REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA S-062/2019

CV2019-00617

SOUTHERN MEDICAL CLINIC LIMITED

RUPERT INDAR SNR

APPELLANTS

V

CHERRY ANN RAJKUMAR

RESPONDENT

PANEL:

M. Mohammed J.A.

J. Jones J.A.

P. Rajkumar J.A.

APPEARANCES:

Mr. Martineau S.C and Mr. Hosein instructed by Ms. Sinanan for the Appellants

Cherry Ann Rajkumar in person

DATE OF DELIVERY: WEDNESDAY 31st JULY 2019

JUDGMENT

1. I have read the judgments of Jones J.A. and Rajkumar J.A. and I agree with their reasoning, analysis and conclusion.

Mark Mohammed
Justice of Appeal

Delivered by J Jones, J.A.

2. I agree with the well-reasoned and carefully crafted judgment of my brother Rajkumar JA but wish to add a few words on the challenge faced by judges with the removal of the application of the rule in Bonnard v Perryman in this jurisdiction.

3. The dilemma faced by us in this case was not with the application of the law to the facts. Nor was it with the manner of disposal of the case. Rather it was with the quandary posed to Judges by the need for the law to keep abreast with modern trends and developments while ensuring that we discharge our responsibility in the protection of rights essential to the proper functioning of our society and the maintenance of civil and respectful interactions between its constituent members. The difficult question for our determination here was whether a slavish adherence to the rule in Bonnard v Perryman is appropriate in modern Trinidad and Tobago.

4. **Bonnard v Perryman**[1] was decided in 1891. Then, after examining earlier cases, the Court of Appeal in England determined that even though it had the jurisdiction to restrain by injunction the publication of a libel its jurisdiction to restrain such allegations by way of interlocutory injunction ought not to be exercised except in the clearest of cases. We do not disagree with the thinking of the Court.

5. On that basis, however, the case established what came to be known as the rule in Bonnard v Perryman ("the Rule"). This was that an interlocutory injunction ought not to be granted when the defendant swears an ability to justify the libel unless the court is satisfied that the defence cannot succeed. In its recent incarnation the Rule has been said to apply unless it is clear that no defence will succeed at trial: **Green v Associated Newspapers Ltd. [2005] QB 972.** For reasons that are explained in detail in the judgment of Rajkumar JA we have determined that the Rule ought not to apply in this jurisdiction. Essentially our concern is with the inflexibility in the application of the Rule.

6. In answer to the question why do away with the Rule the first and most obvious response is that in this jurisdiction it is the judge, and not the jury, who determines whether a statement is defamatory. Another justification is that since the Rule was established in 1891 the publication of defamatory statements is made much easier by the Internet. Potentially damaging statements can now be made recklessly, from the comfort of one's home and, by the tap of a key, circulated to the world at large. Finally the docket system instituted by our courts now requires the judge dealing with the interim injunction to be the same judge who

[1] [1891]2 Ch 269

will ultimately determine the eventual merits of the case. All of these factors render the strictness of the Rule inappropriate.

7. An examination of the written decisions of our courts over the years reveals that in this jurisdiction judges have not been consistent in considering whether or not to apply the Rule to interim injunctions. When the Rule has been considered however, with one notable exception, the outcome has been the refusal of the court to grant an injunction. When not considered the outcome has been that the interim injunction has been granted. The exception is the decision of Rampersad J. in the case of **Kallco v CNN & Bassant CV 2013-04900**. In a well-researched and reasoned judgment Rampersad J. considered the Rule, concluded that it was no longer applicable in this jurisdiction and declined to apply it. Despite this, after applying the principles espoused in the **National Commercial Bank of Jamaica v Olint [2009] UKPC 16**, he refused the injunction.

8. Given our determination that there is no longer a justification for the application of the Rule, in its absence, the question that now arises is how is a judge to treat with applications for interim injunctions seeking prior restrain of statements alleged to be defamatory.

9. Since the decision of the Court of Appeal in the case of **Jetpak Services Ltd v BWIA International Ltd (1998) 55 WIR 362** our courts have moved away from the traditional balance of convenience approach espoused in **American Cyanamid Co. v Ethicon Ltd [1975) AC 389** and embraced the concept of balance of justice. As stated in **Jetpak** the relevant question is where does the greater risk of injustice lie in granting or refusing the injunction?

10. In **East Coast Drilling and Workover Services Ltd v Petroleum Company of Trinidad and Tobago Ltd. (2000) 58 WIR 351** the Court of Appeal explained the concept of the balance of justice test. According to the Court what was required was "a comparative assessment not only of the quantum of the risk involved in granting or refusing the injunction, but also the severity of the consequences that will flow from following either course." A few years later more detailed guidance on the principles to be applied on the grant of interim injunctions was given by the Privy Council in the case of **National Commercial Bank Jamaica Ltd v Olint Corpn. Ltd.** referred to above.

11. According to the Board in the **National Commercial Bank** case the basic principle is that the Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

> "At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted." **Per Lord Hoffmann at page 1409 paragraph 16.**

12. And later on at **paragraph 18**

> "Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

13. And at **paragraph 19**:

> "What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch. 340, 351, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted".

14. In the usual case these are the considerations that a judge treating with an interim injunction is required to bear in mind. In considering the balance of justice and how it applies to cases of prior restraint in

defamation however we must bear in mind that these were all decisions made at a time when the Rule applied and, fashioned by the Rule, the test for granting interim injunctions in cases of defamation was simply whether the claimant could satisfy the court that the defence could not succeed. Once the Rule applied the principles of balance of convenience or balance of justice were not to be applied to interim injunctions in defamation cases in this jurisdiction. The cases of Jetpack, East Coast Drilling and National Commercial Bank therefore did not seek to treat with the criteria for treating with interim injunctions in defamation suits. With the removal of the Rule therefore the question for judges becomes are we to apply the balance of justice to applications for interim injunctions in defamation suits.

15. There seems to us to be no reason for not applying the balance of justice test to interim injunctions in defamation actions. The question then becomes how is the balance of justice test to be applied. There are certain considerations that make defamation actions different from the usual civil action. A major distinction between an injunction to restrain publication or further publication of defamatory statements prior to trial and the run of the mill civil injunction is that at stake in defamatory cases are constitutional values, that is, values or rights recognized in the Constitution and treated as entrenched rights. The removal of the application of the Rule puts into question two of these rights the right to freedom of the press and the right to freedom of expression. These are rights that have been recognized and declared fundamental human rights by section 4 of our Republican Constitution. There is no corresponding constitutional right protecting a person's reputation. Under the Constitution the closest protected right is the right of the individual to respect for private and family life.

16. In a number of cases therefore there may not be a tension between conflicting constitutional rights that has to be resolved. The practical reality of prior restraint in defamation cases is that the claimant is seeking to restrain the exercise of a fundamental right before a determination of whether the right has in fact been abused by the defendant. The existence of these fundamental rights therefore marks a distinction in how the balance of justice is to be treated in defamation cases.

17. In answering the question where does the balance of justice lie we also need to bear in mind that, the grant of a permanent injunction apart, a claimant's only remedy for defamation is in damages. The quantum of the damages that may be awarded is fact dependent. Here damages are "at large". Not only is it dependent on the judge finding, on the evidence, that the statement was defamatory of the claimant but the assessment of the extent to which the claimant is to be compensated in damages is also dependent on the evidence. In certain circumstances even the most odious defamatory statement may only attract nominal damages. Because what is at stake is a constitutional right and because there is no precise or recognizable formula for the award of damages the question of whether damages is an adequate remedy and whether the defendant has the means to pay therefore does not loom as large in defamation cases as in the usual case.

18. What then is a judge to do in the absence of the application of the Rule. In the absence of the Rule a judge is required to do what is done in any other case in which a discretion is to be exercised - assess and weigh the competing positions and, as in the case of all other interim injunctions,

arrive at the course that seems likely to cause the least irremediable prejudice to one party or the other by asking the question where does the greater risk of injustice lie in granting or refusing the injunction.

19. This begs the question how is this to be achieved in defamation cases. It seems to me that faced with an application for an interim injunction in a defamation claim a judge must first determine whether there is in fact a need for an injunction. It may very well be that there will be no further publication of the statement. It may have been a fleeting statement made in the moment with no likelihood of being repeated to or revisited by anyone. In these circumstances there is no need to prevent the defendant from further publication and a claimant is quite properly left to a remedy in damages.

20. Once the need for an injunction has been established then the next step is for the judge to determine whether there is a case to try. There may be some defect in the claim or in the application for the interim order. Or, for example, as in the case before us with respect to the second appellant, there may be no basis for the statements. Conversely there may be no possible defence to the claim. In the latter two instances once the judge determines that the statements are capable of a defamatory meaning an interim injunction may issue without further recourse. At this stage there is no need to interrogate any defence(s) raised by the defendant. The question here is simply is the case posited by the claimant a valid one and is there a possible defence.

21. Once it is established that there is a case to be tried then considerations of the balance of justice arise. The court is here required to assess which

is more likely to produce a just result granting or withholding the injunction. Under the Rule a defendant merely had to assert that it was relying on a defence and the burden was on the claimant to satisfy the court that the defence would fail. In the absence of the Rule it is for the defendant to satisfy the judge that the existence of these defences are, on the facts, real and not fanciful. It is not sufficient for a defendant to simply say I intend to raise such and such defence the defendant must place before the court some basis for the proposed defence(s) however tenuous. Once that is done the question then becomes "where does the greater risk of injustice lie in granting or refusing the injunction?"

22. In applying this test however the judge is required to consider and give weight to the constitutional values contained in section 4 of the Constitution. A consideration of the constitutional values requires an acknowledgment that the right to freedom of expression and, where applicable, freedom of the press are, by our Constitution, made fundamental human rights. Of course it may very well be that, in an appropriate case, the nature of the statements made brings into play the right of the claimant to respect for the individual's private and family life. The judge then is required to consider this right in determining where the balance of justice lies. It is against this background that a judge will be required to consider the risk involved in granting or refusing the injunction and the severity of the consequences that will follow from either course.

23. While not exactly on point it is nonetheless appropriate to consider here a statement made by Mendonca JA in the case of **Kayam Mohammed and others v Trinidad Publishing Co. and Others CA118 0f 2008** albeit in the treatment of a defence of Reynold's privilege. The statement

emphasizes the great weight that a judge is to place on the right to freedom of expression and freedom of the press. According to **Mendonca JA**:

> "There is an obvious tension between freedom of expression and freedom of the press on the one hand and the right of the individual to his good reputation [on] the other. The way the tension is resolved in the application of the defence of Reynolds privilege is to give priority to freedom of the press and freedom of expression where the publication is a matter of public interest and the publisher has satisfied the test of responsible journalism. In the circumstances the right to freedom of expression and freedom of the press trump the individual's right to his good reputation.": **at paragraph 73 of the judgment.**

24. Further in weighing the balance of justice the judge must bear in mind that there is as yet no determination that the statement made is in fact defamatory. The question of whether the statements are defamatory of the claimant is dependent on the evidence led at trial. In these circumstances it is clear that in seeking to answer the question where does the balance of justice lie greater weight must of necessity be placed on the right freedom of expression and freedom of the press.

25. The effect of this is that prior restraint will only be placed on the right of freedom of expression or freedom of the press in the clearest of cases. It may very well be that after engaging in this exercise, a judge may conclude that an interim injunction ought not to issue. But it ought not to be a forgone conclusion as the Rule, as applied, seemed to require.

This was the position taken by Rampersad J. in Kallco and the position taken by us in this appeal.

26. Finally, whether or not an interim injunction is granted, it may be appropriate for the judge, in accordance with Rule 17.7 of the CPR, to give directions for an early trial of the claim. Such a direction ought to ensure that not much time passes between the publication of the statement and a determination of whether or not it is defamatory. In many cases this will minimize the effect of a statement found at trial to have been defamatory of the claimant.

Judith Jones

Justice of Appeal

Delivered by Rajkumar J.A.

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Background

27. The first named appellant is a limited liability company which operates a hospital. The second named appellant is alleged by the respondent to be the owner of the first named appellant. The appellants accept that he is the founder and executive chairman of the first named appellant. The respondent attended the premises of the first named appellant and underwent a CT scan administered by servants or agents of the first

named appellant using its equipment (the equipment). She complains of ill effects and alleges they were caused by that treatment. She requested information from the appellants relating to inter alia, the equipment used, in an effort to investigate and obtain treatment for those effects. The respondent has not instituted legal proceedings against the appellants or anyone in relation to her treatment. However she has indicated an intention to do so.

28. She published material (the allegations or publications) in relation to the appellants including on social media via Facebook, which the appellants contend is defamatory of them. The appellants sought to restrain further publication of the alleged defamatory material.

29. In summary, the publications contain allegations that she was exposed to radiation poisoning administered to her on a visit to the first appellant's hospital and complained of the failure to provide requested records relating thereto. It is not being alleged by the respondent that the second named appellant was personally involved in the matters relating to her treatment, or the maintenance or operation of the equipment. His alleged involvement in those matters arises only in his capacity as alleged owner of the first named appellant.

30. The publications, which include social media posts and placards, also raise concerns generally about the proper functioning of the equipment in the context of requests by the respondent for an independent investigation into its functioning. In relation to the claims in defamation made against her the respondent has asserted that she intends to raise the defences of: i. justification, ii. fair comment, and iii. qualified

privilege, among others. It is understood that this would include Reynolds privilege as she asserts the right to journalistic publication[2].

31. The trial judge refused to grant an injunction to restrain those and further publications in relation to the instant appellants (the refusal). This procedural appeal is in relation to the refusal. However he granted an injunction in favour of a third claimant who was a director of the first named appellant. That order was not the subject of appeal.

32. The trial judge considered that the rule as established in the case of **Bonnard v Perryman [1891] 2 Ch 269**, and applied in the cases of **Greene v Associated Newspapers Ltd [2005] Q.B. 972** and **Ricardo Welch a.k.a Gladiator v Farai Masaisai CA Civ P179/2017**, continued to apply. This was to the effect that an injunction would not normally be granted when the defendant swears that he will be able to justify the libel in circumstances where the court was not satisfied that he may not be able to do so.

33. The appellants contend that the trial judge erred inter alia:

    i. because in the case of *Masaisai* the Court of Appeal did not apply the case of *Bonnard v Perryman* but rather reserved its position on its future applicability and expressly reserved the right to revisit it.

    ii. because the case of *Bonnard v Perryman* no longer applies given, inter alia, that jury trials in relation to libel have now been abolished in the U.K. and do not exist in this jurisdiction.

[2] See paragraph 5 of the respondent's affidavit filed on the 7th March 2019.

iii. because, if *Bonnard v Perryman* did not apply, the trial judge should have applied the analysis in *American Cyanamid v Ethicon* [1975] A.C 396 and concluded that the balance of convenience favoured the grant of the injunction, and

iv. because the trial judge did not consider the defence of Reynold's privilege (and presumably find that defence inapplicable).

Issues

34. That being so the issue on this appeal is whether in those circumstances the trial court was plainly wrong to exercise its discretion by refusing an injunction to the first named appellant and to the second named appellant to restrain publication of the allegations pending trial.

35. Whether or not this is the case in turn depends on the following matters:

i. Whether the defences of justification, fair comment, qualified privilege, or Reynolds privilege[3] could be raised in relation to the publications concerning the first named appellant.

If so,

a. does an application of *Bonnard v Perryman* in relation to the first named appellant favour the grant or refusal of an injunction,

b. if *Bonnard v Perryman* does not apply whether a consideration of the balance of justice in relation to the first named appellant favours the grant or refusal of an injunction.

[3] Reynolds v Times Newspaper [1999] 3 W.L.R. 1010

ii. Whether the defences of justification, fair comment, qualified privilege or Reynolds privilege could be raised in relation to the publications concerning the second named appellant.

If so

a. does an application of *Bonnard v Perryman* in relation to the second named appellant favour the grant or refusal of an injunction,

b. if *Bonnard v Perryman* does not apply whether a consideration of the balance of justice in relation to the second named appellant favours the grant or refusal of an injunction.

iii. Whether the principle in *Bonnard v Perryman* continues to apply in this jurisdiction.

iv. If not what principles would apply to injunctions prior to trial in actions for defamation.

Conclusion

Issue (i) (a) - Whether an application of *Bonnard v Perryman* in relation to the first named appellant favours the grant or refusal of an injunction

36. The defences of justification and Reynolds privilege could be raised in relation to the allegations contained in the publications concerning the first named appellant. The trial judge was not plainly wrong in his application of *Bonnard v Perryman* in relation to the first named appellant, because it had been applied by the Court of Appeal in *Massasai*, though it had reserved the right to revisit it. If *Bonnard v*

Perryman applies then its application favours the refusal of an injunction in relation to it.

37. This is because an application of *Bonnard v Perryman* would lead to an almost automatic refusal of the injunction applied for unless the publications were **clearly untrue** or there was **no prima facie basis** or support for publishing them. In the instant case a substantial amount of material was placed before the court in support of the respondent's belief in the truth of the allegation, and her significant efforts to obtain and substantiate information relating thereto. It could not have been said at that stage that the publications were clearly untrue. Therefore it has not been demonstrated that the trial judge erred in his application of *Bonnard v Perryman* in refusing an injunction to the first named appellant.

Issue (i) (b) - If *Bonnard v Perryman* does not apply whether a consideration of the balance of justice in relation to the first named appellant favours the grant or refusal of an injunction

38. If *Bonnard* v *Perryman* does not apply an arguable case exists on the material before the court at this stage that the **Reynolds** defence[4], which could permit publication of even defamatory and untrue statements once the product of responsible journalism, could be raised in relation to the first named appellant. In that scenario the conventional analysis of the balance of justice, which applies generally to pretrial non-mandatory injunctions would be applicable instead. As explained in **Jetpak v BWIA**[5]

[4] Addressed in greater detail below.
[5] (1998) 55 WIR 362

that analysis requires a consideration of where lies the greater risk of injustice, in granting or refusing the injunction.

39. It can be argued that the publications are being made at least in part in the public interest, and this weighs against their restraint prior to trial. On the other hand the detriment to the first named appellant from such publication in terms of loss of goodwill, loss of opportunity and loss of profits if established at trial can be compensated in damages. In those circumstances, given the extraordinary weight that must continue to be accorded to the right of **freedom of expression,** the balance of justice would also be in favour of no prior restraint by injunction being granted against the respondent in relation to the publications referring to the first named appellant.

40. Even with the higher threshold requirements necessary to establish the defence of **justification**, that defence is **arguable** based upon the extensive material supplied by the respondent. Therefore similarly, because of the great weight to be accorded to the right of freedom of expression, an analysis based on applying balance of justice considerations would lead to the same result as if *Bonnard v Perryman* applied, namely - no prior restraint by injunction in relation to the first named appellant.

Issue (ii) (a) - Whether an application of *Bonnard v Perryman* in relation to the second named appellant favours the grant or refusal of an injunction

41. If *Bonnard v Perryman,* applies the trial judge erred in his application of that principle in relation to the second named appellant. This is because

he failed to consider that the first named appellant was a separate legal entity and that no personal involvement of the second named appellant in the alleged radiation poisoning was being alleged. The mere fact that it was alleged that he was its owner would not enable the respondent, without more, to justify or substantiate the allegations of radiation poisoning being made against the first named appellant as being equally attributable to him. Accordingly, the defences of justification, fair comment, qualified privilege or Reynolds privilege could not be raised in relation to the publications concerning the second named appellant.

42. *Bonnard v Perryman* admits of an exception to the principle of non-restraint prior to trial where the allegations are clearly untrue. That exception must equally apply where the allegations on their face cannot be demonstrated to be sustainable on the material before the court. The possibility of the allegations being justifiable at trial cannot be taken into account if at this stage they are unsustainable.

43. Where, as is the case here, no basis has been established by the respondent for making the allegations then an injunction can be granted without infringing upon the right to **freedom of expression**. If *Bonnard v Perryman* were to have been properly applied this would have precluded refusal of an injunction because it fell within the exception recognized therein.

Issue (ii) (b) If Bonnard does not apply whether a consideration of the balance of justice in relation to the second named appellant favours the grant or refusal of an injunction

44. Even if *Bonnard v Perryman* does not apply no arguable case has been established to demonstrate that the defences of justification, fair comment, qualified privilege, or Reynolds privilege arise in relation to the publications concerning the second named appellant.

45. This is for the same reason as explained above. The first named appellant is a separate legal entity. The alleged refusal by him to disclose machine logs and information about the equipment is inextricably linked to the allegation of responsibility for radiation poisoning made against the first named appellant, a separate legal entity. However, the alleged involvement of the second named appellant in the alleged over dosage/ radiation poisoning relates to him in his capacity as owner of the first named appellant. No direct personal involvement in radiation poisoning is being alleged.

46. Therefore, in so far as the publications alleged radiation poisoning on the part of the first named appellant and seek to associate the second named appellant therewith, it has not been sufficiently demonstrated that it is arguable that their continued publication, on the basis that he is the owner of the first named appellant, could attract a defence of either justification, fair comment, qualified privilege, or Reynolds privilege in relation to the prima facie defamatory statements made in relation to him. Just as in the case where *Bonnard v Perryman* does apply, such an analysis, taking into account the matters aforesaid, would also favour the grant of an injunction to the second named appellant.

Issue (iii) - Revisiting Bonnard v Perryman - whether the rule in *Bonnard v Perryman* continues to apply in this jurisdiction

47. The rigid rule in *Bonnard v Perryman* can no longer be justified in this jurisdiction. The bases for the justification for a prima facie refusal of an injunction when, for example, the defence of justification is raised, inter alia:

    a. have been superseded by developments in law, including: i. the abolition of jury trials in defamation actions and ii. the expansion upon the right to freedom of expression by the development of the defence of Reynolds privilege,

    b. do not withstand closer scrutiny of the assumption that seriously damaged reputations can always be vindicated by recovery of damages awarded at trial,

    c. ignore the requirements of the Supreme Court of Judicature Act Chapter 4:01.

48. Provided that the right to **freedom of expression** is adequately safeguarded, there is no sufficient reason why separate considerations should apply in the case of pre-trial non-mandatory injunctions in actions for defamation, as distinct from other civil actions. The greater flexibility available to a court liberated from the rigidity of the rule in *Bonnard v Perryman* to consider the justice of the individual case before it would justify the replacement of that outdated rule without sacrificing or infringing upon the right to **freedom of expression**.

Issue (iv) - If not what principles would apply to injunctions prior to trial in actions for defamation

49. Therefore, once the exceptional rule in *Bonnard v Perryman* does not apply, general balance of justice principles and analysis as in *Jetpak* must also apply in the case of pre-trial injunctions for defamation. Accordingly

a court can equally take into account the balance of justice in considering whether prior restraint of publication is justified while recognizing and according **significant weight** to the **fundamental right** of **freedom of expression**.

50. Such an approach:

    a. is justified in principle,

    b. would harmonize the approach to pre-trial injunctions to restrain defamation with the approach to the grant of non-mandatory injunctions in civil proceedings generally, and

    c. would provide the flexibility to courts to address the myriad permutations of factual scenarios that could occur while considering the justice of the individual case as required by the Supreme Court of Judicature Act.

    d. does not involve any restriction upon the **right to freedom of expression**.

Orders

51. Accordingly, it is ordered as follows:

    i. An injunction is granted restraining the respondent whether by herself her servants or agents or otherwise howsoever from further publishing or causing to be published or disseminated and/or posted on any forum on the world wide web including but not limited to social media sites on the internet such as but not limited to Facebook and/or newspaper and/or print publication containing the words and/or images used in publications by the respondent on 22nd January 2019 – Facebook page personal blog, 23rd January 2019 – Facebook page personal blog, 8th February 2019 – placards, 10th February 2019 – Facebook page – Cherry

Ann Rajkumar Attorney at Law, (together referred to as “the publications”) or similar words defamatory of the second named appellant.

ii. In default of an undertaking being provided by the respondent that she will not whether by herself, servants or agents or otherwise howsoever erect any banners signs or pictorial displays containing the words and/or images used in the publications or similar words defamatory of the second named appellant within 100 meters of the workplaces and/or residences of the second named appellant, an injunction will be granted to that effect.

iii. An order is granted that the respondent or her servants or agents remove and/or delete any posts on social media which repeat or publish statements made in relation to the second named appellant in the publications (referred to in the first part of this order), within 24 hours of this order.

Analysis

The Publications

52. The first publication dated 11th January 2019 on a Facebook page dealt with an allegation of radiation poisoning at a well-known south based medical hospital.

53. The second publication on 22nd January 2019, unlike the first one, named the first named appellant and identified the respondent as the alleged victim. It alleged radiation poisoning from a ten year old machine (the

equipment). This second article also mentioned the **second named appellant** as **owning** the first named appellant.

54. On 22nd January 2019 the respondent specifically posted in relation to the first named appellant that the CT machine poisoned her.

55. On 23rd of January the respondent posted a further article headed "*boycott* (the first named appellant)" with a **photograph** of the **second named appellant** headlined "***Radiation poisoning*** *in Trinidad, the facts*".

56. A pre action protocol letter was issued on the 4th of February 2019 but further social media postings continued.

57. On the 8th February 2019 the respondent allegedly erected signs stating "**("second named appellant")** *hand over the CT scan machine logs*" with a **photograph** of the **second named appellant**.

58. A further article was published on Facebook on 10th February 2019. That article mentioned the following "*despite writing the* ***owner and chairman*** (**second named appellant**) *he remained tight lipped after eight months*". The article was in the context of an allegation that she had received a blast of radiation beyond the dosage required at the first named appellant and indicated a demand for the data log for the CT machine of the first named appellant.

59. On the 12th of February 2019 the respondent further posted comments alleging injury following a CT scan at the first named appellant. The publications in relation to the second named appellant simply alleged involvement by him in his capacity as owner/chairman of the first named

appellant. They did not allege direct personal involvement by him with respect to the alleged treatment or maintenance of the equipment. While they do make reference to him as the owner of the first named appellant in the context of the request by the respondent for the records/logs of the equipment, the articles go much further than this.

60. They suggest that defective or improperly calibrated equipment of the first named appellant is dispensing radiation poisoning, and that the second named respondent as owner and chairman of the first named appellant is associated with those matters. They used his photographs on Facebook posts and on placards. They therefore went beyond a mere request for information. Their tone was capable of stirring up public sentiment and generating odium and contempt against him based on the allegations that seek to associate him personally with radiation poisoning by equipment at the first appellant's hospital. These are serious allegations against both appellants. The issue is whether an injunction can or should be granted restraining these or similar further publications.

Bonnard v Perryman [1891] 2 Ch 269

61. The rule is explained in **Aldridge on Contempt 5th Edition (2017) paragraph 4-370** as follows:

1. Protection from "gagging" writs

One respect in which the English common law has long accorded a ***high priority*** *to* ***freedom of speech*** *is in its unwillingness to grant interlocutory injunctions by way of "previous restraint" for the prevention of defamatory publications. What is now generally known as the* ***rule in Bonnard v Perryman*** *means that an* ***injunction will always be refused*** *in such circumstances,* ***where the defendant***

***swears that he will prove the truth** of what he intends to say, **unless the applicant can demonstrate** that the mooted **plea of justification is bound to fail**. In Thomson v Times Newspapers Ltd, **(1969) 1 W.L.R. 1236** Salmon LJ said:*

*"It is a widely held fallacy that the issue of a writ automatically stifles further comment. There is no authority that I know of to support the view that further comment would amount to contempt of court. Once a newspaper has justified, **and there is some prima facie support for the justification**, the plaintiff cannot obtain an interlocutory injunction to restrain the defendants from repeating the matters complained of.* (All emphasis added)

62. In the case of **Greene** *(ibid)* the UK Court of Appeal per Lord Brooke LJ reviewed the case law which applied *Bonnard v Perryman* and concluded as follows at paragraph 57 (all emphasis added):

The law of prior restraint in defamation actions: the rationale of the rule

*[57] This survey of the case law shows that in an action for defamation a court will not impose a prior restraint on publication **unless it is clear that no defence will succeed at the trial.** This is partly due to the importance the court attaches to **freedom of speech**. It is partly because **a judge must not usurp the constitutional function of the jury** unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until **there has been disclosure of documents and cross-examination** at the trial **a court cannot safely proceed** on the basis that what the defendants wish to say is not true. And **if it is or might be true the court has no business to stop them saying it**. This is another way of putting the point made by Donaldson MR in Khashoggi v IPC Magazines Limited [1986] 1 W.L.R. 1412 case, to the effect that a court cannot know*

whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth lies. And if the defence fails, the defendants will have to pay damages (which in an appropriate case may include aggravated and/or exemplary damages as well).

63. While explaining and applying the rule in *Bonnard v Perryman*, it suggested that the rule applied even more widely than where a plea of justification was proposed. As stated therein "…*in an action for defamation a court will not impose a prior restraint on publication unless it is clear that* ***no defence*** *will succeed at trial*". (All emphasis added)

64. The court in *Greene* (ibid) also confirmed[6] that the traditional analysis derived from the case of *American Cyanamid* (ibid), of considering inter alia, the balance of convenience, (and now the balance of justice), on applications for interim injunctions, does not apply when *Bonnard v Perryman* applies.

65. This court has been asked to consider whether or not the rule in *Bonnard v Perryman* continues to apply. If it does not, then there will be no reason why the traditional analysis, applicable to non-mandatory injunctions in other areas of civil law, should not be considered. The analysis in *American Cyanamid* has evolved into the need to consider the balance of justice as explained by De La Bastide CJ in **Jetpak v BWIA** and by Archie J (as he then was) in **Venture Productions (Trinidad) Limited v Atlantic LNG Co. of Trinidad and Tobago Ltd**[7] as follows:-

Balance of Justice

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[6] At paragraphs 53 and 55 page 989 applying *Herbage v Pressdram Limited* [1984] 1 W.L.R. 1160.
[7] H.C.1947/2003

"17. The law in Trinidad and Tobago has been established by the decision of the Court of Appeal in ***Jetpak,*** and ***East Coast Drilling and Workover Services Ltd. v Petroleum Company of Trinidad and Tobago Ltd*** *(2000) 58 WIR 35. The plaintiff* ***must first establish that there is a serious question to be tried****. It used to be thought that the enquiry then proceeded sequentially through a consideration of whether the plaintiff would be adequately compensated by an award of damages; whether the defendant would be able to pay; whether if the plaintiff ultimately fails, the defendant would be adequately compensated under the plaintiff's undertaking; whether the plaintiff would be in a position to pay and finally an assessment of the balance of convenience.*

18. The new approach required a simultaneous consideration of all relevant factors and a degree of inter play between various factors. The plaintiff is not necessarily denied relief by the consideration of any single factor in isolation. The question, which must be posed, is ***where does the balance of justice lie****?*

19. ***An assessment of the balance of justice requires a comparative assessment of (i) the quantum of the risk involved in granting or refusing the injunction and (ii) the severity of the consequences that will flow from following either course.****"*

[All emphasis added]

66. Whether or not the rule in *Bonnard v Perryman* remains applicable in this jurisdiction is considered further in this judgment. However, at this point, it is possible to consider the effect of applying each analysis and the impact

of this on the outcome of the instant appeal. Before doing so however it is necessary to consider the allegations made against the second named appellant in the context of his alleged ownership of the first named appellant.

The significance of ownership of the first named appellant by the second named appellant

67. The publications in relation to the second named appellant simply alleged involvement by him in his capacity as owner/chairman of the first named appellant. They did not allege direct personal involvement by him with respect to the alleged treatment or maintenance of the equipment. While they do make reference to him as the owner of the first named appellant, in the context of the request by the respondent for the records/logs of the equipment, the articles go much further than this.

68. They suggest that defective or improperly calibrated equipment of the first named appellant is dispensing over dosages of radiation or radiation poisoning, and that the second named appellant as owner and chairman of the first named appellant is associated with those matters. They therefore went beyond a mere request for information. The allegations seek to associate him personally with radiation poisoning by equipment at the first appellant's hospital.

69. The mere fact of ownership by the second named appellant is not sufficient to pierce the corporate veil and attribute to him personal responsibility for the alleged actions or defaults of the first named appellant. See **Dave Persad v Anirudh Singh** [2017] UKPC 32 in particular at **paragraphs 17, 18,**

20, and **22**[8]**.** In that case Mr. Persad and Mr. Singh were the parties in negotiation over a lease. When the lease was finalized, prepared by Mr. Persad and submitted to Mr. Singh, the named lessee was a company,

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[8] *17. As the Court of Appeal rightly acknowledged,* ***piercing the veil is only justified in very rare circumstances****, a point which was implied in the UK Supreme Court's decision in VTB Capital Plc v Nutritek International Corpn [2013] 2 AC 337, paras 127, 128 and 147, and was expressed in terms in its subsequent decision in Prest v Petrodel Resources Ltd [2013] 2 AC 415, paras 35, 81-82, 99-100 and 106. As Lord Sumption explained in Prest at para 35, piercing the veil can be justified only where "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control". In this case, Mr Singh cannot get near establishing any evasive or frustrating action on the part of Mr Persad. Mr Persad was under no relevant "legal obligation or liability" to Mr Singh at the time that he proffered to Mr Singh the draft lease executed by CHTL or at the time that the lease became binding. He had been negotiating for the grant of a formal lease and therefore there could have been no question of his having been bound as lessee prior to the formal completion of the Lease. In any event, the parties always envisaged a term of five years, and such a lease can only be granted by deed - see section 3 of the Landlord and Tenant Ordinance (Chapter 27, No 16).*

18. The fact that Mr Persad proffered a draft lease with CHTL as the lessee, after he and Mr Singh had been negotiating on the assumption that Mr Persad would be lessee, does not assist Mr Singh's case. Mr Persad did not give any sort of assurance that he personally would take the lease or that he would not put forward a limited company as the lessee, when the proposed lease came to be drawn up. Further, it is not as if Mr Persad misled Mr Singh in any way: Mr Singh appreciated that the lease which he was being asked to execute involved the grant to a lessee which was not Mr Persad but was CHTL. It is not even as if Mr Singh failed to appreciate that ***a limited company was a different legal person from its shareholder or director.***

20. In the light of the issues before the Judge, the fact that Mr Persad did not produce any documents relating to the creation or constitution of CHTL takes matters no further. ***The fact that CHTL was a "one man company" is also irrelevant****: see Salomon v A Salomon and Co Ltd [1897] AC 22, which famously established the difference between a company and its shareholders. That case also exposes the fallacy of the notion that the court can pierce the veil where the purpose of an individual interposing a company into a transaction was to enable the individual who owned or controlled the company to avoid personal liability. One of the reasons that an individual, either on their own or together with others, will take advantage of limited liability is to avoid personal liability if things go wrong, as Lord Herschell said at pp 43 to 44. If such a factor justified piercing the veil of incorporation, it would make something of a mockery of limited liability both in principle and in practice.*

22. In the course of his able and spirited submissions, Mr Beharrylal suggested that the facts of this case were comparable with those in Gilford Motor Co Ltd v Horne [1933] Ch 935 and Jones v Lipman [1962] 1 WLR 832, whose facts are respectively set out by Lord Sumption in Prest at paras 29 and 30. The Board considers that those cases are readily distinguishable from the present case. Not only did the person who set up the company in those cases have an existing relevant legal obligation which he was trying to avoid by entering into a transaction involving the company, but also the involvement of the company was unilaterally effected by the person concerned, without the knowledge, let alone the consent, of the other party. In this case, as already mentioned, Mr Persad had no relevant obligation to Mr Singh at the time of the transaction involving the company, namely the grant of the lease, and furthermore Mr Singh, the person seeking to pierce the corporate veil, was directly involved in, indeed was a necessary party to, that transaction.

CHTL, and not Mr. Persad. The lease was executed by Mr. Singh. It was held in an action to recover damages, arrears of rent and / or mesne profits that those circumstances did not justify piercing the corporate veil, so as to attribute personal liability to Mr. Persad.

70. As the case of **Persad v Singh** itself illustrated (at para 20 citing **Saloman v Saloman**), "*the notion that the court can pierce the veil where the purpose of an individual interposing a company into a transaction was to enable the individual who owned or controlled the company to avoid personal liability"*, is a fallacy. As explained at paragraph 20 "*One of the reasons that an individual, either on their own or together with others, will take advantage of limited liability is to avoid personal liability if things go wrong, as Lord Herschell said at pp 43 to 44. If such a factor justified piercing the veil of incorporation, it would make something of a mockery of limited liability both in principle and in practice".* The effect of this distinction between the appellants was not addressed by the trial judge. However it is a critical issue in determining whether an injunction should have been granted or refused, whether or not *Bonnard v Perryman* applied.

Issue (i) (a) - Whether an application of *Bonnard v Perryman* in relation to the first named appellant favours the grant or refusal of an injunction

71. The defences of justification and Reynolds privilege could be raised in relation to the allegations contained in the publications concerning the first named appellant. The trial judge was not plainly wrong in his application of *Bonnard v Perryman* in relation to the first named appellant, because it had been applied by the Court of Appeal in *Masaisai*, though it

had reserved the right to revisit it. If *Bonnard v Perryman* applies then its application favours the refusal of an injunction in relation to it.

72. An application of Bonnard would lead to an almost automatic refusal of the injunction applied for unless the publications were **clearly untrue** or there was **no prima facie basis** or support for publishing them. In the instant case a substantial amount of material was placed before the court in support of the respondent's belief in the truth of the allegation. Care must be taken to avoid expressing an opinion on matters which remain to be finally decided at the trial of the substantive action. However, given that much of the material is of a technical nature relating to, inter alia, calibration of the equipment, maintenance of the equipment, and causation of her alleged symptoms, derived after research and supported by input from prima facie independent third parties with relevant expertise, it could not have been said at that stage that the publications were clearly untrue. It has not been demonstrated that the trial judge erred in his application of *Bonnard* in refusing an injunction to the first named appellant.

Issue (i) (b) - If *Bonnard v Perryman* does not apply whether a consideration of the balance of justice in relation to the first named appellant favours the grant or refusal of an injunction

73. If *Bonnard* v *Perryman* does not apply, an arguable case exists on the material before the court at this stage that the **Reynolds** defence, which could permit publication of even defamatory and untrue statements in the context of responsible journalism, could be raised in relation to the first named appellant as explained hereinafter. In that scenario, the conventional analysis of the balance of justice, which applies generally to

pretrial non-mandatory injunctions, would be applicable instead. As explained in ***Jetpak Services Limited v BWIA International Airways***[9] and ***Venture Productions*** (supra) that analysis requires in effect a consideration of where lies the greater risk of injustice, in granting or refusing the injunction**.**

74. Given the nature of the allegations against the first named appellant it may be inferred that the refusal of an injunction in relation to it may cause it damage to its reputation and goodwill, and possibly financial loss. On the other hand the allegations made by the respondent are grounded in her personal experience and based upon extensive research and **efforts to substantiate** the claims that she makes. Further, her claim that the **public interest** is served by her publications of this material to make members of the public aware, cannot be dismissed.

75. In those circumstances, given the extraordinary weight that must continue to be accorded to the right of **freedom of expression,** the balance of justice would also be in favour of no prior restraint by injunction being granted against the respondent in relation to the publications referring to the first named appellant. Any loss or damage sustained by the first named appellant can be compensated by an award of damages at trial if the defences fail[10]. Even with the higher threshold requirements necessary to establish the defence of **justification**, given that (i) that defence is **arguable** based upon the extensive material supplied by the respondent, and also (ii) because of the great weight to be accorded to the right of freedom of

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[9] (1998) 55 WIR 362

[10] Damages in this jurisdiction for defamation can be substantial as reflected by the court of appeal in its review of such awards in the case of Civ Appeal 252 of 2014 **Faaiq Mohammed v Jack Warner** delivered May 22nd 2019 per Jamadar JA at paragraphs 23 to 43.

expression, an analysis based on the balance of justice would produce the same result in relation to the defence of **justification**.

76. Therefore in the instant case applying balance of justice considerations would lead to the same result as if Bonnard applied, namely - no prior restraint by injunction in relation to the first named appellant.

Issue (ii) (a) - Whether an application of *Bonnard v Perryman* in relation to the second named appellant favours the grant or refusal of an injunction

77. If *Bonnard v Perryman* applies the trial judge erred in his application of that rule in relation to the second named appellant. This is because he failed to consider that the first named appellant was a separate legal entity and that no personal involvement of the second named appellant in the alleged radiation poisoning was being alleged. The mere fact that it was alleged that he was its owner would not enable the respondent, without more, to justify or substantiate the allegations of radiation poisoning being made against the first named appellant as being equally attributable to him. Accordingly, the defences of justification, fair comment, qualified privilege, or Reynolds privilege could not be raised in relation to the publications concerning the second named appellant.

78. *Bonnard v Perryman* admits of an exception to the principle of non-restraint prior to trial where the allegations are clearly untrue. That exception must equally apply where the allegations on their face cannot be demonstrated to be sustainable on the material before the court. The possibility of the allegations being justifiable at trial cannot be taken into account if at this stage they are unsustainable.

79. Where, as is the case here, no basis has been established by the respondent for making the allegations, then an injunction can be granted without infringing upon the right to freedom of expression. If *Bonnard v Perryman* were to have been properly applied this would have precluded refusal of an injunction because it fell within the exception recognized therein.

Issue (ii) (b) If Bonnard v Perryman does not apply whether a consideration of the balance of justice in relation to the second named appellant favours the grant or refusal of an injunction

80. Even if *Bonnard v Perryman* does not apply, no arguable case has been established to demonstrate that the defences of justification, fair comment, qualified privilege, or Reynolds privilege arise in relation to the publications concerning the second named appellant.

81. This is for the same reason as explained above. The first named appellant is a separate legal entity. The alleged refusal by him to disclose machine logs and information about the equipment is inextricably linked to the allegation of responsibility for radiation poisoning made against the first named appellant, a separate legal entity. However, the alleged involvement of the second named appellant in the alleged over dosage/ radiation poisoning relates to him in his capacity as owner of the first named appellant. No direct personal involvement in radiation poisoning is being alleged.

82. Therefore, in so far as the publications alleged radiation poisoning on the part of the first named appellant and seek to associate the second named appellant therewith, it has not been sufficiently demonstrated that it is

arguable that their continued publication, on the basis that he is the owner of the first named appellant, could attract a defence of either justification, fair comment, qualified privilege or Reynolds privilege in relation to the prima facie defamatory statements made in relation to him.

83. If *Bonnard v Perryman* does not apply, an analysis which takes into account the balance of justice would permit a closer scrutiny of the legitimacy and basis of alleged defamatory statements. This is because as a matter of law a defence of justification or even Reynolds privilege could not be sustained on the basis of the matters alleged by the respondent, an injunction should have been granted in relation to statements involving him. Without being able to surmount that threshold requirement, the further steps in the analysis referred to in *Jetpak* and *Venture Productions* would not therefore have been required in this case. Therefore just as in the case where *Bonnard v Perryman* does apply, such an analysis taking into account the matters aforesaid, would favour the grant of an injunction to the second named appellant.

84. As to the respondent's submissions in reply re ***Persad v Singh*** the following points are relevant:

    i. It is arguable that the first named appellant owes a duty of care to the respondent. If he is a director, the second named appellant would owe fiduciary duties to the first named appellant.

    ii. However, without more, any such fiduciary duty by the second named appellant to the first named appellant would not of itself suffice to impose a separate duty of care by him in relation to the respondent, because the separate legal personality of

the first named respondent is interposed between him and the matters complained of. Without more responsibility and involvement in any alleged radiation poisoning cannot be imputed to him personally by reason only of his being owner/chairman or even director. As shown in *Persad* the circumstances in which the corporate veil can be pierced are limited and do not here apply.

Revisiting Bonnard v Perryman

85. The Court of Appeal in the case of *Masaisai* signalled the possibility of a re-visitation of *Bonnard v Perryman* when it could be considered whether that rule is appropriate at this time and in this jurisdiction. In that case it was common ground between both parties that the cases of *Bonnard and Greene* applied. No argument to the contrary was addressed to the court that it should be dis-applied or modified.

86. Further the trial judge in that case identified it as one of the matters that she was required to consider, the other being a consideration of the balance of justice. In that case it was held that the trial judge had not demonstrated that she had considered or addressed the *Bonnard v Perryman* requirement, there accepted by all parties and the trial judge. No such consensus applies in this case and this court has been invited to consider whether *Bonnard v Perryman* remains applicable and represents the common law in this jurisdiction.

87. While the Court of Appeal in *Masaisai* did not reject the principle in ***Bonnard,*** it expressly reserved the right to revisit it. In addressing the issue of whether Bonnard continues to apply in this jurisdiction it is necessary to consider the following sub issues:

a. the present content of that rule,

b. its application in this jurisdiction and other Commonwealth jurisdictions,

c. justifications if any for maintaining or dispensing with the rule,

d. developments in technology,

e. developments in the common law particularly in relation to the right to free speech,

f. whether the rule can continue to be justified,

g. if not what should replace it.

88. The principle in *Bonnard* was based on the following considerations:

a. at the time it was decided there existed in the United Kingdom trial by jury in libel cases and the jury determined at trial whether libel existed. A preliminary consideration of this issue by a judge alone would, it was argued, risk usurping the constitutional function of the jury.

b. another more important reason was the court's reluctance to interfere with freedom of speech **prior** to trial of the issue as to whether that speech was defamatory. The rationale was that the claimant alleging defamation would be entitled to his remedies **after** trial if defamation were established and those remedies could include aggravated or even exemplary damages.

c. The court in *Greene* considered that "*The rule is also partly founded on the pragmatic grounds that until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it.*"

Sub Issue (a) - Bonnard v Perryman – Present content of the rule

89. "*The general rule has been that where the defendant contends that the words complained of are true, and asserts that he will plead and seek at trial to prove the defence of justification, the court will not grant an interim injunction unless exceptionally the court is satisfied that such a defence is one that cannot succeed*[11]*. This was the decision in Bonnard v Perryman."*

90. In **Khuja v Times Newspaper Limited & Ors**[12] the Supreme Court in the UK formulated the rule in *Bonnard v Perryman* as follows: *"…the court will not grant an interlocutory injunction in advance of publication if the defendant asserts that he will plead justification, unless exceptionally the court is satisfied that the defence is bound to fail".*

91. In *Bonnard v Perryman* the defence of **justification** was being asserted. However the rule appears to have evolved and its development was traced in the case of *Greene*[13]*.* For example in the case of *Fraser v Evans*[14] cited in *Greene,* Lord Denning MR referred to the rule as applying to the intended defences of justification and also fair comment on a matter of public interest.

92. In the case of *Greene* itself at paragraph 57[15] the court appeared to contemplate that the rule in *Bonnard* applied where **any defence** had been

[11] Gatley on Libel and Slander (2013) 12th Edition paragraph 25.6 at page 954
[12] [2017] UKSC 49 at paragraph 19
[13] *(see paragraph 51 Greene Ibid)*
[14] *[1969] 1 Q.B 349 at 360-361*
[15] [57] This survey of the case law shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial. This is partly due to the importance the court attaches to freedom of speech. It is partly because a judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that

asserted by a defendant, when it restated the rule as follows "*this survey of the case law shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that **no defence will succeed at the trial***".

93. In **Aldridge on Contempt 5th Edition paragraph 4-370** *Thomson v Times Newspapers Limited [1969] 1 W.L.R. 1236* was cited where it was contemplated that there must be prima facie support for a plea of justification before the principle of *Bonnard v Perryman* applied.

94. In *Greene* the UK Court of Appeal at paragraph 56[16] cited with approval *Holley v Smythe* [1998] Q.B. 726 where the exception in *Bonnard v Perryman* was expressed to apply where the court was satisfied that the defamatory statements were "***clearly untrue***". In Khuja (supra) the exception to *Bonnard v Perryman* was expressed to apply where "*the court is satisfied that the defence is bound to fail*".

Justifications for disapplication of American Cyanamid

95. Another feature which has been engrafted upon the rule is the disapplication of American Cyanamid principles. At paragraph 55 of *Greene* it was confirmed that it was established by the UK Court of Appeal that the

what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it. This is another way of putting the point made by Donaldson MR in *Khashoggi*'s case, to the effect that a court cannot know whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth lies. And if the defence fails, the defendants will have to pay damages (which in an appropriate case may include aggravated and/or exemplary damages as well).

[16] [56] In *Holley v Smyth* [1998] 1 All ER 853 at 872, [1998] QB 726 at 749, where the potency of the rule was reaffirmed, Sir Christopher Slade, another experienced Chancery judge, said:
'I accept that the court may be left with a residual discretion to decline to apply the rule in *Bonnard v Perryman* in exceptional circumstances. One exception, recognised in that decision itself, is the case where the court is satisfied that the defamatory statement is **clearly untrue**. In my judgment, however, that is a discretion which must be exercised in accordance with established principles.'

principles underlying the grant of interlocutory injunctions which Lord Diplock laid down in *American Cyanamid* (decided in 1975 long after *Bonnard v Perryman*), did not apply to cases covered by the rule in *Bonnard v Perryman*. The significance of this is addressed infra.

96. Griffiths LJ in **Herbage v Presdram Limited** [1984] 1 W.L.R at 1160, a case cited at paragraph 53 of *Greene vs Associated Newspapers Ltd*, summarizes the concern that if *American Cyanamid v Ethicon* applied to pretrial restraint in the case of defamation, this would result in the watering down of the right to freedom of speech. That paragraph is instructive.

> *[53] He refused to water the principles down. After summarising an argument by counsel which suggested that the combined effect of the Rehabilitation of Offenders Act 1974 and the decision of the House of Lords in American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, [1975] AC 396 justified a radical departure from the rule, he went on to say:*
>
> *'If the court were to accept this argument, the practical effect would I believe be that in* ***very many cases*** *the plaintiff would obtain an injunction, for on the American Cyanamid principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that* ***the balance of convenience favoured restraining repetition of the alleged libel*** *until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.' (All emphasis added)*

See also Aldridge, Eady & Smith on Contempt 5th Edition (2017) at Paragraph 6-10, page 450[17].

Justification for dis-applying American Cyanamid

97. This is based upon an assumption that a simple application of balance of convenience would often favor restraining repetition of an alleged libel until trial of an action. However it fails to take into account that a court being guided by balance of justice considerations can consider that very great weight must be accorded to the principle of freedom of speech. The concerns of incursion into that right can be readily addressed by a court taking this into account when considering the balance of justice. Freedom of speech is not diminished by a court taking into account the balance of justice and according a significant **weight** to the factor of **freedom of expression**. A court not thus bound by the rule in *Bonnard v Perryman,* without being restricted from considering other factors, would have the flexibility to achieve justice in an appropriate case. One example where the different approaches could produce different results would be an alleged serious libel with a very tenuous basis whose continued publication risks putting a claimant's life in danger.

[17] *"In the context of defamation, for example, applications for interim injunctions to restrain the anticipated publication of defamatory words are treated by the courts as being outside the usual framework laid down by the House of Lords in American Cyanamid Co v Ethicon Ltd.[25] It will not do for a claimant to show merely that: (i) he has an arguable case; (ii) damages would not be an adequate remedy; and (iii) the balance of convenience (or justice[26]) lies in his favour. The well-established principles of Bonnard v Perryman[27] were applied because of the special value attached to freedom of speech. For the moment at least, they continue to be applied in defamation claims notwithstanding the more recent approach taken by the House of Lords in S (A Child) Re[29] to the effect that, where Convention rights appear to come in to conflict,* ***a balancing exercise should be carried out in the light of the particular facts*** *and no right is to be accorded automatic priority over any other".[30]*

98. In fact however, in many cases as illustrated by the facts in the instant case, the outcome under *Bonnard v Perryman* and the outcome applying a balance of justice approach would be similar. There is no presumption that the balance of convenience or justice would favor restraining repetition of an alleged libel until trial. If prima facie, material has been produced to the court that the alleged defamatory material could either be justified or be the subject of a defence of Reynolds privilege, then giving appropriate weight to the paramount right to free speech, there is no reason why the grant of an injunction would be foreordained. It is significant that in the case of *Herbage v Pressdram* the arguments in favor of maintaining a *Bonnard v Perryman* approach did not take into account the expanded right to freedom of expression conferred by the now available defence of Reynolds privilege (further addressed infra).

99. Further, it appears that, at least in the limited scenario where convention rights appear to come into conflict, a court in the UK could carry out a balancing exercise, rather than being constrained by *Bonnard v Perryman* to only recognize and accord priority to the right to free speech. This latter principle has been emphasised in *Khuja v Times Newspaper Limited & Ors*[18] which also considered Re S[19].

> *In its current form, the cause of action for invasion of a claimant's right to private and family life is relatively new to English law. It originates in the incorporation into our law of the Human Rights Convention. But once the court is satisfied that that right is engaged, it must be balanced against a public interest in freedom of the press. That interest is not*

[18] [2017] UKSC 49 at paragraphs 22 -24

[19] [2005] 1 A.C 593 at paragraph 17.

new. Although now protected by article 10 of the Convention, it corresponds to a common law right which has been recognised since the 18th century. In Campbell v MGN [2004] 2 AC 457, para ***55****, Lord Hoffmann described the balance between these competing values in language that has frequently been adopted since that case was decided:*

> *"Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need …"*

Campbell did not involve a pre-emptive injunction against the press, nor did it involve the reporting of court proceedings. But in In re S [2005] 1 AC 593, which involved both of these things, Lord Steyn adopted Lord Hoffmann's approach, and summarised the principles in four points, at para ***17****:*

> *"First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the* ***individual*** *case is necessary. Thirdly, the justifications for interfering with or restricting*

*each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate **balancing test**."(emphasis added)*

100. In this case the court was dealing with the right of the press to publish proceedings in open court. While it took into account the established body of law and principles governing that issue developed by, inter alia, the common law it recognized the principle of a balancing exercise in the individual case.

101. In its current incarnation therefore:

i. the rule in *Bonnard v Perryman* (formulated in 1891) has limited the discretion of a trial judge.

ii. the rule precludes the analysis of the balance of justice in the individual case by requiring a disapplication of the subsequently developed principles in *American Cyanamid*.

iii. the rule has been extended from its initial application to an intended defence of justification to now apply where other defences are intended to be raised. In fact the rule may even apply "*unless it is clear that **no defence** will succeed at the trial*".

iv. despite *American Cyanamid*/balance of convenience analysis applying generally in cases of prior restraint in defamation actions in the UK, where competing rights arise under the Human Rights Act and Convention for the Protection of Human Rights and Fundamental Freedoms, a balancing exercise is

permitted rather than permitting any one fundamental right to be accorded automatic priority over any other[20].

102. It appears that the rule in *Bonnard v Perryman* in practice and in its application has been evolving to include its application when any defence is being asserted. The underlying principle is the need to avoid restricting the right to free speech. The rule emphasises the right to free speech without sufficient flexibility to permit consideration of the right to reputation in appropriate cases[21]. However the development of the defence of Reynolds privilege caters for additional protection for the publisher of an alleged libel and thereby expands the right to free speech as explained hereinafter. Therefore the necessity for emphasizing the right to free speech while de-emphasizing the right to reputation, and precluding consideration of the justice of the individual case, can no longer be justified.

Sub-Issue (b) - Application of Bonnard v Perryman in this jurisdiction and other Commonwealth jurisdictions

103. The rule in *Bonnard v Perryman* has been criticized in a decision of the High Court in this jurisdiction by the Honourable Devindra Rampersad J in **Kallco v CNN & Basant** CV2013-04900 delivered October 31st 2014. The shortcomings of the rule in *Bonnard v Perryman* have been pointed out in the dissenting judgment of Kirby J in the case Australian case of **Australian**

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[20] The tension between the right to free speech and the right to reputation is addressed infra in the context of Reynolds privilege.See paragraph 4 (b) of *Faaid Mohammed* loc cit.

[21] Paragraph 4 (c) Faaiq Mohammed per Jamadar JA "Thus free speech - **freedom of thought and expression**, even in the political 'Gayelle', is constitutionally to be held in balance with the protection of the freedom and dignity of the person and to **the right to respect for the individual**. **As a matter of principle**, **all of these sets of constitutional values and rights deserve special, if not equal, constitutional regard and respect**". (all emphasis added)

Broadcasting Corporation v O'Neill [2006] HCA 46, 229 A.L.R 457 (a case cited by Rampersad J at paragraph 31 of his judgment) as follows:

> *"144.* ***There is no reason in legal concept to excise defamation actions, as a unique or special sub-category, from the general approach to interlocutory injunctions.*** *That approach is already expressed in principles of broad application, adaptable to particular needs and circumstances. It accommodates a great variety of cases invoking vastly differing legal rules and values. In matters of basic approach, it is ordinarily undesirable to fashion "stand alone" principles. Moreover, it is difficult to justify grafting a special exception onto the general language of the statute law that ultimately governs the case, namely s 11 (12) of the Supreme Court Civil Procedure Act 1932[7]. That sub-section does not contain an express exception for interlocutory injunctions in defamation actions.*
>
> *145. There are two additional considerations that support this conclusion. The first is the reminder, contained in the reasons of Blow J in the Full Court[8], referring to the analysis of Dr I C F Spry QC, in his work Equitable Remedies[9], that* ***devising a peculiar and special rule for defamation actions*** *(and specifically for those in which the publisher indicates an intention to justify the matter complained of)* ***is fundamentally inconsistent with the provision of a remedy that is equitable in nature, such as an injunction.*** *According to Dr Spry[10], the expression of a particular rule for defamation actions was:*

*'A further example of the manner in which judges trained in a common law rather than an equitable tradition may misunderstand the nature of equitable discretions, and hence attempt to describe them in terms of inflexible rules…**In such cases the right to obtain an interlocutory injunction ought, on general equitable principles, to depend simply on whether, in the special circumstances in question, the balance of justice inclines towards the grant or refusal of relief; and such matters should be taken into account as considerations of hardship in relation to the parties, any special considerations of unfairness that may arise, the undesirability that a defendant should be prevented from making statements the legality or illegality of which will only subsequently be establish with certainty, the extent to which third persons or the public generally may be interested in the truth of those statements, the degree of probability that the alleged libel will be published and will be wrongful, the degree to which the plaintiff will be injured in the event of its publication, and any other material considerations.'"***

Sub-Issue (c) – Justifications if any for maintaining or dispensing with the rule.

104. The argument was raised in the case of **Greene v Associated Newspapers** Ltd [2005] Q.B 972 as follows "*people with a fair reputation which they do not deserve will on the claimant's approach, be able to stifle public criticism by obtaining injunctions simply because on necessarily **incomplete information**, a court thinks it more likely than not that they will defeat a defence of justification at trial*" (emphasis added). However that is the role of a court. On any other type of injunction the court is required to balance the rights of competing parties and to make a principled decision. It can

accord appropriate weight to freedom of expression and take this into account. It is difficult to justify the categorical statement that such an approach would stifle public criticism or freedom of expression.

105. If incomplete information is insufficient to substantiate at least a *prima facie* case of justification, then it is equally difficult to justify permitting damage to reputation at a pretrial stage on the basis of such information. Fears of a chilling effect on freedom of expression would be overblown once it is recognized and appreciated that on a consideration of the balance of justice the right to **freedom of expression** must continue to be recognized as a weighty and often paramount consideration. However mere allegations or accusations without a scintilla of material to substantiate them, even though it is contended by a defendant that they will be justified at trial, cannot fall into any special category so as to exempt them from appropriate scrutiny at a pretrial stage. If publishers of such material have to think twice about making this type of unsubstantiated allegations, and consider the possibility or the risk of an injunction being granted against them, this could hardly be called a chilling effect on freedom of expression. Freedom of expression was never a freedom to publish recklessly or to publish material which was untrue.

106. In *Greene v Associated Newspapers Ltd* the UK Court of Appeal referred to the judgment of the Trial Judge as follows: "*the judge said that it was evident that the rule in Bonnard v Perryman had survived for so long not least because it provided a test for the grant of interim injunctions in libel cases that was wholly workable*". While it is accepted that the rule in *Bonnard v Perryman* is workable, the fact is that it is somewhat simplistic in that it does not allow critical or analytical consideration of the balance of justice. Neither does it ascribe weight to the reputation of the claimant

and the possibility of irreversible damage thereto. In that case a passage from **Gatley on Libel and Slander** 10th Edition 2004 pages 797 to 798 was cited as follows: "*moreover the rule releases the court from the usually impossible task of investigating summarily the merits of the defense of justification which is so often dependent on the credibility of witnesses and detailed consideration of documents*".

107. However this can provide no justification for perpetuating the exceptional rule in *Bonnard v Perryman*. This again ignores the fact that in most non-defamation civil matters the balance of convenience, (and now in this jurisdiction the balance of justice), must be considered on an application for pretrial injunction. It ignores the fact that it is not necessary for that purpose for a court to make a detailed consideration of documents at that stage. When the court therefore properly considers an application for an injunction taking into account the balance of justice, it must consider as a paramount factor the right to **freedom of expression** and accord considerable weight to this factor. The result is that in most cases the balance would still be in favor of refusing an injunction unless it is sufficiently established, on the material available at that stage, that the defendant is unlikely to or cannot, on the material before the court, substantiate an intended defence of justification, Reynolds privilege or otherwise. On a balance of justice approach, a court would be permitted to consider the harm to the claimant associated with the refusal of a pretrial injunction to restrain a grave defamatory allegation which has little evidential foundation at that stage, without necessarily needing to await trial and await cross examination of witnesses. The latter is a situation which does not apply to pretrial injunctions in any other area of civil law.

Basis of the rule

108. As stated at paragraph 57 of Greene (ibid) the bases for the rule in ***Bonnard v Perryman*** were as follows:

i. *the importance the court attaches to freedom of speech.*

The importance of the right to freedom of speech in a democracy as in this jurisdiction cannot be overemphasized. However the law has expanded the protection of freedom of expression by the development of the defence of **Reynolds privilege**, wherein can be found many expressions of the importance of this right and the duty of the court to protect it. In fact in that case the common law expanded upon this right in extending a defence to statements which are both defamatory and untrue, once not published maliciously. The defence of Reynolds privilege and its impact on the expansion of the protection of the right to freedom of expression will be considered hereinafter.

ii. At the time the principle was formulated jury trials existed in the UK. It was for the jury to determine the defence of justification at the **trial** stage ("…*a judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury*").

However, given that jury trials have long been abolished in this jurisdiction, and were abolished in the United Kingdom in respect of defamation actions in the year 2013 that rationalization no longer applies. In **Khuja v Times Newspapers Limited** [2017] UKSC 49, the UK Supreme Court at paragraph 19 explained that though the rule originated in the division between the functions of judge and jury "*in its modern form its function is to balance the freedom of the press and the right of the claimant to protect his reputation,*

by ***confining the plaintiff to the post publication remedies*** *to which he may prove himself entitled at a trial*" (all emphasis added). The practicality of this approach given the impact of social media in a small society such as Trinidad and Tobago, and its underlying assumption of recoverability of damages is considered hereafter.

iii. It was *"partly founded on the pragmatic grounds that until there has been disclosure of documents and cross examination at the trial a* ***court cannot safely proceed*** *on the basis that what the defendants wish to say is not true. And that if it is or might be true the court had no business to stop them saying it"*. It was alternatively expressed in **Khashoggi v IPC Magazines Limited [1986] 1 W.L.R. 1412** (all emphasis added) *"to the effect that a* ***court cannot know*** *whether the plaintiff has the right to his/her reputation until the trial process has shown where the truth lies and if the defence fails the defendants will have to pay damages…"*.

109. These categorical statements do not stand up to analysis. This reasoning in fact accords very great weight to the right to freedom of expression and very little weight to the right to reputation of a claimant. However, additionally, it arguably inhibits a court from conducting anything other than a superficial analysis of whether any foundation even exists for the defamatory allegations, and permits their continued publication on the promise of the publisher to justify them or to establish a defence to defamation at trial. In all other cases where pretrial injunctions are sought a court is called upon to decide the justice of granting interim relief before the truth of the allegations made in support of the cause of action has been determined. In all such cases the court is required to perform a balancing exercise weighing the risks and harm to each party inherent in granting an

injunction and comparing and contrasting it with the risks and harm to each party inherent in refusing it. The nature of that balancing exercise requires that the justice of individual cases be considered, rather than a single automatic default position being applied regardless of the facts.

110. It was contemplated in *Greene* that an exception existed to the principle in *Bonnard v Perryman*: that is, where a publication was *"clearly untrue"*. Subject to that exception, the rule in *Bonnard v Perryman* would permit almost unrestrained publication of statements based on the mere assertion that the statements are true and the defence of justification will be relied upon at trial, or even as contemplated in *Greene,* "*unless it is clear that **no defence** would succeed at trial"*. The *Bonnard v Perryman* rule would require the issue of restraint prior to trial of alleged defamatory publications to be resolved almost entirely in favour of the publisher.

111. The danger of this largely inflexible rule is that it could permit unrestrained court sanctioned publication of defamatory statements ruinous of reputations. The further justification that damages would be available at trial to vindicate any such reputation is based on the optimistic assumption that such damages, even if adequate, would be even recoverable. However such an approach is not mandated in the UK where competing Convention rights arise. There is no reason therefore why a balancing exercise should be precluded in other cases where competing rights arise.

112. Such an approach would be consistent with that endorsed by the Privy Council in **National Commercial Bank v Olint Corp Ltd** [2009] UKPC 16 at paragraphs 16, 17, 18 and 19 in relation to injunctions generally in non-defamation matters, i.e., the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

113. Further, application of the rule is inconsistent with the Supreme Court of Judicature Act Section 23 (5) Chapter 4:01[22], (though it has been contended that in the UK the interpretation of the equivalent provision is constrained by authority, such as *Bonnard v Perryman*, despite its express wording).

Recoverability of Damages

114. The reasoning in *Bonnard v Perryman* is based on the assumption that reputation can eventually be vindicated by the payment of damages awarded at trial. However recoverability of damages after trial is not a matter that can be taken for granted as the rationale for *Bonnard v Perryman* appears to presume. It is no longer necessarily the case that in the 21st century the publisher of a defamatory statement would be the traditional media, or persons with assets locatable for enforcement of an award of damages at trial, or even connected to an identifiable physical address. Given that anyone can now be a producer and publisher of defamatory content, it cannot be assumed that the publisher of a post would be in a position to pay an adequate amount of damages.

115. Given the possibility of publication by anyone with a mobile phone, vindication of reputation by an award of damages at trial may be hollow compensation.

116. Technology has now shifted the balance between freedom of speech on the one hand (having permitted <u>widespread</u> and <u>instant</u> publication by almost any one), and protection of reputation on the other, even further in favour of the former. These developments in technology form part of

[22] 23(5)

the context in which the continued relevance of *Bonnard* must be assessed, as appreciated by the Honourable Jamadar JA in *Masaisai*.

Sub-Issue (d) – Advances in Technology - Developments since Bonnard v Perryman

117. Since *Bonnard v Perryman* was decided in 1891, there have been many advances in technology. These include the ability to publish on the internet and on social media. Further, anyone with access to a computer, ipad, tablet or a smart phone can now publish anything **instantly**. Publication on social media had permitted the vast expansion of the potential audience for a post or publication. Traditional publications by letter, by radio, by television, or newspaper have therefore evolved into the availability of instant, national and international publication by almost anyone via the internet.

118. A publication on the internet or on social media can assume very different characteristics from those envisaged at the time that ***Bonnard v Perryman*** was decided, a situation recognized by the UK Supreme Court in the case of Stocker v Stocker [2019] UKSC 17 (delivered April 3rd 2019 at paragraphs 41 and 43[23]).

Because current technology enables vastly increased potential audiences by persons who can now publish defamatory material to even a worldwide

[23] **[41]** The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read.

[43] I agree with that, particularly the observation that it is wrong to engage in elaborate analysis of a tweet; **it is likewise unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (i.e. an ordinary reasonable) reader would interpret the message.** That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on.

audience at the touch of a button, such widespread dissemination of a post on social media carries the potential for vast reputational damage. See for example *Khuja* (ibid) at paragraph 15 "...*but because the resonance of what used to be reported only in the press and the broadcasting media has been greatly magnified in the age of the internet and social media".* In the instant case for example one of the pages complained of had over 1600 direct followers.

Sub-Issue (e) - Developments in the common law re Free Speech – Reynolds Privilege

119. Further, apart from the developments in law and in technology as referred to above, since the decision in ***Bonnard*** the common law's protection of free speech has been further developed and expanded by the case of ***Reynolds v Times Newspaper*** [2000] 2 LRC 690, [1999] 3 W.L.R. 1010. The issue that arose was where does the balance lie and where is the line to be drawn between the **protection of reputation** and the **protection of free speech.** In this context a variation of qualified privilege was established. This case was subsequently applied in a line of authorities including ***Edward Seaga v Leslie Harper [2008] UKPC 9*** among others. It has been applied by the Court of Appeal in this jurisdiction in the cases of ***Ramdhan v Assang*** Civ. Appeal 54 of 2004 P.C and **Kayam Mohammed & Ors and Trinidad Publishing Company Ltd & Ors CA Civ 118/2008** delivered December 19, 2012.

Reynolds privilege

120. In ***Reynolds***, the House of Lords clearly recognised that there was tension between the individual's rights to protection of reputation on the one hand and the right to freedom of expression and the right of a free press to investigate on the other. See for example the judgment of Lord Nicholls

of Birkenhead at page 1023 para C-G: (all emphasis added)[24]. See also judgment of Lord Hobhouse of Woodborough Page 1059 para D-G[25].

121. Throughout the judgments of their Lordships is to be found a recognition of the extreme importance of freedom of expression and in particular freedom of expression by the media.

122. It considered that this tension was best resolved on a case-by-case basis rather than permit a general defence of qualified privilege. Accordingly, it set out the following as relevant considerations in determining whether an offending article was the product of "responsible journalism".

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[24] *"Likewise, there is no need to elaborate on the importance of the role discharged by the media in the expression and communication of information and comment on political matters. It is through the mass media that most people today obtain their information on political matters. Without **freedom of expression** by the media, freedom of expression would be a hollow concept. **The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment.** In this regard it should be kept in mind that one of the contemporary functions of the media is **investigative journalism.***

*This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally. **Reputation** is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. **Once besmirched by an unfounded allegation** in a national newspaper, a **reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation**. When this happens, society as well as the individual is the loser. For it should not be supposed that **protection of reputation** is a matter of importance only to the affected individual and his family. **Protection of reputation** is **conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."***

[25] *"The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that **it is the communication of information not misinformation which is the subject of this liberty**. **There is no human right to disseminate information that is not true.***

No public interest is served by publishing or communicating misinformation.
*The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. **There is no duty to publish what is not true: there is no interest in being misinformed.** These are general propositions going far beyond the mere protection of reputations.*

123. Per Lord Nicholls of Birkenhead at page 1027 para C-E:

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

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

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

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

4. The steps taken to verify the information.

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

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

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

8. Whether the article contained the gist of the plaintiff's side of the story.

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

10. The circumstances of the publication, including the timing".

124. These were also applied by the Privy Council in the case from Jamaica of **Seaga v Harper [2008] UKPC 9.**

See Lord Nicholls of Birkenhead at page 1028 para C-F:

"Above all the <u>court should have particular regard to the importance of freedom of expression….</u>Any lingering doubts should be resolved in favour of publication". [p1027 G-H]

Per Lord Hobhouse of Woodborough Page 1060 para B-C:

"To attract privilege the report must have a qualitative content sufficient to justify the defence should the report turn out to have included some misstatement of fact. *It is implicit in the law's insistence on taking account of the circumstances in which the publication, for which privilege is being claimed, was made that the circumstances include the character of that publication. Privilege does not attach, without more, to the repetition of overheard gossip whether attributed or not nor to speculation however intelligent".*

125. See also ***Kayam Mohammed*** loc cit per the Honourable Mendonça JA at paragraphs 60 and 61.

*60. The defence of Reynolds privilege is a complete defence and if established denies any remedy to the claimant. It only arises as a live issue where the statement in question is **defamatory and untrue**. Reynolds privilege therefore protects the publication of untrue and defamatory matter. It does so for two reasons that impact on freedom of expression and freedom of the press; first so as not to deter the publication in question, which might have been true and secondly, so as not to deter future publication of truthful information (see Loutchansky v Times Newspapers Ltd. (No. 2)*

[2002] 1ALL E.R. 652,68 (at para 41)). It protects such matter where the publication is to the public at large or a section of it and where (1) it was in the public interest that the information should be published and (2) where the publisher has acted responsibly - a test usually referred to as "responsible journalism".

61. In explaining the rationale of the test of responsible journalism Lord Bingham in Jameel and others v Wall Street Journal Europe Sprl [2006] UKHL 44 stated (at para 32): "The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency [in the Reynold's case at p. 238], no public interest is served by publishing or communicating misinformation. But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication." The privilege therefore will only be earned where the journalist has taken such steps as a responsible journalist should to try and ensure that what is published is fit for publication." (all emphasis added)

Whether a defence of Reynolds privilege is available to individuals

126. Reynolds expanded the circumstances in which responsible journalism would be protected. Although developed in the context of publications by traditional print or broadcast media the principles are applicable, and the defence established thereby available, to individuals[26]. Once it is recognized that the concept of responsible journalism could apply to individuals, as well as the media, and that there is no difference between

[26] See Seaga [2008] UKPC 9 at paragraphs 11 and 13

a person who publishes his views to the general public via the internet, and a journalist employed with traditional media, then it must be accepted that such a person, effectively equivalent to a journalist with the privileges of a journalist, should also be subject to the responsibilities of a journalist.

127. In the instant case there is no dispute that this is the basis upon which the respondent claims the right to publish the various statements and articles which she has freely admitted to doing. It is also claimed by the respondent that at trial she would be entitled to raise the defences of justification, fair comment, qualified privilege and Reynolds privilege.

128. A defence of Reynolds privilege confers upon a court a discretion to take into account several factors in assessing whether the public interest permits the protection of the publication of even a defamatory and untrue statement, provided that the statement was the product of investigation and responsible journalism. It recognizes both the right to publish and the responsibility to ascertain that the material published is verified to the extent that it can be. If the material is defamatory and it turns out to be untrue, its publication could still be protected. The publisher would be exonerated from liability provided that it was published responsibly or after a responsible process.

129. In that context the question of the balance between the right to protection of reputation by the appellants and the right to free speech asserted by the respondent resolves into the issue of whether there is sufficient basis at this stage for a court to determine, on a prima facie basis, that a defence of Reynolds privilege, (wider in scope than traditional qualified privilege[27]), can legitimately be raised in that context. The various factors that the court

[27] Seaga paragraph 15

needs to take into account have been elaborated upon in the cases as set out above.

130. Without undertaking the exhaustive evidence based analysis that would be required at trial, it is clear that there is a sufficient basis on the material asserted by the respondent in relation to the **first named appellant** that could constitute a publication in the public interest and that could arguably raise a prima facie defence of Reynolds privilege. For example by reference to just some of the factors identified by Lord Nicholls the following prima facie assessments can be made:

131. According to Lord Nicholls of Birkenhead in Reynolds at page 1027 para c-e:

> *"Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.*
>
> *1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.*
>
> The allegations here are of serious radiation poisoning from an outdated malfunctioning CT machine with the concealment of that issue from other members of the public who are likely to receive treatment with that machine being alleged.
>
> *2. The nature of the information, and the extent to which the subject matter is a matter of public concern.*
>
> Clearly this is such a matter. While unverified, the allegations are based on legitimate inquiry concerning relevant issues of public concern.

3. The source of the information.

The information is purportedly based on input from a medical specialist in radiation poisoning, sources from the internet in relation to the equipment, and from a party who previously serviced the equipment who would be expected to have relevant knowledge. Each of these sources is prima facie a legitimate source of relevant, though untested information.

4. The steps taken to verify the information.

The fact is that steps have been taken to identify sources that might shed further light on the issue. The allegations are not being made in a vacuum or without research.

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

The tone of the article is highly accusatory. However this is in the context of allegedly serious effects suffered by the respondent and non-response to her requests for information that she has reason to believe may assist her treatment."

Sub-Issue (f) - Whether *Bonnard v Perryman* can be justified

132. The rule in *Bonnard v Perryman* (the rule) leads to the conclusion that the court's jurisdiction to consider the grant of a pre-trial injunction should be curtailed, simply because of an assertion by a proposed defendant that he intends to justify the allegation at trial. As demonstrated above the justifications for that proposition are no longer maintainable. The rule must therefore be revisited in this jurisdiction.

133. Firstly, inherent in the rule is a restriction on the flexibility of the court's exercise of its jurisdiction to do justice in the circumstances of the individual case before it. Such restriction is incompatible with the jurisdiction conferred on the court by the **Supreme Court of Judicature Act Chapter 4:01 section 23 (5)[28].**

134. Secondly, it was decided in a context, now inapplicable, where jury trials existed for defamation in the UK. Jury trials for defamation were abolished by section 11 of the UK Defamation Act 2013, and have not existed in this jurisdiction for decades.

135. Thirdly, the potential for pre-trial reputational damage has significantly increased because of developments in technology which have expanded the potential number of publishers of defamatory material as well as their audience. However at the same time and for the same reason, there is now a greater risk that such damage may not be compensable by an appropriate enforceable award of damages at trial.

136. Fourthly, protections of the right to free speech, (an important rationale for the rule), have been subsequently enhanced by the further development in the law of defamation and of the defence of Reynolds privilege as explained above. This caters for the additional possibility that the statements may be protected even though defamatory and even though untrue, once made responsibly and without malice. However this approach additionally and properly takes into account the right to reputation of the party allegedly being defamed and takes cognizance of

[28] (5) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court or Judge in all cases in which it appears to the Court or Judge to be just as (sic) convenient that the order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court or Judge thinks just.

the fact that the right to freedom of expression was never a right to publish untruths.

137. Because no basis has been demonstrated for restricting the court's jurisdiction to consider the balance of justice in the case of a justification defence, it is time to equate the peculiar approach to injunctions in the case of defamation with that in other cases. Under the *Bonnard v Perryman* approach the potential for reputational damage is downplayed. The court's ability to assess whether an individual's hard won reputation should be sacrificed by permitting a potentially defamatory publication is restricted. It cannot consider other potentially relevant matters that could otherwise be weighed on a balance of justice approach. However a balance of justice analysis is equally capable of recognizing the importance of **protecting free speech** and **weighing this factor appropriately** without being restricted to a single outcome no matter the individual circumstances. A dis application of *Bonnard v Perryman*, and its replacement by balance of justice considerations in the context of an intended defence, for example of Reynolds privilege, cannot be considered a restriction of freedom of expression.

138. This is especially so because the expanded defence of Reynolds privilege takes into account and tolerates the possibility of factual inaccuracy. Reynolds recognizes that statements may be both defamatory and untrue but permits publication nevertheless in appropriate cases. Further it takes into account, weights, and in fact emphasises the importance of freedom of expression. In both of those respects it actually expands upon the right to freedom of expression. Coincident with that expansion however is the obligation to publish responsibly as assessed by reference to the several carefully considered guidelines therein. The guidelines

provided by Reynolds also clarify that, where these matters are finely balanced, the outcome should be in favour of allowing publication.

139. It can be concluded that ***Bonnard v Perryman*** cannot survive closer examination. The claim that justification will be pleaded, without more, can no longer be a licence to continue to publish defamatory matter until trial, without a court having the ability to consider the balance of justice in permitting continued publication in the specific circumstances of each individual case.

Sub-issue (g) - what if anything should replace Bonnard v Perryman in this jurisdiction

140. The conceptual bases for **Bonnard v Perryman** and the non-applicability of **American Cyanamid** have been superseded by the developments referred to above. An analysis based upon the balance of justice, which applies in this jurisdiction to applications for non-mandatory injunctions[29] would be appropriate if Bonnard v Perryman were being replaced. This would also harmonize the law relating to injunctions rather than perpetuate an exception which has ceased to be justifiable.

141. Just as *Bonnard v Perryman* was intended to uphold the protection of free speech by restricting prior restraint, this can be equally achieved by a consideration of balance of justice principles in the context of any

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[29] As noted by the Judicial Committee of the Privy Council as recently as July 29 2019 in the case of Simon v Lyder [2019] UKPC 38 (a case of defamation from this jurisdiction)-"*It is a feature of the common law of defamation that neat conceptual solutions do not always provide satisfactory answers to the endlessly varied fact-sets with which judges and (in some jurisdictions) juries have to wrestle, for the purposes of achieving an outcome which properly accords with justice and common sense".*

[29] Except in the case of public law – see Chief Fire Officer, Public Service Commission v Felix Phillip, Elizabeth & Ors CA Civ s.49/2013 per Bereaux JA

intended defences. It must be emphasised that **the right to free speech in a democratic society, and the obligation not to impose unnecessary fetters thereon**, would remain important factors in any balancing exercise which the courts are required to undertake in determining the balance of justice. Once **significant weight** is attached in the balancing exercise to the paramount right to freedom of expression, as it must be, this approach could not detract from the right to free speech. There is therefore no justification for the separate approach of *Bonnard v Perryman* to pre-trial injunctions in the case of defamation as distinct from pretrial injunctions in other areas of civil law.

142. The evolution in this jurisdiction to the more nuanced analysis requiring the weighing of the **balance of justice** (a concept which has replaced American Cyanamid principles in this jurisdiction, since *Jetpak*) would allow a court greater flexibility to consider the justice of a particular case rather than the default position of almost rubber stamping inherent in the rule in *Bonnard v Perryman*.

143. Liberated from a simplistic ***Bonnard v Perryman*** analysis, a court would be able to take account of all relevant factors, as it now can in relation to most other types of injunction. It can take into account for example:

i. the paramount importance of freedom of expression in a democratic society.

ii. the right to protection of individual reputation.

iii. though not applicable to relations between individuals, the recognition of the importance in this democratic society of the rights to freedom of expression, to freedom of the

press, and *(c)* the right of the individual to respect for his private and family life, as illustrative of the rights considered sufficiently important to be reflected in our Constitution. (See Faaiq Mohammed supra)

iv. the possibility in individual cases, that for example, where justification is raised, though a particular defamatory statement is not "*clearly untrue*", the likelihood of it being justifiable on the material put forward by the publisher. This can be factored into any balancing exercise.

v. the possibility that a publisher of a defamatory statement, (which category of publishers has now expanded to the entire population with access to a mobile smart phone or computer), may not have sufficient assets to satisfy any substantial award of damages after trial necessitated by a decimated reputation.

vi. A court liberated from the ***Bonnard v Perryman*** rule would not need to be hampered by any illusory consideration or fiction that a non-existent jury was separate fact finder which had not yet considered the issue.

144. It is appreciated that the rule in *Bonnard v Perryman* has survived in the UK since 1891 because it serves an important function, namely it provides certainty with respect to the position that a court is likely to adopt in an application for a pretrial injunction to restrain defamation. Further it recognizes, preserves, and elevates the right to freedom of speech over the right to reputation.

145. It must also be appreciated that replacing Bonnard a. must not be done lightly and b. must not inadvertently result in any diminution of the right to freedom of expression. However, preserving the rule in *Bonnard v Perryman* comes at a cost. It deprives a court of flexibility to depart from it in the exceptional case where this is necessary.

146. Replacement of the exceptional rule in *Bonnard v Perryman,* by permitting the application of a balance of justice analysis, does not and should not result in any encroachment on the right to freedom of speech, especially if the following are borne in mind: -

(i) With or without *Bonnard v Perryman* nothing in this analysis removes from a trial judge the obligation to consider and give extraordinary weight to the fundamental right to freedom of speech in any balancing of justice exercise. Even with a balance of justice analysis a court would still be required to recognize, and attribute extraordinary weight to, the right of freedom of expression and the right to free speech. What its removal does permit is flexibility in appropriate cases to consider other factors in that analysis to achieve justice in the individual case. In many cases, like the instant one the outcome will be the same.

(ii) In some cases there may be other factors that need to be taken into account on the part of a claimant. For example, it may be envisaged that a right to life may have to be balanced against the right to freedom of expression, where the allegation is so heinous that it places the life of the defamed party at risk. This a real possibility in a small society such as this.

(iii) Fears of a chilling effect on publication can therefore be placed in context. In most cases, the extraordinary weight to be attributed to the right to free speech and freedom of expression would, as in the instant case, produce the same result as if *Bonnard v Perryman* were applied. Accordingly, once courts keep to the forefront of their analysis the extraordinary importance of the right to free speech and freedom of expression, while conducting any necessary balancing exercise in determining the balance of justice, there would be no reason why a disapplication of *Bonnard v Perryman* in this jurisdiction should result in erosion of that fundamental right.

(iv) The constitutional right to respect for private and family life, of which arguably the right to reputation is a facet, (See Faaiq Mohammed) is, as with freedom of speech thought and expression, a right recognized under our Constitution, and equally entitled to protection, rather than being entirely precluded from consideration as under *Bonnard v Perryman.*

(v) In the UK a balancing exercise is permitted where fundamental rights come into conflict. Accordingly, just as with competing fundamental rights in the UK, where a balancing exercise is permitted, there is equally a basis for a balance of justice approach to injunctions in defamation actions where these, or any other , fundamental rights come into conflict. There is therefore no reason in principle why that approach should be precluded, simply because of the delicate nature of the jurisdiction in relation to pre-trial injunctions for defamation.

(vi) There was never a right to publish untruths. Therefore a party who wishes to publish defamatory material should not enjoy an untrammeled right to publish before trial unless he can establish at least some basis for making or defending the publication before trial. This was arguably the position under Bonnard. A balance of justice analysis which also required that approach would not therefore be detracting from the right to free speech.

(vii) Even if *Bonnard v Perryman* applied it was always open to a party to institute proceedings for a pre-trial injunction to restrain publication. If a party wishes to publish defamatory material there is no reason why at least the basis of an arguable defence should not be examined, (without of course the need for a full analysis at that stage), rather than reliance on a simple assertion of an intended one.

Orders

147. As explained previously the outcome in this case is the same whether or not Bonnard is applied.

148. Accordingly, it is ordered as follows:

i. An injunction is granted restraining the respondent whether by herself her servants or agents or otherwise howsoever from further publishing or causing to be published or disseminated and/or posted on any forum on the world wide web including but not limited to social media sites on the internet such as but not limited to Facebook and/or newspaper and/or print

publication containing the words and/or images used in publications by the respondent on 22nd January 2019 – Facebook page personal blog, 23rd January 2019 – Facebook page personal blog, 8th February 2019 – placards, 10th February 2019 – Facebook page – Cherry Ann Rajkumar Attorney at Law, (together referred to as "the publications") or similar words defamatory of the second named appellant.

ii. In default of an undertaking being provided by the respondent that she will not whether by herself, servants or agents or otherwise howsoever erect any banners signs or pictorial displays containing the words and/or images used in the publications or similar words defamatory of the second named appellant within 100 meters of the workplaces and/or residences of the second named appellant, an injunction will be granted to that effect.

iii. An order is granted that the respondent or her servants or agents remove and/or delete any posts on social media which repeat or publish statements made in relation to the second named appellant in the publications (referred to in the first part of this order), within 24 hours of this order.

Peter Rajkumar
Justice of Appeal