel and slander can no longer be viewed through the myopic lens of written word versus spoken word as technological advances have created circumstances by virtue of which the spoken word can be easily encrypted into a permanent irreversible format which can be accessed from a global platform.”

32. Radio broadcasts can reach a wide audience and it can cause as much or even more harm than a newspaper report.
33. In Grant and Anor -v- Southwestern and County Properties Ltd and Anor (1974) 2 All ER 465 at 469(b) -476(b) it was held that a tape recording was a *document* if, what was recorded was information or evidence and a tape recording of a conversation, could properly be described as documentary evidence of the conversation.
34. In Atkin’s Court Forms (2ndEdn), Vol. 15 paragraph 2, p. 7 it was stated that generally *any publication published in a form which can be described as permanent will constitute libel. Moreover, publications on the internet also gives rise to actions in libel.*
35. The 1st Defendant in its defence did not deny that it is the operator of a website www.morefmttrinidad.com and publication on a website is regarded as publication in permanent form and is actionable in libel.
36. Sharon Amar in cross-examination acknowledged that some of the 1st Defendant’s broadcasts could be accessed either through the radio station’s website or through Livestream on Facebook by an international audience. The following exchange is her evidence under cross examination:-

“Q: *The programme is aired on website?*

A: *Some of the programmes not all...they have a Livestream so if they put it on, it would be available*

Q: *But your company has a website on which the programmes can be accessed*

A: *If it was working at the time. The time of this I am not sure because it took*

8 months

Q: *So if it was working you would hear it on the website or Livestream*

A: *Yes there are two avenues*

Q: *So the Livestream...*

A: *Its really only for Facebook and those things with a separate camera but the staff don't keep it running*

Q: *But your company had a policy to keep the programmes available on the website*

A: *Not a policy but they can use it if they wish*

Q: *So this was available*

A: *If they made it workable*

Q: *So you cannot deny these programmes were available on the livestream?*

A: *No I cannot say if I check now it may be off*

Q: *You agree with me on the livestream there would be an international audience?*

A: *It would*

37. The Court is of the view that the words broadcasted in *The Ground Report* were retained for posterity and they were reduced into a permanent form in at least three (3) places, namely:-

- (i) On TATT's Broadcast Monitoring System from which the two (2) audio CDs containing audio recordings of *The Ground Report* for the period 28th November, 2016 to 08th December, 2016 were provided to the Claimants;**
- (ii) On the 1st Defendant's servers or hard drives or recorded memory apparatus; and**

(iii) **The burnt audio CDs containing audio recordings of *The Ground Report* for the period 28th November, 2016 to 08th December, 2016 which were presented to the Court in evidence by the Claimants.**

38. The audio CDs and the transcripts which were presented as evidence to the Court are new documents which form part of the official record of the Court and they can now be accessed by the public as well.

39. **Having considered the evidence and the law, this Court is resolute in its view that the instant action was properly founded in libel as opposed to slander.**

Is the 1st Defendant liable for the words uttered by the 2nd and 3rd Defendants?

40. The 1st Defendant contends that at all material times there existed an independent contractor relationship between the 1st Defendant of one part and the 2nd and 3rd Defendants of the other part.

41. Generally, in defamation matters, the person who first spoke or composed the defamatory matter (the originator) is of course liable, provided that he intended to publish it or failed to take reasonable care to prevent its publication - **(Gatley on Libel and Slander, Twelfth Edition, paragraph 6.10)**

42. The 1st Defendant relied upon the case of **Ricardo Welch v PBCT Limited, More FM 104.7 Limited, Devon Welch, Andy Williams and Juliet Davis CV 2011- 00751**, in which Dean Armorer J considered a circumstance where the 3rd, 4th and 5th Defendants were employees of Michael Kerr who rented airtime from the 1st and 2nd Defendants, and they were not agents of the 1st and 2nd Defendants (i.e. the radio stations). In that case the Dean Armorer J stated that the 1st and 2nd Defendants had also disclaimed liability and in her view they were in no way responsible and the proceedings concern the 3rd, 4th and 5th Defendants.

43. In her judgment Dean-Armorer J did not refer to the legal authorities or principles upon which her decision was premised.

44. There is in the common law, a defence, as was pointed out at page 183 of Gatley, known as innocent dissemination which gives some degree of protection to the person who

publishes but who is not the author, printer, or the “first or main publisher of a work which contains a libel”, and who has only taken a “subordinate part in disseminating it” e.g. by selling, distributing or handing to another a copy of the newspaper or book in which it appears.

45. The common law defence of innocent dissemination was however not pleaded by the 1st Defendant and in any event is not available to the 1st Defendant as a radio broadcaster, as the defence, is usually only available to persons who had a subordinate part in the dissemination of material such as newsagents, book and magazine sellers.

46. Even if the defence was available to the 1st Defendant, to succeed, the 1st Defendant would have had to establish the following elements:-

(a) that it did not know that the material complained of contained a libel;

(b) that there was nothing in the material itself or in the surrounding circumstances of the case which ought to have led it to suppose that it contained a libel; and

(c) that the absence of knowledge of the existence of the libel was not due to the negligence on its part.

47. The 1st Defendant did not on the evidence, establish the aforesaid. Consequently the defence of innocent dissemination cannot be relied upon.

48. The 1st Defendant had knowledge that the radio broadcasts contained defamatory matters. The evidence demonstrates that the defamatory statements were published over a period of time by the 2nd and 3rd Defendants and that this was brought to the attention of the 1st Defendant by the 1st Claimant, but it did not take any steps to prevent further broadcasts of the defamatory statements.

49. The 1st Defendant failed to impose any system to vet the statements of the 2nd and 3rd Defendants and it is irrelevant that there was a contractual relationship between them as the 1st Defendant permitted the 2nd and 3rd Defendants, for commercial gain, to utilize its forum for broadcasting.

50. The 1st Defendant ought to have taken reasonable care to include a disclaimer on its website or on the radio station, stating that libellous and other unlawful material is

strictly forbidden and had a responsibility to monitor the use of its forum so as to ensure that there was no violation.

51. The law in this jurisdiction needs to be reviewed especially given the fact that talk shows have become the norm and there are numerous ‘call in’ programmes where persons regularly make highly offensive and defamatory remarks. The Defamation Act of 1966 of England and Wales provides for defences to a Defendant for secondary responsibility in the publication of defamatory matter but without statutory intervention these defences do not apply in Trinidad and Tobago. Pursuant to section 1 of the Defamation Act (UK) a person involved only as a broadcaster of a live programme containing statements over which he has no control over, now has a statutory defence of secondary responsibility. In *Gatley supra* at pages 233-234, the learned author makes it clear that this new statutory defence does not exist in the common law:

*“a person involved only as a broadcaster of a live programme containing the statement in the circumstances in which he has no effective control over the maker of the statement. **This involves a complete departure from the common law** though its significance is somewhat reduced as a very large proportion of broadcast material is pre-recorded. The requirement that the broadcaster has no effective control over the maker of the statement should probably be read as relating to the contractual relationship between them rather than the ability to prevent the making of the statement.....”*

52. Consequently, given the current common law, the 1st Defendant has no protection as against liability on the premise that there existed an independent contractor relationship with the 2nd and 3rd Defendants. The right to broadcast cannot be taken lightly and where for commercial advantage, decisions are made to contract out airtime, the station has to take steps so as to ensure that the privilege to broadcast, is not violated. The implementation of time delays, the implementation of a pre-recorded broadcast policy and the inclusion of indemnification policies as between the station and third party should be considered and adopted.

Issue (ii)- Whether the 2nd, 3rd and 4th Claimants were identified in the words complained of and if they were, whether the Claimants established that the words complained of are defamatory.

53. In order to succeed in an action for defamation, the Claimant must prove that the Defendant published the words and that they are defamatory, he must also identify himself as the person defamed. As expressed in the case of **Knupffer v London Express [1944] A.C. 116 HL**, “*It is an essential element of the cause of action for defamation that the words complained of should be published of the plaintiff*”.

*“Where the words complained of do not specifically identify the Claimant Company and that company is one of several in a larger group with similar names, the claim may fail unless a reasonable person could think that the Claimant Company was sufficiently referred to or that the words sufficiently identified all or some of, the companies in the group.” **Gatley on Libel and Slander, Twelfth Edition paragraph 7.2.***

54. In the case of **Palace Films Pty Ltd v Fairfax Media Publications Pty Ltd [2012] N.S.W.S.C 1136**, it was held that reference in the statement complained of to “Palace Films” was not enough, without resort to extrinsic facts, to establish sufficient reference to the plaintiff company. The Court held that the incompleteness of the company’s proper title produced uncertainty, giving rise to the need for the 1st Plaintiff to establish that at least one person to whom each matter complained of was published understood from extrinsic facts that the article referred to Palace Films Pty Ltd.

55. The Claimants claimed that the alleged defamatory words referred not only Junior Sammy but also to Junior Sammy Contractors Limited, Jusamco Pavers Limited and Sammy’s Multilift Services Limited (2nd, 3rd, 4th Claimants herein). It was pleaded that these private limited liability companies comprise the Junior Sammy Group of Companies (the Group) which is the largest locally owned private general contractor in Trinidad and Tobago and the southern Caribbean. The Claimants further pleaded that those alleged defamatory words in “The Ground Report” referred to the Claimants by name of the 1st Claimant, “the Construction God”, “the Contractor God” or the Group.

56. The 1st Defendant disputed that the 2nd, 3rd and 4th Claimants were ever subject of the alleged defamatory words and it was denied that the 1st Claimant was the alter ego of the

2nd, 3rd and 4th Claimants. The 1st Defendant contended that at all material times, the 1st Claimant was a person separate and apart from the other Claimants which were limited liability companies with separate legal personalities. It was also contended that there was no legal entity/company in operation and/or registered in the name of the Junior Sammy Group of Companies.

57. During her evidence, Shivonne Sammy admitted that the 2nd, 3rd and 4th Claimants were not expressly named in the course of words complained of.

58. At **Gatley (supra) pages 264-265 para 7.2**, the learned author stated as follows:

“The test is whether the Claimant may reasonably be understood to be referred to by the words. Thus, eg, it is sufficient if he is described by a nickname, his initial letters, by photograph, drawing or caricature, his office, or by the 1st and last letter of his name, or even by asterisks or blanks or if he is referred to under the guise of allegorical, historical, fictitious or fanciful name, or by means of a description of his status, physical peculiarities or by recognizable likeness or caricature or his residence, the places which he has visited on his travels, his products or indeed if he is not mentioned at all, there need be no “peg or pointer” for his identification in the words complained of themselves.”

59. A Defendant will not escape liability simply because he did not publish the name of the Claimant if the intention was to refer to the Claimant. In the instant case it is clear that the Defendants intended to refer to the Corporate Claimants and referred to them as the *Junior Sammy Group*. The dictum of Lord Denning in **Hayward v Thompson [1982] QB 47 at 61** is also instructive, in that case Lord Denning said:

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

persons will read it as intended to refer to the plaintiff, then the Defendant is liable.”

60. There can be no doubt that as members of the Junior Sammy Group of Company, the 2nd to 4th Claimants can bring these proceedings. In **Knupffer v London Express Newspaper Ltd (supra)**, Viscount Simon LC stated:

“There are cases in which the language used in reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action. A good example is Browne v DC Thomson & Co where a newspaper article stated in Queenstown “instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged” and where seven pursuers who averred that they were the sole Catholic Church in Queenstown were held entitled to sue for libel as being individually defamed.

Lord President Dunedin in that case said “I think it is quite evident that if a certain set of people are accused of having done something, and if such accusation is libelous, it is possible for the individuals in that set of people to show that they have been damnified, and it is right that they should have an opportunity of recovering damages as an individual.”

61. In **Duncan and Neil on Defamation Fourth Edition**, the learned authors at para 7.03 stated as follows:

“Where the statement complained of does not identify clearly the Claimant, the matter can sometimes be decided by reference to the context. More often, however the Claimant will be seeking to show that the statement would have been understood to refer to him because of some facts or circumstances which are extrinsic to the statement itself.

In these cases the Claimant is required to plead and prove extrinsic facts on which he relies to establish identification and, if these facts are proved, the question

becomes would reasonable people knowing these facts or some of them reasonably believe the statement referred to the Claimant?

62. The Court also found that there was compelling evidence which would enable a reasonable person to conclude that the words complained of referred to or identified the Corporate Claimants.

63. The evidence of the 1st Claimant on this issue established that:

- (a) The Junior Sammy Group of Companies comprises of the 2nd to 4th Claimants;
- (b) The Second Claimant (Junior Sammy Contractors Ltd) bears the 1st Claimant's name and was incorporated by him in May 1990;
- (c) The Third Claimant (Jusamco Pavers Ltd) was incorporated by the 1st Claimant in 1990 and its name is a combination of the 1st Claimant's 1st name and the 1st three letters of his last name;
- (d) He acquired the 4th Claimant in 2001 and changed its name to Sammy Multi Services Limited as he wanted the company to be easily identified with him and his name;
- (e) The three companies are known locally, regionally and internationally as the Junior Sammy Group of Companies and employ over 5000 employees directly and indirectly;
- (f) He is the executive chairman of the Group and all of the policy decisions are made by him;
- (g) He is actively involved in the day to day running of the business and he personally interacts with the Group's clients, employees, bankers, suppliers, joint venture partners and other stakeholders;
- (h) Under his guidance the Group has completed a number of successful construction projects;
- (i) He has accepted numerous awards and commendations on behalf of the Group;
- (j) The Group and its constituent companies have been so closely and inextricably linked with him as their founder, principal shareholder and Executive Chairman and vice versa;
- (k) He has been featured in many magazines and journals as a businessman and Chairman of the Group;

- (l) He is often invited to attend functions and events as Chairman of the Group and on occasions he makes comments to the media on behalf of the companies in the Group;
- (m) In 2010, the Group celebrated the 2nd Claimant's 30th anniversary and a commemorative brochure was distributed to the Group's clients, employees, contractors, suppliers and stakeholders. The brochure expressly refers to the Junior Sammy Group of Companies and identified him as being the Chairman of the Group and further identified the 2nd to 4th Claimants as being members of the Group.
64. The Claimants pleaded and produced evidence which would lead a reasonable person to understand that the statements complained of referred to the 2nd to 4th Claimants.
65. The Claimants asserted the 1st Claimant is or should be regarded as the *alter ego* of the corporate Claimants.
66. In their amended statement of case, the Claimants averred that the 1st Claimant is the Corporate Claimants' *executive chairman, director and principal shareholder*. Further, that the Group is family owned and 1st Claimant's wife Linda and their children are all directors and employees of the Group. On the evidence adduced the 1st Claimant is in fact the public face and voice of the Group and he is closely linked to the Group as to be regarded as the latter's alter ego.
67. In his witness statement the 1st Claimant described how he is the face and voice of the Group and as the founder/incorporator of the Corporate Claimants (save for SMSL) he has given his name to the various companies.
68. **Trinidad and Tobago is a small society and the name Junior Sammy is synonymous with construction. This Court is of the view that reasonable persons would understand the phrase "Junior Sammy Group" as referencing the 2nd, 3rd and 4th Claimants. A reasonable person living in Trinidad and Tobago and hearing the name Junior Sammy would reasonably understand that the words used in The Ground Report related to the various companies under 'the group' and that they referenced the 2nd, 3rd and 4th named Claimants. There exists an entrenched perception in this society that the 1st named Claimant is the individual behind the various companies as they are seen as his companies. The nuances and intricacies in relation to the**

principle that a company is separate legal entity does not alter the perception that the 1st named Claimant is the “Boss” who controls the various companies.

Were the words defamatory?

69. The classic exposition of what constitutes defamation is set out in **Sim -v- Stretch (1936)** **2 ALL ER 1237** as follows:-

“the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally or tend to make them shun or avoid him”

70. In determining whether the words published and/or broadcasted on *The Ground Report* are defamatory, the Court considered the meanings that the words conveyed to the ordinary person.

71. It is well established that words are capable of being defamatory if the words tend *inter alia* to lower the Claimant in the estimation of right thinking members of society, discredit the Claimant’s trade or damage its financial position or credit.

72. In **Keith Christopher Rowley -v- Michael Anisette CV 2010-04949** at paragraph 7 Boodoosingh J in considering whether the words complained of were defamatory observed that this was a question of fact and that the Court should first consider what the words mean, in their ordinary and natural meaning, to the ordinary reasonable man, and then whether that meaning is defamatory.

73. In **Civil Appeal No. 118 of 2008 between Kayam Mohammed and Others -v- Trinidad Publishing Company Limited and Others** the Court of Appeal outlined the approach that the Court should adopt in determining whether words are defamatory. Mendonca JA in delivering the judgment of the Court of Appeal at paragraph 10 held that:-

“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):

“...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 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...”

74. Mendonca JA in Kayam Mohammed *supra* at paragraph 11 went on to say that:-

“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.”

75. Further, Mendonca at paragraph 12 of Kayam Mohammed supra observed that:-

“... 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.”

76. Finally, Mendonca JA at paragraph 13 of Kayam Mohammed supra cited with approval the *dicta* of Lord Bridge in Charleston v News Group Newspapers Ltd. [1995] 2 AC 65 at paragraph 71 as follows:-

“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 1st , 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 1st 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.”

77. In CV 2013-04366 between Seebalack Singh –v- Trinidad Express Newspapers Limited this Court having reviewed the authorities cited above and in considering whether words are defamatory noted that the Court must take into account the following principles:-

- (i) 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: Kayam Mohammed *supra*;
- (ii) The universally accepted meaning of the words, the context and intrinsic circumstances or environment of the publication, and general knowledge should also be ascribed to the offending words as was stated by the Privy Council in Pinard-Byrne v Lennox Linton [2015] UKPC 41 and;
- (iii) The determination of the issue is essentially a question for the trial judge. (See Seebalack Singh v Trinidad Express Newspaper Limited (supra) at paragraph 28).

78. This Court also held at paragraph 29 that in determining the single meaning that an ordinary reader would give the words complained of and its assessment as to whether the words complained of are defamatory of a Claimant, the Court should also address its mind to the context in which those words were used.

79. In determining whether the words complained of are defamatory the Court should give to the material their natural and ordinary meaning, that is, the meaning which the reasonable man would have attributed to them. In seeking to determine the meaning that an ordinary reader would give the words complained of and whether this meaning is defamatory of the Claimants, the Court considered not only the actual words of which complaint was made but also the context in which the words were used. *The Ground Report* is a live call in program which generally deals with issues of public interest.

80. Having read the words complained of the Court is of the view that the hypothetical reasonable man deemed to have ordinary knowledge and intelligence and knowledge of special extrinsic facts would have formed the view that the said words in their ordinary or natural meaning were defamatory. The references to Construction God were specific and clear and unequivocally conveyed the impression that not only did the 1st named Claimant have a monopoly on the industry but that the modus operandi which he and his companies

employed was characterized by impropriety.

81. Having reviewed the words in the broadcasts of *The Ground Report* this Court is of the view that the words in their natural and ordinary meaning meant and were understood to mean in relation to the 1st Claimant that :-

- (i) The 1st Claimant was dishonest and corrupt;
- (ii) The 1st Claimant bribed a government minister with \$6.0M to get the majority of contracts being issued by the present Government;
- (iii) The 1st Claimant was an incompetent general contractor who receives government contracts because he paid bribes to government officials to receive these contracts;
- (iv) The 1st Claimant was the *Construction God* who took government officials and girls on his yacht down the islands in order to bribe them to give him contracts;
- (v) The 1st Claimant as the *Construction God* continues to receive construction contracts from the government notwithstanding that his road and runway paving was of poor quality; and
- (vi) The 1st Claimant as the *Construction God* controls every road that needs to be paved and every bridge that has to be built because he bribed everyone.

82. The words, by their plain and ordinary meaning, conveyed to the hypothetical listener that the 1st Claimant had bribed a government official to obtain contracts for the corporate Claimants. This is a serious allegation since bribery is a criminal offence under Section 5 of the Criminal Offences Act Chap 11:01 and *ipso facto* by their plain and ordinary meanings the words were calculated to and would have impacted upon and lowered the 1st Claimant's reputation, in the estimation of right thinking individuals.

83. The words in the broadcasts of *The Ground Report* in their natural and ordinary meaning meant and were understood to mean in relation to the Corporate Claimants that :-

- (i) **The Corporate Claimants whether individually or as the Group had bribed government officials and officials from PURE and NIDCO to continue to receive government contracts;**
- (ii) **The Corporate Claimants whether individually or as the Group carried out their contract works incompetently and/or unprofessionally using poor materials;**
- (iii) **Jusamco was awarded a contract for \$170.0M to pave the runway at the ANR Robinson International Airport and the next bid was for \$70.0M and that Jusamco procured the contract fraudulently; and**
- (iv) **Jusamco paved the runway at the ANR Robinson International Airport incompetently and/or improperly using poor quality material.**

Does the defence of Qualified Privilege apply?

84. The 1st Defendant in its defence pleaded the defence of qualified privilege otherwise referred to as the Reynolds privilege on the basis that the procurement process, the award of such contracts and the quality of the works rendered in relation to such projects as well as the disbursement of public funds are all matters of public interest [and that] there is a public interest in the exposure, prevention and protection against the unfair procurement of government contracts and the disbursement of public funds.

85. In **Reynolds -v- Times Newspapers and Others (1999) 4 All ER 609**, the House of Lords identified ten (10) non-exhaustive criteria of responsible journalism which affects the availability of the Reynolds privilege, namely:-

- (i) 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;
- (ii) The nature of the information, and the extent to which the subject-matter is a matter of public concern;
- (iii) The source of the information as some informants may have no direct knowledge of the events. Some have their own axes to grind, or they are being paid for their stories;

- (iv) The steps taken to verify the information;
- (v) The status of the information and whether the allegation may have already been the subject of an investigation which commands respect;
- (vi) The urgency of the matter as news is often a perishable commodity;
- (vii) Whether comment was sought from the plaintiff as he may have information others do not possess or have not disclosed but an approach to the plaintiff will not always be necessary;
- (viii) Whether the article contained the gist of the plaintiff's side of the story;
- (ix) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact; and
- (x) The circumstances of the publication, including the timing.

86. Reynolds's privilege is a defence which is available to a responsible broadcaster who must strike a balance between the need to provide information on matters of public interest on the one hand and to protect the reputation of the defamed individual on the other.

87. At the trial no evidence was adduced in support of the aforesaid Reynolds Privilege defence.

88. The Court therefore finds as a fact that the words in the broadcast were defamatory in nature and that they applied to all the Claimants.

Issue (iii)- Whether the Claimants led evidence to establish an entitlement to damages and if so, under what heads and in what quantum.

89. The general rule is that in claims for defamation, damages are assessed on a compensatory basis which includes special damages and aggravated damages. Compensatory damages are intended to compensate the Claimant for injury to his reputation and injury to his feelings and to vindicate him to the public. In certain circumstances exemplary or aggravated damages may be awarded.

90. Where the Claimant is a non-natural person (as in this case in relation to the Corporate Claimants) upon proof of injury to its goodwill, it will be entitled to damages. Nominal damages should be awarded if there is no evidence that actual loss or damage was suffered.

91. It is a well-established principle in defamation law that a Corporate Claimant cannot claim damages for injury to its feelings but it can claim damages of loss of goodwill. Boodoosingh J in **Viro Chem Janitorial Services Company Limited –v- Ackbar Khan CV 2012-03304** at paragraph 67 cited with approval the commentary in Gatley on Libel and Slander, 9.17, p. 353 under the rubric *Corporate Claimants and damages* where it was stated:-

“While substantial damages may be awarded to a corporate entity notwithstanding a failure to prove any specific damage, in practice, in the absence of at least a general loss of business, a limited liability company is unlikely to be entitled to a really substantial award of damages.

*As was made clear by Lord Reid in Lewis v Daily Telegraph Limited, “A company cannot be injured in its feelings; it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.” Whilst Lord Reid went on to say, “The **injury need not necessarily be confined to loss of income; its goodwill may be injured, a company which is unable at trial to point to the slightest hiccup in its trading figures may be hard pressed to persuade a court that even an unpleasant libel has seriously injured its reputation.**”*

Unlike a personal Claimant, it cannot tug the jury’s heart-strings by describing its distress and humiliation on reading the defamatory words. This presents a problem for a limited company which has been defamed, since it is often difficult to prove that the publication caused either a specific or general loss of business.

*That there is an entitlement to general damages which are more than nominal damages is certain, but the amount likely to be awarded to a corporation may be small in commercial terms, **unless the defendant’s refusal to retract or apologise makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a really substantial award of damages** (Applause Store Productions v Raphael [2008] EWHC 1721).”*

92. Compensatory damages may be increased to take into account a defendant's motives or *mala fides* as well as its conduct before or during the proceedings, the extent of the publication and the absence or refusal of any retraction or apology.

93. In **Rookes v. Bernard [1964] 1 AC 1221** Devlin LJ in a well-known speech noted that:-

“...it is very well established that in cases where the damages are at large the jury (or judge if the award is left to him) can take into account the motives and conduct of the Defendant where they aggravate the injury done to the Plaintiff. There may be malevolence or spite in the manner or in committing the wrong which may be such as to injure the Plaintiff's proper feelings of dignity or pride...”

94. In order to prove their case the Corporate Claimants ought to have provided financial statements, evidence of contracts tendered for and not obtained, evidence of earnings prior to the making of the statements and evidence of the earnings following the statements. Counsel for the 1st Defendant questioned both of the main witnesses for the Claimants on the List of Documents and Supplemental and Further Supplemental Lists of Documents and the absence of any reference to financial documentation and contractual documentation. Both witnesses confirmed that they elected not to adduce such evidence as they considered same to be private and confidential. Shivonne Sammy also confirmed that the person who would be in possession of such information, namely Hugh Murphy, had not been called as a witness and no other employee of the Claimants was called as a witness relative to the financial affairs of the companies.

95. The absence of financial information in this case is significant and the Corporate Claimants have not demonstrated that they were injured in their pocket or that there has been any fall off in trade or damage to the Companies' goodwill. In the Amended Statement of Case the 1st named Claimants pleaded that he received calls from well-wishers who did not believe the alleged defamatory words and no details were provided by way of the pleaded case nor was evidence adduced to identify any persons or entities who refused to engage their business relationships with the Corporate Claimants.

96. The appropriate method of quantifying damages in relation to the 1st Claimant has to be approached differently from the method in relation to the 2nd, 3rd and 4th Claimants.

97. As regards the 1st Claimant, the gravity of the allegations is a relevant factor for the Court's

consideration and the Court formed the view that the terms “Construction God” and Contractor God” referred to the 1st Claimant.

98. In **Defamation, Law, Procedure and Practice (supra) at paragraph 20-06**, the learned author stated as follows:

“In order to establish a right to damages the Claimant need only prove that the defamatory statement has been published to one person. In such a case the damages will be far less than where the libel is published by a national newspaper or television station. The positioning and prominence given to the allegation is important as is the influence of readership.”

99. In assessing damages the Court had regard to the fact that the publication of the words complained of continued over a period of weeks and would have been widely circulated, therefore increasing its influence.

100. The size and influence of the circulation is also a relevant factor in the quantification of an award of damages. The evidence led before the Court established that the audience of *The Ground Report* is significant and on a balance of probabilities the broadcasts were also aired on the worldwide web.

101. In relation to the effect of the publication, there is no evidence of any actual loss sustained by any of the Claimants herein.

102. The broadcasts levelled serious allegations of corruption against all of the Claimants and there was evidence from Junior Sammy that he received calls from family, friends, the Group’s bankers, joint venture partners as well as to colleagues and competitors alike and they all said that they heard the broadcasts. His evidence revealed that he had to attend meetings with the Group’s bankers because of the allegations.

103. The Court also considered the effect of the disclaimer and whether it reduced the sting of the libel. The disclaimer did not say that the contents of what was being said were untrue or that the 1st Defendant was not responsible for its publication. Further it did not forbid libellous material from being disseminated nor did it exclude the 1st Defendant from liability which may have arisen as a result of the publication of libellous material.

104. The function of compensatory damages in defamation is three fold: (1) to console the Claimant for distress he has suffered (2) to repair the harm to reputation and (3) as a vindication of his reputation. In **Gatley** (supra), at pages 330-331 at paragraph 9.4 it stated that:

“The purpose of general damages is to compensate the Claimant for the effects of the defamatory statement, but compensation here is a more complex idea than it is in the case of injury to person or property by negligence. General damages serve three functions: to act as a consolidation to the Claimant for the distress he suffers from the publication of the statement, to repair the harm to his reputation (including where relevant his business reputation) and as a vindication of his reputation. As Windeyer J said in a passage approved in the House of Lords:

“It seems to me that, properly speaking, a man does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways- as a vindication of the plaintiff to the public, and as a consolidation to him for the wrong done.

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

105. The allegations contained in the publications against the 1st Claimant were egregious and impacted upon his reputation, profession and calling. The Court had evidence as

to his accomplishments and his experience over the years as a businessman, his receipt of awards and recognitions. The 1st Claimant has considerable experience and accomplishments as a businessman and the allegations contained in the words complained of would have undoubtedly impacted negatively upon his reputation. Allegations of corruption as was recognized by Bereaux J at paragraph 94 of his decision in Kayam Mohammed (supra), can last a lifetime. The 1st Claimant however has been the subject of public discussion, even in the Parliament, and there exists strong views and/or perceptions with respect to how ‘big businesses and businessmen in the Republic operate and the influence they exercise over politicians especially in a climate where there exists no regulations with respect to election campaign financing.

106. In Gatley at pages 332-333 it is stated:

“While actual financial loss (such as loss of business or employment) which is not too remote is clearly recoverable (and in some cases of slander has to be shown in order to establish a cause of action), it is comparatively rare case in which evidence of such loss is given simply because it is not available.

It has been said that the most serious defamations are those that touch the “core attributes of the plaintiff’s personality, such matters as integrity, honour, courage, loyalty and achievement and in those cases it most unlikely that he will be able to point to provable items of loss flowing from the words. Even where the libel goes to the Claimant’s financial credit it may be virtually impossible to prove financial loss but the damage is insidious and merits a substantial award. As has been said in the Supreme Court of Canada:

“A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation.”

In cases of libel and slander actionable per se the law therefore presumes damage arising from the publication and the Claimant is entitled to look to an award of damages sufficient to vindicate his reputation according to the seriousness of the defamation, the range of its publication and to the extent to which the Defendant has persisted with the charge.”

107. On the facts before this Court in relation to the 1st Claimant damage is presumed to have arisen from the publication of the words complained of and he is entitled to an award of damages so as to vindicate his reputation.

108. On the evidence, the Court is of the view however that an award of aggravated damages is not warranted as the Court finds that there are no aggravating factors which ought to impact the award of damages.

109. **Gatley** at pages 353-354 paragraph 9.18 sets out the circumstances in which a Court may award aggravating damages:

“The conduct of the defendant, his conduct of the case and his state of mind are all matters which the Claimant may rely on as aggravating the damages in so far as they bear on the injury to him.

“It is very well established that in cases where the damages are at large the jury (or the judge if the award is left open to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff’s proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.

The conduct of a defendant which may often be regarded as aggravating the injury to the plaintiff’s feelings, so as to support a claim for “aggravated” damages, include a failure to make any or any sufficient apology and withdrawal, a repetition of the libel, conduct calculated to deter the Claimant from proceeding, persistence, by way of a prolonged or hostile cross examination of the Claimant or in turgid speeches to the jury, in a plea of justification which is bound to fail, the general

conduct either of the preliminaries or of the trial itself in a manner calculated to attract wide publicity, and persecution of the plaintiff by other means.”

110. The Court considered the evidence that the 1st Defendant did not act over a 2-3 week period and the fact that no response to the pre-action protocol was issued. The Court also noted that no apology was issued. However, the 1st Defendant did not author the defamatory statements but its forum was used for the broadcasts and the 1st Defendant may have erroneously felt that it was shielded against liability having regard to the contractual nature of its engagement with the 2nd and 3rd Defendants.

111. The Court next considered the issue as to exemplary damages and noted that in **Gatley** (supra) pages 361-365 paragraph 9.25, the learned author stated as follows:

“Exemplary damages are intended to punish the defendant for the wilful commission of a tort or to teach him that tort does not pay.”

112. At page 287, the learned author referred to the three categories of exemplary damages as set out in Rookes v Barnard (1964) AC 119:

- (1) *Where they are recognized by statute. Whether or not there are any examples of this, none applies to defamation.*
- (2) *Where the wrong involves oppressive, arbitrary or unconstitutional action by servants of the government. In practice these cases have tended to concern matters such as false imprisonment and malicious prosecution. As a matter of principle there seems no reason why this head should not apply to defamation, provided there is some abuse of official power, as perhaps were a government official libelled a person through official channel so as to bring pressure on him in a dispute within his department.*
- (3) *Where the defendant’s tortuous act has been done “with guilty knowledge”, for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical penalty.*

113. The Court formed the view that exemplary damages are not applicable on the facts of this case and given the nature of the contractual relationship that existed between the Defendants, it cannot be said that the 1st Defendant acted with guilty knowledge.

114. The 1st Claimant is therefore entitled to an award of damages which takes into account, *inter alia*, the damage to his reputation and the injury to his feelings and in assessing the quantum of damages to be awarded, the Court had regard to, *inter alia*, the following factors:

- (i) The 1st Claimant's conduct and credibility;
- (ii) The 1st Claimant's position and standing;
- (iii) The subjective impact that the libel has had on him;
- (iv) The nature of the libel, its gravity and the mode and extent of the publication;
- (v) The absence or refusal of any retraction or apology; and
- (vi) The conduct of the defendant from the time the libel was published.

115. The Court also considered the cases of **CV 2013-04726 Faaig Mohamed -v- Jack Austin Warner** and **Civil Appeal No. 166 of 2006 between TnT News Centre Ltd -v- John Rahael, CV 2006-02092 between Conrad Aleong -v- Trinidad Express Newspapers Ltd., CV 2014-00134 between Anand Ramlogan -v- Jack Austin Warner and Claim No. CV2011-00751 Ricardo Welch -v- P.B.C.T. Ltd.**

116. **Based on the law and the facts the Court formed the view that an appropriate award for damages to the 1st Claimant is \$450,000.00.**

117. **In relation to the Corporate Claimants, the Court was not satisfied that the evidence established damage to goodwill or loss of profit or loss of business opportunities. It is settled law that general damages may be recovered without proving actual damage on claims founded in libel, however in relation to the Corporate Claimants and given the lack of evidence as to actual damage to business or goodwill, the Court is constrained to consider awards of nominal damages.**

118. In **Kyam Mohammed and Others -v- Blast Publications Company Limited and Anor (supra)** the 9th Claimant (Point Lisas Industrial Port Development Corporation Limited) through its President gave evidence that *the company's trading reputation has been*

severely infringed. Bereaux J (as he then was) awarded Plipdeco the sum of \$100,000.00. Bereaux J considered that an article alleging mismanagement and corruption in the course of its operation is bound to affect its goodwill. He held that actual damage did not have to be proven and he was entitled to take into account the high-handed nature of the publication.

119. Although the words complained of were significant, the Court took judicial notice of the fact, that the Corporate Claimants continue to receive substantial contracts including government contracts, the most recent being the extension of the Point Fortin Highway along the Mosquito Creek. **In these circumstances, the Court formed the view that damages in the sum of \$7,500.00 in favour of each of the Corporate Claimants is appropriate and no awards for aggravated and exemplary damages are necessary.**

120. The parties shall be heard as to the issues of costs on the injunctive proceedings and on the claim.

.....
FRANK SEEPERSAD
JUDGE