THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 122 of 2009
CV 2006-02092
H.C.A. No. 1386 of 2003

Between

1. **TRINIDAD EXPRESS NEWSPAPER LIMITED**
2. **CRAIG REYNALD**
3. **SUNITY MAHARAJ**
4. **CAMINI MARAJH**

Appellants/Defendants

And

CONRAD ALEONG

Respondent/Claimant

PANEL: **A. Mendonça, J.A.**
P. Jamadar, J.A.
M. Rajnauth-Lee, J.A.

APPEARANCES:

Mr. Alvin Fitzpatrick S.C. leading Mr. Faarees Hosein instructed by Ms. Carolyn Ramjohn-Hosein for the Appellants

Mr. Russell Martineau S.C. leading Mr. Ian Benjamin instructed by Mrs. Stephanie Daly for the Respondent

Dated: 25th June, 2014

****

I agree with the judgment of Rajnauth-Lee J.A. and have nothing to add.

....
A. Mendonça
Justice of Appeal

I too agree and have nothing to add.

....
P. Jamadar
Justice of Appeal

<u>JUDGMENT</u>

<u>Delivered by M. Rajnauth-Lee, J.A.</u>

INTRODUCTION

1. This appeal arises from the oral judgment of the trial judge who delivered written reasons on the 30th July, 2010. The respondent brought a claim for libel against the appellants in relation to eight articles published between the 6th April, 2003 and the 3rd May, 2003 The trial judge found that seven of the eight articles were defamatory of the respondent. He also found that the seven articles were not the products of responsible journalism to which the defence of qualified privilege applied. As to the eighth article, an editorial published on the 20th April, 2003, the trial

judge found that it constituted fair comment. The trial judge awarded general damages in the sum of $450,000.00 and exemplary damages in the sum of $200,000.00. The respondent was awarded costs on the prescribed scale in the sum of $82,250.00.

2. The appellants appealed on the grounds *inter alia* that the trial judge erred in finding that the defence of Reynolds privilege did not apply and that the quantum of damages was too excessive. There was no appeal in relation to the judge's findings that the seven articles were defamatory and bore several of the meanings pleaded in the statement of claim. I will return to these meanings in detail.

3. The respondent cross-appealed on the grounds that the quantum of damages awarded was inordinately low and that the trial judge erred in awarding costs on the prescribed scale.

4. The main issues on appeal are whether the seven articles complained of were the products of responsible journalism and whether the judge erred in his assessment of damages and quantification of costs.

DISPOSITION

5. In my view, the appeal should be dismissed. I believe that the trial judge was entitled to come to the conclusion that the seven articles were not the product of responsible journalism. As to the cross appeal of the respondent, I am of the view that the appeal ought to be allowed as to general damages. In my view, the general damages awarded by the trial judge were inordinately low, did not take into account certain aggravating features, and were an entirely erroneous estimate of the damage to which the respondent was entitled. In my opinion, an award of $650,000.00 is appropriate. I am of the view that the trial judge was correct in his award of exemplary damages. In addition, I do not believe that the trial judge was wrong on the issue of costs.

RELEVANT FACTS AND BACKGROUND

6. By writ of summons and statement of claim dated the 16th May, 2003, the respondent alleged that seven articles and one editorial published by the first appellant were defamatory of him. The publications were made on five successive Sundays in the Sunday Express Newspapers from the 6th April, 2003 to the 4th May, 2003.

7. The respondent was the president and the chief executive officer ("CEO") of the now defunct BWIA (West Indies) Limited ("BWIA"). The respondent was a chartered accountant and a member of the Canadian Institute of Chartered Accountants. He practised as a chartered accountant at Price Waterhouse & Company between 1970 and 1974 and between 1974 and 1993 he held a series of managerial positions with Air Canada, a commercial airline company. The respondent was president and CEO of BWIA from 1993 to 1994 and from 1998 to May 2003 and president of ALM Antillean Airlines between 1995 and 1997.

8. In addition, the respondent was the president and CEO of Air West Indies Limited ("AWIL") trading as CA International, which was his own company and which had an executive supply contract with BWIA. The respondent was also the chairman of Tobago Express Limited, a local airline, and a director of Allied Caterers Limited and of Katerserv Limited, both of which were at one time subsidiaries of BWIA. He was a director of West Indies Airways Aircraft Limited ("WIAAL") and of West Indies Airways Aircraft No. 2 Limited ("WIALL (No.2)"), both of which were subsidiaries of BWIA and were incorporated in the Cayman Islands. He was also chairman of the United Way of Trinidad and Tobago, a non-profit company.

9. BWIA was the national airline of Trinidad and Tobago and the Government of Trinidad and Tobago owned forty-nine percent (49%) of its shares. BWIA was also a public company listed on the Trinidad and Tobago Stock Exchange.

10. The first appellant was the proprietor of two newspapers, the Sunday Express and the Daily Express. The second appellant was the joint publisher of both newspapers. The third

appellant was the editor in chief of the Sunday Express. The fourth appellant was the journalist who researched and wrote the articles and had been employed by the first appellant for over twenty years. The trial judge observed that the Sunday Express described itself as the national newspaper of Trinidad and Tobago and claimed that it had the largest circulation of all newspapers in Trinidad and Tobago.

11. Maxie Cuffie wrote the editorial published on the 20th April, 2003, which the trial judge had found, constituted fair comment. He was not made a party to the action but gave evidence on behalf of the appellants.

THE ARTICLES

12. The trial judge observed that in early March 2003 the fourth appellant requested an interview with the respondent about allegations made against BWIA in a high court action, brought by a minority shareholder of BWIA and which action had been withdrawn. The respondent had initially declined the interview but changed his mind. According to the respondent, the fourth appellant had represented to him that the focus of the story would be the state of the airline industry and how BWIA was coping. The fourth appellant conducted a four hour interview with the respondent on April 2, 2003. During the course of the interview, the respondent furnished the fourth appellant with certain documents which provided information about BWIA, relevant to her enquiries, including the figure for the total executive payroll of BWIA, the executive supply contract between BWIA and AWIL, and other information pertinent to BWIA and the respondent's role therein.

13. The trial judge noted that on the 5th April, 2003, the defendants advertised on the front page of the *Saturday Express,* an *"exclusive investigation"* to be published in the *Sunday Express* entitled *"Inside the BWIA fiasco",* encouraging members of the public to purchase the *Sunday Express* and to read the articles published therein.

14. The seven (7) articles were headlined as follows:

i. *"How BWIA's flight plan went off course"* dated April 6, 2003 ("the first article");

ii. *"BWIA fighting to stay in the air"* dated April 13, 2003 ("the second article");

iii. *"Aleong's Pay Deal"* dated April 13, 2004 ("the third article");

iv. *"BWIA $m bailout, but …"* dated April 20, 2003 ("the fourth article");

v. *"BWIA board backs CEO"* dated April 27, 2003 ("the fifth article");

vi. *"BWIA board to meet Govt on Tuesday"* dated May 4, 2003 ("the sixth article"); and

vii. *"Fat cows can't fly"* May 4, 2003 ("the seventh article").

15. Following are the articles or the relevant parts thereof and the meanings as found by the trial judge.

The First Article - *"How BWIA's flight plan went off course" – 6th April, 2003*

16. The relevant portions of the first article highlighted by the trial judge are set out below. The trail judge observed that the first article contained a number of themes to which the author kept returning in the subsequent articles.

> ***BWIA is hurtling off the runway, buffeted, in part, by the turbulence of the Gulf War, the lingering effects of 9/11, high fuel prices and a global economic slowdown.***
>
> ***But in the soft underbelly of the airline, there are allegations of greed, personal vendettas, smear tactics, secret companies in offshore tax havens, suspicious profit***

from the sale and lease-back of assets booked into the accounts as profit and a compensation package for the airline's top brass to which only the Prime Minister and a few members of the board are privy.

Conrad Aleong, the man in the eye of the storm, has also been taking some hard knocks, over his management style, fights with BWIA's four unions, his private consultancy business, CA International and accounting questions about the airline's three consecutive years of historic profits.

Aleong's response was furious to questions about his private company, CA International and specific BWIA transactions, accusing the unions of spite and muckraking. He also dismissed as "ridiculous" and "total rubbish" suggestions that he bolstered BWIA's bottom line by booking income from frequent sale and lease-back of assets.

CA International was hired by the Lawrence Dupery BWIA board of directors in January 1998 through a second Aleong company, Air West Indies Limited. The performance based management supply contract was not then, nor is it now disclosed to the full board of directors.

Aleong who was in the CEO's chair at BWIA prior to the 1995 Acker privatization has scoffed at reports suggesting that his private company, of which he is a director has benefitted from any finders fees in respect of any transaction involving BWIA. His company initially provided management supply contracts for BWIA's top five people, including himself. He said he is not paid anything for providing top management services to BWIA. The CA contract, managed through an executive payroll paid out by the company's auditors, Price Waterhouse, Coopers (PWC) is said to be worth well over US$40,000 a month.

Aleong who said CA was a Port of Spain registered name, had no explanation for why it did not turn up in a search at the Registry of Companies. Making clear that it was a "consulting division" of his company, AWIL, he said he registered it as a brand name. The records of the 1996 incorporated AWIL, however, reflect no association to a CA International.

The name CA International turned up however, on the Cayman registry as having been recently voluntarily struck off the register.

It was exempt from all filing requirements, including the names of shareholders and or directors.

Aleong said the Cayman CA International was not his. He also expressed surprise that a No. 2 company, bearing the identical name to the wholly owned BWIA subsidiary, West Indies Aircraft Ltd, turned up with the same registered address as the BWIA WIAAL, as PO Box 265 GT, Georgetown, Grand Cayman.

"I have no idea who No. 2 is", he said when asked if it was a BWIA entity. He said he would have to check with the airline's corporate secretary. "I really don't know those things. They (company lawyers) arranged the corporate matters. They can answer that".

He said it could well be another BWIA company which owned one of the BWIA-purchased Dash-8s. "I think we may have put one aircraft on one company and another aircraft in another," he said explaining that it was much easier to dispose of an asset through the sale of a special purpose company.

Told that WIAAL was listed as the financier of all three BWIA Dash-8s 9Y-Wiz, WIL and WIP, Aleong said: "I don't know if WIAAL has three planes." He said he would have to check with the company's lawyer. But airline sources said if the

planes were BWIA owned and held in a secret offshore company, they would have to be properly disclosed in the accounts.

...…...Coincidentally, WIAAL No. 2 is a stakeholder of Katerserv, a company incorporated in 1998 by a piano technician and the company holding a lucrative contact from a majority owned BWIA subsidiary Allied Caterers Ltd. ACL has subcontracted its entire catering facility to Katerserv of which BWIA now has a small stake. Several BWIA officials, including Aleong, are listed as directors. In the 2001 BWIA accounts, the catering operation was said to be worth US$360 million. Aleong however, said it was cheaper to subcontract facilities to Katerserv.

Also under scrutiny is a put option placed in a block of Equant or SITA shares sold to an unidentified buyer for US$5 million in 2000. BWIA recorded a US$2.4 million profit on the transaction in its December 2000 accounts.

...........Financial analyst and former Citi-banker Ved Seereeram claimed the transaction was improperly recorded. "It should have been recorded as a loan and not as a sale of assets for the purpose of inflating profit and understating the liability," he said, declaring that "the whole transaction was a clear sign that the books were manipulated to report a much better picture than the actual state of affairs."

But Aleong questioned: "Why would a chartered accountant firm like PWC sign an audit statement if it was not acceptable accounting practice?" he asked rhetorically. Declaring that he did not deal with the matter, he said: "Why don't you ask William Lucie Smith. He and our financial comptroller deal with those questions and when they finish deal with those questions, it is brought to the audit committee of the board. So I don't understand these questions."

> ***Lucie Smith, the managing partner of PWC said the questions should be directed to BWIA. "I don't know," he said "you will have to ask them direct".***
>
> ***On the sale and leaseback of L1011 airplanes, Aleong said: "You always do that when you are trying to raise some money." Two of the sales, however, were done in 2000, year three of BWIA profits.***
>
> ***It is alleged BWIA broke several agreements with different aircraft financiers prematurely to repurchase and resell L1011s.***

17. The trial judge found that the words in the article in their inferential meaning, meant and were understood by the reasonable reader to mean that:

i. the respondent was greedy or was motivated by greed;

ii. the respondent engaged or had engaged in personal vendettas;

iii. the respondent engaged or had engaged in smear tactics;

iv. the respondent engaged or had engaged in secret and suspicious deals;

v. the respondent was incompetent;

vi. the respondent was involved in or engaged in, or was reasonably suspected of being involved in or engaged in suspicious, questionable, shady, clandestine dealings or business practices;

vii. the respondent was involved in and engaged in suspicious and questionable practices;

viii. the respondent had manipulated or participated in the manipulation of the accounts of BWIA, a publicly listed company for his own financial gain;

ix. the respondent had compromised or was reasonably suspected of having compromised, or participated in compromising, or in sacrificing, the interest of BWIA (of which he was president and CEO) and the shareholders of BWIA to private individuals;

x. the respondent had given away, or conspired with others to give away, assets, or income generating assets, of BWIA to benefit private individuals;

xi. the respondent was getting rich at the expense of BWIA and its shareholders;

xii. the respondent was guilty of deception;

xiii. the respondent did not act, or, had not acted, or was reasonably suspected of not having acted, in the interest of BWIA (of which he was president and CEO) or its shareholders, or employees but in his own self-interest.

The Second Article — "*BWIA fighting to stay in the air*" — 13th April, 2003

18. The trial judge observed that the second article, like all of the subsequent articles, had to be read in the context of the first article. He also observed that the first article had ended with the caption - *"Next week: The BWIA saga continues"*. The judge noted that while the second article was set out at pages 4 and 5 of the newspaper, there was a banner headline on the front page of the newspaper which spoke of BWIA and its financial difficulties. The judge observed that although the banner headline referred the reader to page 6, the reader would certainly have encountered the second article set out at pages 4 and 5.

19. The trial judge found that the second article was defamatory of the respondent in that the words would have been understood, inferentially, by the reasonable reader to have had the meanings set out at paragraph 17 (i) to (xiii) above. The judge also found that the meaning conveyed at page 5 of the second article suggested, at minimum, incompetence and at worst, dishonesty, on the part of the respondent. He referred in particular to the following passages as indicative of these conclusions.

> ***.......Industry analysts described as 'unusual' the several large transactions to move the one airplane which ended up as a direct lease from CAAL to Tobago Express.***
>
> ***The No. 2 company also turned up in the records of the companies' registrar as a 55 percent stakeholder in Katerserv, now occupying the facilities previously owned by a major BWIA subsidiary, ACL on Golden Grove Road, Piarco.***
>
> ***The incorporators of what was initially a $2 company are piano technician Lance Smith of 73 Tragarete Road and Ann Furlonge, a legal secretary at 39 Richmond Street, Port of Spain. The company was incorporated in September 1998 and has as its registered address Lp 57 Golden Grove Road…....***
>
> ***"Why would the airline's catering arm subcontract its entire facilities to Katerserv? According to Aleong, it's a cheaper way of doing business. He admitted that BWIA and the Goddard Group were major stakeholders in Katerserv but was unclear on the exact numbers. "I forgot what the percentage is", he said, declaring, however, that the subcontracting arrangement was a win-win situation for everybody. He said ACL effectively acts as a landlord to Katerserv.***
>
> ***"It gets rent based on the profits of Katerserv, so Katerserv is making a profit and most of it goes to Allied because Allied owns the facilities. It is no different from the Airports Authority and our duty-free shop. Katerserv doesn't end up with much profit, he said, adding, "I'll put it this way. Allied gets the bulk because it charges***

rent on its facility. It is more lucrative that way and they take the risk. It is exactly like a franchise."

Aleong explained the transaction this way. "You need to have the ability to run the money back through. If you don't do that, somebody is going to end up with most of the money."

But it is this BWIA's practice of sharing money-spinning opportunities with private individuals that is worrying observers, who fear that some people are getting rich off the financially stricken public-listed company which has once more returned to Government for a taxpayers' bailout.

Insiders questioned the loss of another BWIA corporate opportunity to the 51 percent privately-owned Tobago Express which staked its claim on the lucrative domestic airbridge in June,2001.

BWIA gave up its monopoly on the airbridge after sustaining a reported TT$5 million loss in five months following the demise of Leslie Lucky-Samaroo's Air Caribbean venture. Aleong blamed onerous labour contracts, expensive reservation systems and delays in and out of Caracas and Barbados for the financial hit.

Tobago Express was built-up using BWIA resources, everything from routes and aircraft to pilot and cabin training, maintenance and ground handling. Aleong, however, is adamant that the 51 per cent stakeholders got no free ride…......

Aleong insists that Tobago Express does not get a free cent from BWIA. "Tab Ex pays for everything," he said. But insiders question whether BWIA is getting value for its money and whether the start-up cost for what essentially is a paper company was not closer to US $5 than to US $7 million.

BWIA bought one airplane and paid the deposit on another Dash-8 for Tobago Express. According to documents seen by this newspaper, the airline also paid fuel bills to National Petroleum to keep the start-up in the clear. It also paid close to US four million dollars (US $4,000,000.00) more on its three Dash-8s. And while Aleong maintained that BWIA negotiated deep discounts on all four planes, there is no dispute that Tobago Express got very lucky on its Dash-8 acquisition.

The Third Article – *"Aleong's Pay Deal - The US$30,000.00-a-month executive supply contract"* – 13th April, 2003

20. In this article, the trial judge highlighted the following portions.

BWIA boss, Conrad Aleong, maintains that his pay is nobody's business. But, in an airline that is tottering on the edge, with a failed initial public offering (IPO), massive lay-offs and no cash in hand, the privately negotiated executive supply contract of CA International has become a major bone of contention among shareholders, employees and BWIA's four unions.

Aleong has thumbed his nose at critics, saying the Securities Exchange Commission was satisfied that a "material" disclosure relating to his stock options at US twenty-five cents a share was included in the December 2000 IPO, which went to the market at US $1.25 per share.

He has also said that all material provisions in his secretly negotiated contact have been disclosed to the SEC. But, nowhere in the document is the value of the executive supply contract to BWIA stated. The SEC has refused to discuss the matter.

...And while Aleong maintains that his remuneration package is substantially less than what his predecessors made, the Sunday Express understands that it is about thirty thousand United States dollars (US $30,000.00) a month, plus allowances.

21. The article continues:

The Sunday Express understands that this figure has been somewhat shaved in the savings concessions made to keep BWIA afloat.

Aleong readily admits there is a bonus provision attached to his contract but says he is not paid any fees for supplying BWIA with executive staff.

"If I bring in an expat, I don't get a cent for it," he said, dismissing reports that he is paid a recruitment fee for every executive supplied through CA International. In the cost-cutting exercise, the five executives hired by CA International have been pared down to three.

22. The trial judge noted that the third article was on the same page as the second half of the second article and that the third article and the respondent's picture were juxtaposed against the second half of the second article. The judge found that the effect of the juxtaposition of the second and third articles was to leave no doubt as to the connection of the respondent to the second article.

23. The judge also found that the juxtaposition of the third article (which addressed the respondent's remuneration) against the second article reinforced the allegations of greed made in the first and second articles. The judge made the point that the second and third articles were not successive articles made in separate publications on different dates but were in effect, composite articles sharing the same day of publication and the same page.

The Fourth Article – *"BWIA $m bailout, but…"* - 20th April, 2003

24. The trial judge found that this article would have been impeccable but for the fact that, in its second half, it repeated the libels set out in the previous article and that in its final sentence, it expressly linked the payment of a bonus to the respondent, to BWIA's making of a profit, such as to suggest that BWIA's accounts were manipulated by the respondent in order to obtain a bonus for himself.

25. The following portions of the fourth article were identified by the trial judge.

> ***….....Insiders contend that BeeWee Express was used as the launching pad to set up the majority held, privately-owned Tobago Express. In last week's Sunday Express, this newspaper reported a series of complex transactions which saw one aircraft, 9Y-W1Z, undergo several ownership changes between the point of purchase and the time of delivery to the final beneficiary, Tobago Express.***
>
> ***BWIA, in a public relations assault on the Sunday Express, has published ads, declaring that "all transactions involving the three Dash8s for BWIA and the Dash8 for Tobago Express, as well as related Cayman companies are proper corporate transactions and have been duly approved by the Board".***
>
> ***The airline maintains that "these have been fully disclosed in the company's 2001 Statements".***
>
> ***This newspaper, however, could find no reference to a West Indian Airways Aircraft No. 2 Ltd. BWIA also sought to shoot down a Sunday Express report about the airline's three years of historic profits. A review of the airline's financials, however, shows that BWIA benefitted from an US$8 million windfall in fuel prices in 1998, the year it declared its first profit of US $9 million. Favourable fuel prices accounted for a significant percentage of the 1998 profit.***

The operating profit for 1998 was almost US$11 million but, by the next year, this figure dropped US$2 million even though revenues increased by US$14 million. In fact, the airline declared a profit of US$3.6 million in 1999 but US$4 million was derived from the sale of an investment.

"Operationally, therefore, BWIA made a loss in 1999", according to one insider. The operating profit in 2000 fell further to US$571,000 and although the airline declared a profit of US$1.1 million, almost US$5 million was derived from the sale of fixed assets and investments.

The management team led by Conrad Aleong increased revenues from US$225 million in 1998 to US$270 million in 2001, an increase of US$45million. And, according to the accounts, signed by PriceWaterhouseCoopers, it generated net profits of US$13 million during that period. However, over $10 million of the profit declared was derived from extra-ordinary, non -operating items involving the sale and refinancing of aircraft and investments.

In its third consecutive year of reported profits, BWIA terminated a four-year lease with Finova Capital on two L1011 aircraft. It negotiated a new sale and leaseback agreement with Cabot Aviation. A year later, in January 2001, in an agreement brokered with another company, Fleet Capital Leasing, BWIA would terminate the agreement with Cabot.

Aleong's executive supply contract is performance-based. The company makes a profit, he gets a bonus.

26. The judge found that although the article had very little reference to the respondent, there were five significant factors which collectively rendered it libellous:

i. There was a photograph of the respondent juxtaposed between the columns of the article and which because of its juxtaposition dominated the article even though there was a much larger picture above it. That larger picture was that of a BWIA aircraft.

ii. The article returned to the themes set out in the first article. It repeated the earlier allegations about a series of complex transactions involving the ownership changes of one aircraft 9Y-W1Z. While it referred to denials by the Board published in a newspaper advertisement which contended that the transactions were above board, it immediately reverted to the style of undermining that denial recalling that, as published in its first article, the report could find no reference to a West Indian Airways Aircraft No. 2 Ltd.

iii. Having also referred, somewhat dismissively, to the Board's attempts to "shoot down a Sunday Express" report raising "accounting questions about the airlines three years of historic profits", the article again questioned the soundness of that profit, albeit referring to BWIA as opposed to the respondent. The claimant's photograph however, was sufficient to link him to the publication.

iv. The article for the first time in the series, explicitly suggested that the BeeWee Express was used as a launching pad to set up the majority held, privately owned Tobago Express.

v. Most significant of all, the article ended with a specific reference to the respondent, the executive supply contract and the fact that it was performance based with the statement that *"the company makes a profit, he [Aleong] gets a bonus"*.

<u>The Fifth Article – *"BWIA Board backs CEO"* with the caption below *".......complains of unclear demands for State bailout"*- 27th April, 2003</u>

27. The trial judge referred to the following portions of the fifth article.

> ***…...From all accounts, Aleong continues to have trouble convincing Government of his turnaround plan despite his high standing with the BWIA board as a "tough, shrewd strategist".***
>
> ***.........Troubling questions remain about his executive supply contract and its bonus-link to profits, the sale and refinancing of aircraft and other investments; the expensive start-up and sudden demise of BWIA's regional commuter service later last year –BeeWee Express which left BWIA with two idle Dash8-300s and the virtual giveaway of revenue streams in catering and the airbridge service to private investors.***
>
> ***Aleong denies the charges and insists he is doing all he can to turn the airline around. But as reported in this series, a review of the accounts shows that a significant chunk of the Aleong declared profits originated from extra-ordinary, non-operating items involving the sale of assets.***
>
> ***The Aleong management also benefited from a US$5 million Government credit placed in the 2001 accounts, an expense that was tacked on to the 1995 accounts and year one of the Ed Acker privatization. The Acker group recorded a US $5.2 million loss in 1995 but industry analysts question whether BWIA actually made a loss, if that amount was properly applied in the 1995 accounts.***
>
> ***Page 47 of the 2001 accounts (item 22), points to a US $9.9 million credit from Government, relating in part, to "settlement of the 1995 investment agreement and related issues." Insiders report that expenses were overstated in the 1995 accounts***

as a direct result of pre-privatization bills owned to suppliers being placed in the 1995 accounts.

Tough for the long gone Acker, but a lucky reconciliation of accounts for Aleong, who said he was on his way to reporting a projected US$9.2 million profit in 2001 when 9/11 hit BWIA's bottom line. He still boasted of a modest loss of US $694,000, however.

28. The judge found that the article repeated the previous libel in the following ways:

i. the respondent was greedy or was motivated by greed;

ii. the respondent had engaged in or was engaging in secret or shady suspicious deals;

iii. the respondent was incompetent;

iv. the respondent engaged in suspicious clandestine business dealings or practices;

v. the respondent was involved in or engaged in questionable accounting practices;

vi. the respondent had manipulated or participated in the manipulation of the accounts of BWIA, a publicly listed company in a manner calculated to mislead;

vii. The respondent manipulated or participated in the manipulation of the accounts of BWIA, a publicly listed company for his own financial gain.

The Sixth Article – *"BWIA Board to meet Govt on Tuesday"* – 4th May, 2003 (page 3)

29. This was the shortest of the articles. The trial judge highlighted the following portions.

Despite its protestations that it had not requested a detailed written outline of Government's cash for concessions offer, the BWIA board of directors is yet to undertake the State's request for a review of the Conrad Aleong management team.

..........The Government was quite clear, however, at a post Cabinet news conference on April 17, that it would not release a cent of a promised US$18.5 million bailout for cash-strapped BWIA unless and until a management review of the Aleong team is undertaken, among other things.

- ***See story on page 4 and letter on page 13.***

30. The trial judge found that although the article, on its face, appeared quite innocuous, at its conclusion, it invited the reader to page 4 of the same publication in which the seventh article was written[1]. The judge observed that the contents of the sixth article had therefore to be taken in the context of the seventh article and the entire series of articles. The trial judge reasoned that, having regard to all that had been written in the previous articles and in the context of the seventh article which repeated the earlier libels, the allegation that the government would not release a cent of a promised US$18.5 million bailout for cash-strapped BWIA unless and until a management review of the Aleong team was undertaken pointed to the competence and character of the respondent. The trial judge therefore found that it was inferential that the respondent was incompetent and unfit to hold the office, that his performance should be reviewed, that he should be dismissed and that the government would not act until his performance was reviewed and he was fired.

[1] The judge referred to the eighth article at paragraph 49 of his judgment, when he clearly intended to refer to the seventh article.

<u>The Seventh Article – *“Fat Cows can’t fly”* with the caption below *"BWIA – from Acker to Aleong”* – 4th May, 2003 (page 4)</u>

31. The trial judge observed that the seventh article was largely a history of the troubled management of BWIA from February, 1995, under one Ed Acker to May, 2003, under the respondent, and was mostly unobjectionable, except for the last two columns to which the respondent took objection. The words complained of by the respondent began in the third paragraph of the passage set out below.

> ***Then finance Minister Brian Kuei Tung, seemed determined to slug it out. Upset over the shabby treatment meted out to Government by the private sector-run board. Kuei Tung threatened to send Filiatreault packing back to Canada over the airline’s failure to obtain the required work permit.***
>
> ***He would face union resistance, frequent breakdown of old aircraft, runaway costs and huge double digit US million-dollar losses. Filiatreault sought unsuccessfully to extricate BWIA from Acker-signed contracts forcing BWIA to take delivery of a second A321. But the tough negotiating ILFC forced BWIA to take delivery of both short-haul airplanes which Filiatreault subsequently subleased.***
>
> ***‘Filiatreault’s days were numbered, however, when Lawrence Duprey replaced Ken Gordon as BWIA’s chairman. Duprey brought in Conrad Aleong nearing the end of 1997, initially to undertake an audit. By early 1998, he was in the CEO’s chair. It was a good year for BWIA, maintenance costs were down, the A321s were gone, there was no more ferrying of engines to and from London and fuel prices had hit the floor.***
>
> ***It was a better year for Aleong, who claimed credit for posting the first-ever profit in the history of BWIA. Under Aleong’s tenure, BWIA would post three years of successive profits, totalling some US$13 million but almost all of it, US$10 million***

exactly, derived from extraordinary, non-operating items involving the sale and refinancing of L1011 aircraft and investments like BWIA's SITA shares.

Questions remain about several transactions, among them the sale of a 45 per cent stake of Allied Caterers, to the Goddard Group, the Dash-8 acquisitions, Tobago Express and Katerserv.

Aleong has blamed a lot of the airline's current troubles on the terror attacks of 9/11, the Iraq war, global economic slowdown, SARS, downgrade to Category 2, predatory pricing by charge operators, labour disputes and more recently, bad Press.

The airline has weathered many storms since its wartime start-up in 1940. It's gone from world class to world class disaster. Now only time will tell if BWIA will come out of this one intact.

32. The trial judge found that the words complained of, by themselves, were not libellous, even though they again questioned the genuine nature of the profits and the transactions involving the sale of Allied Caterers and the Dash-8 acquisitions. He found, however, that taken in the context of the preceding articles in which, inter alia, the profits were said to have been wrought by manipulation of the accounts, the alleged sharing of money spinning opportunities with private individuals, secret deals, etc, it in effect repeated the previous libels.

<u>The Seven Articles Collectively - Their Meanings</u>

33. The trial judge found that all seven articles were defamatory of the respondent. At paragraph 51 of his judgment, the judge said:

"In my judgment, the seven articles published on 6th, 13th, 20th, 27th April, and 4th May, were defamatory of Mr. Aleong. They would have lowered the claimant in the

estimation of right thinking members of society generally or in the estimation of reasonable people generally. The reasonable reader having read the entire series would have held the claimant in considerably lower estimation than before the publication of the articles. The overall impression of the claimant conveyed by articles to the reasonable reader, was that he was a dishonest and devious man who had manipulated the airline's accounts to declare profits which were in fact fictitious, so as to get an undeserved bonus, who sold the valuable assets of BWIA for his and other persons' private gain, who engaged in deals, smear tactics and personal vendettas."

34. The trial judge found that the following several meanings pleaded in the statement of claim could be ascribed to the articles.

i. that the respondent was greedy or was motivated by greed;

ii. the respondent engaged or had engaged in personal vendettas;

iii. the respondent had engaged in smear tactics;

iv. the respondent engaged or had engaged in secret suspicious deals or questionable and clandestine business dealings or practices;

v. the respondent was incompetent and not fit to be employed as CEO of BWIA;

vi. the respondent was, or had been involved or engaged in suspicious and questionable accounting practices;

vii. the respondent had manipulated or participated in the manipulation of the accounts of BWIA, a publicly listed company, for his own financial gain.

viii. the respondent was guilty of deception;

ix. the respondent had compromised, or participated in compromising, or sacrificing the interests of BWIA and shareholders of BWIA to private individuals;

x. the respondent had given away, or conspired with others to give away, assets of BWIA for the benefit of himself or private individuals;

xi. the respondent was getting rich at the expense of BWIA and its shareholders;

xii. the respondent did not act or had not acted in the interest of BWIA or its shareholders or employees but rather in his own self-interest;

xiii. that his performance as president and CEO of BWIA should be reviewed and his contract terminated.

WHETHER THE ARTICLES WERE THE PRODUCTS OF RESPONSIBLE JOURNALISM

35. As mentioned earlier, the appellants did not challenge the judge's findings that the seven articles were defamatory of the respondent and bore the meanings set out above. I therefore turn to the key issue whether the articles were the products of responsible journalism.

36. The defence of **Reynolds** privilege or public interest privilege was considered by Lord Nicholls in **Reynolds v Times Newspapers Ltd and Others** [1999] 3 W.L.R.1010. He noted that the essence of this defence lay in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information

from a particular source. Lord Nicholls said that the law was indeed concerned to attain that end by protecting the maker of the statement. He then observed that the court had to assess, whether, in the public interest, the publications should be protected in the absence of malice.[2]

37. The defence of **Reynolds** privilege can only be sustained in the absence of malice. The trial judge found as a fact that the respondent failed to prove malice on the part of the appellants. The respondent contended that the departure of the second appellant from BWIA was a direct result of his decision to separate the second appellant from BWIA. The second appellant who had acted in the office of Chief Executive Officer of BWIA from February 1993 had been terminated by the respondent on the 30th June, 1993. The respondent also contended that the second appellant was a close friend of Captain Goddard who was also antagonistic towards him. The second appellant had testified at the trial that he had already decided to leave BWIA before the respondent's arrival at BWIA. Although the trial judge accepted that the respondent did in fact terminate the second appellant's appointment, he did not accept the respondent's contention that he was targeted by the appellants. The judge accepted the evidence of the second appellant that he took no part in the crafting or editing of the articles and that he was not aware of any antagonism towards the respondent emanating from Captain Goddard.

38. Also on the issue of malice, the judge rejected the respondent's contention that he was tricked by the fourth appellant into doing the interview. The judge reasoned that the respondent, given the nature of his job, should have come to expect that difficult questions would have been put to him. The judge also observed that that it was the respondent's choice whether and how to answer the questions put to him in the interview. The trial judge also noted that the respondent could not have expected that he would have dictated the terms under which the interview would have been conducted. The respondent has not challenged the judge's findings on malice.

39. The trial judge adopted the approach of Lord Hoffmann in **Jameel (Mohammed) v Wall Street Journal Europe Sprl** [2006] UKHL 44. The trial judge posed three questions as

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[2] See page 1017 of the judgment of Lord Nicholls.

suggested by Lord Hoffmann[3].

(a) whether the subject matter of the article was a matter of public interest?
(b) if yes, whether the inclusion of the defamatory statement was justifiable?
(c) if yes, whether the steps taken to gather and publish the information were responsible and fair?

40. As to the first question, a necessary precondition of reliance on **Reynolds** privilege is that the publication should be a matter of public interest. The trial judge found that the articles were concerned with a subject matter of public interest.[4] He reasoned that questions about the operations of BWIA, the quality of its management, its profitability and even the remuneration package of its senior management including the CEO, were matters of public interest. He also observed that BWIA had been consistently dependent on subventions from the central government and ultimately the taxpayer. He noted that the remuneration packages of the CEO and other senior managers were indeed matters of public interest, especially at a time when the airline was struggling to stave off its creditors and was approaching government for further financial assistance, and more so if they should be shown to have been excessive. The judge further observed that the fact that the airline could have declared three years of profit, but yet have returned, cap in hand, to the government for financial assistance within twelve months was a matter worthy of coverage. In this appeal, no challenge has been made to the judge's finding that the articles were concerned with a matter of public interest. In any event, these were matters of significant public interest. The respondent was therefore correct not to challenge this finding of the trial judge.

41. As to the second and third questions posed by Lord Hoffmann in **Jameel,** the trial judge considered them together under the heading of responsible journalism. As to the second question of Lord Hoffmann, that is, whether the inclusion of the defamatory statement was justifiable, the trial judge found[5] that the issues surrounding the respondent's management of BWIA, his

[3] See paragraph 48 and following of Lord Hoffmann's judgment in **Jameel**.
[4] See paragraph 122 of the judgment of the trial judge.
[5] See paragraph 127 of the trial judge's judgment.

remuneration package, the acquisition of the four Dash-8s, the start up of Tobago Express, the sale and leaseback of airplanes and their inclusion as non-operating profits were all matters of legitimate public interest and merited inclusion in the articles. There has been no appeal on this finding. The key issue which remained before the trial judge, therefore, was whether the steps taken to gather and publish the information were responsible and fair.

42. Lord Nicholls in **Reynolds** provided a list of "illustrations", which *"depending on the circumstances"* should be taken into account. These matters would aid in answering the question whether the test of responsible journalism was satisfied. They were as follows[6].

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.

[6] See page 1027 of **Reynolds.**

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.

43. Lord Nicholls then made important observations on these illustrations. He noted that the list was not exhaustive and that the trial judge had to carry out a balancing operation. He also highlighted the importance of freedom of expression and the role of the press in discharging vital functions as a bloodhound as well as a watchdog. He said at page 1027:

> "***This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.***
>
> ***In general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it. Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of***

publication."

44. In the case of **Jameel**, Lord Bingham set out the rationale of the test of responsible journalism. He described Lord Nicholls' list of illustrations as pointers which might be relevant to the facts of a particular case. They were not to be considered hurdles which had to be negotiated by a publisher before he could rely on **Reynolds** defence. He said at paragraphs 32 and 33:

"***Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one of public interest, that Lord Nicholls proposed, at p 202, a test of responsible journalism, a test repeated in Bonnick v Morris [2003] 1 AC 300, 309. 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, 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.***

Lord Nicholls, at p 205, listed certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege. Lord Nicholls recognised, at pp 202-203, inevitably as I think, that it had to be a body other than the publisher, namely the court, which decided whether a publication was protected by qualified privilege. But this does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner."

45. In **Bonnick v Morris and others** [2002] UKPC 31, Lord Nicholls delivering the judgment of the Board, stated[7] that responsible journalism was the point at which a fair balance was held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard was in the public interests and in the interests of those whose reputations were involved. The standard of conduct to be meaningful had to be applied in a practical and flexible manner, having regard to practical realities. In **Seaga v Harper** [2008] 3 WLR 478, Lord Carswell made the point that the factors set out by Lord Nicholls in **Reynolds** were not like a statute, nor were they a series of conditions each of which had to be satisfied or tests which the publication had to pass.[8]

46. I therefore pass to the question whether the appellants satisfied the test of responsible journalism. The following factors will be considered:

(a) the steps taken to verify the information contained in the seven articles;
(b) the urgency of the publications;
(c) the tone of the articles;
(d) the opportunity given to the respondent to comment;
(e) the sources of the information.

Verification

47. The trial judge found that certain "*factual inaccuracies*" were contained in the articles. The judge set out the following inaccuracies[9]:

(I) The executive supply contract

The fourth appellant, in her articles of 6th April 2003 and 13th April 2003, alleged that the executive supply contract was worth US$40,000.00 per month (6th April 2003) and

[7] See paragraphs 23 and 24 of **Bonnick.**
[8] See page 484, paragraph 12.
[9] See paragraphs 99-105 of the judgment.

US$30,000.00 per month (13th April 2003). She also referred in the latter article to *"Aleong's pay deal"* and to this remuneration package being worth ***"about US$30,000.00 a month plus allowances"***. At the interview, however, the respondent had told the fourth appellant that the moneys paid under the contract were moneys paid to three executives. Indeed that latter information (not the quantum) was available in the 2000 Prospectus. At the time of the articles, the respondent's package was in fact US$12,520.00 per month. In cross-examination he did concede that when travel, housing and other benefits were taken into account, it was worth far more.

(II) Sale of BWIA's catering concerns

In her articles of the 6th April 2003 and 13th April 2003, the fourth appellant spoke of Katerserv having a contract of the catering facility with Allied Caterers Ltd (6th April 2003) and that BWIA sold a 45% interest in Allied Caterers to the Goddard Catering Group (13th April 2003). BWIA, however, retained a 55% stake in Allied Caterers and owned 55% of Katerserv through its wholly owned subsidiary WIAAL No. 2. In her 6th April 2003 article, however, the fourth appellant spoke of the Katerserv contract being *"lucrative"* and described BWIA as having *"only a small stake"* in Katerserv. She also wrote that in the 2001 BWIA accounts, the catering operation was said to be worth US$360,000,000.00. In fact, none of BWIA's accounts showed any such thing. The 2001 accounts showed a figure of US$360,000.00 for *"depreciation and amortisation"* with respect to catering operations.

(III) Quid Pro Quo for Goddard

In her article of 13th April, 2003, the fourth appellant suggested that the Godard Catering Group got a *"sweetheart"* deal when purchasing 45% of the shares of Allied Caterers Limited. She could not verify the allegation. The suggestion was that the purchase of the 45% shareholding was obtained as part of a *"deal"* and was in fact a quid pro quo for subscribing to BWIA's IPO in 2000.

(IV) Tobago Express

In her article of 13th April 2003, she described Tobago Express as a *"paper"* company and quoted *"insiders"* as questioning whether start up costs were no *"closer to US$5 dollars that US$7 million as stated in the accounts"* and also spoke of BWIA's *"practice of sharing money-spinning opportunities with private individuals"* and *"the loss of another BWIA corporate opportunity to the fifty-one percent privately-owned Tobago Express."* Tobago Express in fact was far from being a "paper" company. It was a US$700,000.00 investment.

(V) Suspicious Profits

The fourth appellant, in her articles, consistently questioned whether the profits made in the years 1998, 1999 and 2000 were real profits, suggesting that they were in fact procured through a *"doctoring"* of the accounts by booking income from the *"frequent"* sale and leaseback of aircraft and by wrongly listing the disposal of a block of Equant shares as *"sale"* rather that as a *"loan"*. She quoted one Ved Seereeram who said of the Equant share transaction that *"the whole transaction was a clear sign that the books were manipulated to report a much better picture than the actual state of affairs"* In fact, there was no *"frequent"* sale and leaseback of assets but one such transaction involving two aircrafts. The articles were also written as though the accounts were prepared personally by the respondent who manipulated them in order to obtain a bonus, when that was not in fact so. The accounts are in fact prepared by BWIA's management.

(VI) Ownership of aircraft 9Y-WIZ

It was alleged that the aircraft 9Y-WIZ was owned by WIAAL. According to the fourth appellant, this was obtained from an inspection instruction document which wrongly listed WIAAL as the owner of the aircraft and which instruction was later cancelled. The document was not even certified by any public official. However, the fact is that the aircraft was owned by WIAAL No. 2 and then leased to BWIA and then subleased by BWIA to Tobago Express.

Caribbean Aircraft Acquisitions Ltd later acquired the aircraft and leased it to Tobago Express and subsequently to Caribbean Airlines Limited. There was no *"maze of offshore companies"* nor was any of the companies *"secret"*. Their existence was fully disclosed in the BWIA's annual reports. Moreover, in the interview, the respondent had fully and clearly explained the tax implications behind the formation of the companies in the Cayman Islands and the leasing arrangements.

(VII) Two Aleong Companies

In her article of 6th April, 2003, the fourth appellant spoke of two Aleong companies, stating that *"CA International was hired by the Lawrence Duprey board of directors ... through a second Aleong company"*. During the interview, the respondent had explained that CA International was not another company but a brand name and was a division of Air West Indies Limited.

The trial judge cited this sequence of question and answer in the interview:

> Q: Where is CA International incorporated and why is its executive supply contract done through a second company, Air West Indies Limited?
>
> A: It is not a second company. It is the same company. The company official name is Air West Indies Limited, a consulting division of CA International and I use it as a brand name so that I can keep the airline name different from consulting.

At the end of the interview, on the question that CA International was not found in the companies' registry, the respondent repeated that *"CA International is a brand name, it is not registered as a company, it is registered as a brand name"* (more that once). He added that CA International is a consultancy and was a division of Air West Indies Limited.

48. The trial judge also found that during the cross-examination of the fourth appellant, she was forced to make a number of concessions. The judge set out what he described as the significant concessions. He considered them under two headings, general concessions and

specific[10].

49. The judge found that the fourth appellant made the following general concessions:

- *"for the most part"* there were several aspects of the fourth appellant's story for which she could produce no documentary corroboration. She added that *"documentary evidence was not always readily available or forthcoming and my memory of the volume of transactions that I reviewed in 2003 is not complete at this time"*.

  The trial judge considered the latter answer unacceptable since the fourth appellant was aware early enough during the series of articles that the respondent was likely to take legal action and ought to have been prepared for such an eventuality. Indeed, she had been permitted several opportunities during a break in proceedings or at the end of a day's sitting, to review her notes and report back to the court, and in most instances could not verify her facts.

- that nowhere in her articles did she hold the board of directors accountable for plans which the respondent told her (during the interview) had been approved by the BWIA board of directors. Her response however was that *"it was not a question of holding anyone accountable but merely presenting the information to the public"*.

  The trial judge observed however that the latter comment was not consistent with the tone, style and direction of the series of articles which clearly held the respondent accountable.

- a lot of the information she used in her articles could have been verified (but

[10] See paragraph 106 of the judgment.

was not) by checking them against published documents in her possession.

- that at the time of writing the articles, BWIA's board of directors had authorised the financial statements.

- in response to Mr. Martineau's suggestion that she did not verify her information before publication, she said that *"there were some honest errors but given the time frame, I did my best to verify the information"*. The trial judge observed that she did not detail how.

- that a lot of her sources of information (among others) were persons who were critical of the respondent or antagonistic towards him (Captain Kelshall, Abraham and former employees of BWIA who had been retrenched).

- she did not tell the respondent, at any stage, that there were allegations of greed made against him or, of his having personal vendettas or of his engaging in smear tactics.

- that the unions had an axe to grind with BWIA and the respondent.

- she did not check the records of the Registrar General to see whether CA International was registered as a trade name. She did think that it was a prudent thing to do but spoke of time constraints. She said that, *"the airline was falling apart. It was a do or die situation and there were deadline considerations"*.

- she searched the companies' registry for CA International but did not search for a brand name. (CA International is registered under the Registration of Business Names Act, Chap. 82:85).

50. The trial judge also found that the fourth appellant made the following specific

concessions:

(a) *Tobago Express – Free Ride – Lucrative Airbridge*

- the fourth appellant conceded that, in the interview, the respondent was at pains to tell her that BWIA got paid for everything it provided for Tobago Express and he gave specifics (reservations and maintenance). She further conceded that she never told the respondent of Minister Valley's concerns about Tobago Express. She reasoned that *"it is a general strategy in conducting interviews to the information gathering process. When you go to the person you put the question out without letting them know you have other information, it varies for the subject, circumstances and issue."* The trial judge considered that strategy to have been flawed and misguided. He found that by no stretch of the imagination could it have been considered fair.

- she conceded that she had no accounts to show that the Tobago airbridge route was lucrative.

- she stated that she relied on *"insiders"* when she spoke of *"loss of money-spinning opportunities"* and that the *"insiders"* and *"observers"* were BWIA employees and other sources.

- she admitted to calling Tobago Express a *"paper company"* even though she was aware that a number of parties had made significant investments in it (US$700,000.00).

(b) *The virtual giveaway of BWIA's catering concerns*

- she could not find or verify in any BWIA's published accounts (or in any document for that matter) that BWIA's catering concern was worth US$360,000,000.00.

- she conceded that on the basis of the information she had at the time of writing the articles, she could not say that BWIA had a small stake in Katerserv.

(c) Fictitious profits – bolstering of the BWIA bottom line

- that contrary to her statement in the 6th April, 2003 article that there were frequent sale and lease back transactions which bolstered BWIA's profits, there was only one sale and lease back transaction (involving two aircrafts) during the period 1998 to 2000.

- that the accounts for 1998, 1999 and 2000 were prepared by BWIA and certified by Price Waterhouse Coopers and the financial statements of BWIA were prepared in accordance with international accounting standards. The trial judge observed that the fourth appellant appeared to be sceptical of PWC's reputation, referring in cross-examination, to the fact that they were *"perceived"* as a respected firm of accountants, and suggesting that the firm's American counterpart was the accounting firm which had been held responsible for false accounting in the 'Enron' scandal, a suggestion which she later conceded was wrong.

- that the monthly lease payments (in respect of the sale and lease back arrangement) of BWIA L1011 aircraft and the buy back price were disclosed in the 2000 prospectus and was therefore public information.

- that the respondent told her that one could not sell assets and place them as operating profits.

- that BWIA's accounts separated operating profits from profits for the sale and lease back arrangement and from the Equant shares, the latter two of which were both declared under non-operating expenses/income and that the separation was clear and obvious under the appropriate heads.

- that the difference between the put option (option to re-purchase) and the market value of the securities under the Equant shares had been provided for in the accounts.

- when shown the BWIA accounts for 1999, she conceded that it was not correct to say that, operationally, the airline did not make US$1,987,000.00.

- she did not tell the respondent during the interview, that there were suggestions that he bolstered the BWee bottom line by booking income from frequent sale and lease back of assets.

- she said she was told by Ved Seereeram and industry analysts that the Equant shares were not properly recorded. Although she could not say whether Mr. Seereeram was an accountant, she was prepared to write the articles on the basis of what he and others said.

(d) Ownership of 9Y-WIZ/existence of WIAAL

- as to the ownership of the aircraft 9Y-WIZ, she acknowledged that the document CMII (inspection instruction) which purported to show that it was owned by WIAAL had been cancelled. She said she had personally checked the records of the Director of Civil Aviation to determine the ownership of the aircraft over time. She conceded however, that before writing the articles, she should have obtained certified copies of the registration certificate from the Director of Civil Aviation (which would have revealed the true ownership).

- she was fully aware that the existence of WIAAL had been made public by the 2000 prospectus and there was nothing secret about its existence.

- she accepted that ownership of the aircraft 9Y-WIZ was disclosed in the 2001 accounts (Caribbean Aircraft Acquisitions Ltd) as was the ownership of the other three Dash-8 aircrafts. The trial judge observed however that she added that her concern was that the several transactions involving change of ownership of the aircraft were not reflected in the accounts and that accounting procedure would not have been the basis of her review of the transaction.

(e) *Aleong's pay deal*

- she said that she never asked the respondent whether his remuneration was US$30,000.00 plus allowances, because he refused to discuss it.

(f) *Minority shareholders' action*

- she conceded that she was aware that the minority shareholders' action had been withdrawn but continued to pursue the very questions raised in the action because *"there were concerns flagged by stakeholders in the industry"* who included industry analysts, shareholders (including government) and unions.

- the unions had expressed those concerns in public pronouncements and in interviews she had conducted with them.

- as to the suggestion that the union members to wit; Abraham (of ACAWU), Goddard and Kelshall (of Talpa) had *"axes to grind"* with the respondent, the fourth appellant stated that they appeared to have a *"beef about his management but were not hostile to him"*. She conceded that she was aware of an incident between Goddard and the respondent over the return of an aircraft captained by Goddard but Goddard, while he did not express any hostile views in her interview towards the respondent, did admit that he did not have a good relationship with him. She was aware of the relationship when he wrote the articles. The trial judge observed, however, that the fourth appellant went on to say that she did not believe that she included in her articles information given to her by Goddard and

Kelshall but some of Mr. Abraham's concerns were included.

51. The trial judge concluded[11] that the failure in many instances to report the facts accurately, more so, facts which could have been verified from available documentation, left a lot to be desired. The judge found that the inaccuracies gave a distorted picture which portrayed the respondent in an even less favourable light. At paragraph 131 of the judgment, the judge made the point that factual inaccuracies which were defamatory might not necessarily have been fatal if the journalist had taken appropriate steps to verify the accuracy of his or her story.

52. The trial judge focused on inaccuracies surrounding Tobago Express. Tobago Express was described as a *"paper company"* and the cost of start up for which was described as closer to US$5 than US$7 million. The judge found that no effort was made by the fourth appellant to verify whether Tobago Express was in fact a paper company. The judge noted that local investors had put in close to US$700,000.00 and Mr. Clovis' evidence suggested that the cost of start up was anything but cheap. Indeed, the judge observed that in the interview the respondent had named some of the investors to whom the fourth appellant could have spoken.

53. The trial judge added that Tobago Express was described as having been given *"a free ride"* by BWIA with respect to services provided to it by BWIA, although the fourth appellant had been told in the interview that Tobago Express paid for every service which BWIA provided. The judge noted that Mr. Clovis, a witness, had verified this in his witness statement.

54. The judge also focused on inaccuracies concerning Katerserv[12]. BWIA was described as owning a *"small"* stake in Katerserv despite owning 55% of shares through its fully owned subsidiary WIAAL No. 2; the value of BWIA's catering concerns was put at $360,000,000.00. The judge noted that the fourth appellant could provide no basis upon which she arrived at that figure despite having been given ample opportunity to justify it. The judge found that when taken together, the figures and statements gave the impression that the respondent had given away valuable income earning assets belonging to BWIA and had allowed Tobago Express to

[11] See paragraph 127 of the judgment.
[12] See paragraph 131 of the judgment.

profit from the operations and services of BWIA.

55. The trial judge also considered that the accounts of BWIA were presented as if they were prepared by the respondent himself, with no input from the Board and no certification by external auditors. The judge said that it was not that one could not be critical of the accounts for 1998-2000, but it was quite another thing to have suggested openly that the accounts were manipulated by the respondent so that he could get a bonus.

56. In **Flood v Times Newspapers Ltd** [2012] 2 WLR 760, Lord Phillips stated that **Reynolds** privilege would normally only be earned where the publisher had taken reasonable steps to satisfy himself that the allegation was true before he published it[13]. Lord Phillips went on to point out that verification involved both a subjective and an objective element. He observed that the responsible journalist must satisfy himself that the allegation he published was true. He added that his belief in its truth must be the result of reasonable investigation and must be a reasonable belief to hold. Lord Hoffmann in **Jameel** made a similar observation. He noted that the fact that a defamatory statement was not established at the trial to have been true was not relevant to the **Reynolds** defence. It was a neutral circumstance. He further observed that the defence of **Reynolds** privilege was not affected by the newspaper's inability to prove the truth of the statement at the trial.

57. Mr. Fitzpatrick S.C. on behalf of the appellants criticised the trial judge's findings of inaccuracies and concessions and submitted that the trial judge focused disproportionately on non-compliance by the fourth appellant. He submitted that the judge failed to adopt a pragmatic and flexible approach, despite his stated intention. In addition, Mr. Fitzpatrick submitted that the judge fell into error by treating the **Reynolds** guidelines as hurdles. He also contended that the trial judge was guilty of nitpicking.

58. Mr. Fitzpatrick's approach to verification was three-fold. Firstly, he submitted that the judge erred in finding that there were inaccuracies. Secondly, he submitted that the inaccuracies

[13] See paragraph 78

if they did exist went to mismanagement and not to greed on the part of the respondent. Thirdly, it was submitted that the fourth appellant had taken reasonable steps to satisfy herself that the allegations contained in the articles were true before they were published.

59. Mr. Fitzpatrick submitted that the trial judge was wrong to find that there were certain inaccuracies in the articles. I do not agree with Mr. Fitzpatrick. As to the inaccuracies set out by the trial judge and repeated at paragraph 47 of this judgement, Mr. Fitzpatrick eventually conceded that the trial judge was correct in respect of *the sale of BWIA's catering concerns*, *the quid pro quo for Goddard, Tobago Express* and *the two Aleong companies*.

60. As to the judge's findings of inaccuracy in respect of the *executive supply contract*, I believe that he was correct. In the articles of the 6th April and the 13th April, 2003, the fourth appellant had alleged that the executive supply contract was worth US$40,000.00 and US$30,000.00. In the third article headlined *"Aleong's Pay Deal - The US$30,000.00-a-month executive supply contract"* of the 13th April, 2003, the fourth appellant had said that the Sunday Express understood that the respondent's *remuneration package* was about US$30,000.00 per month, plus allowances. The article did go on to say that *this figure had been somewhat shaved in the savings concessions made to keep BWIA afloat*. Mr. Fitzpatrick argued before us that in this third article, the fourth appellant had said that monies paid to CA International on the executive supply contract were in fact for three executives and not for the respondent only. That is not so. What was stated at the last paragraph of that article was that there was a cost-cutting exercise and the five executives hired by CA International had been pared down to three. There was nothing in that statement which clarified that the monies paid, that is, the US$40,000.00 or US$30,000.00, were paid to three executives and not to the respondent alone.

61. As to the findings of the trial judge on *suspicious profits*, I am also of the view that the he was correct. The trial judge found that the fourth appellant had consistently questioned whether the profits made in the years 1998-2000 were real profits, suggesting that they were doctored by booking income from the frequent sale and leaseback of assets and by wrongly listing the disposal of a block of Equant shares as a sale instead of a loan. In the first article of the 6th April,

2003, there was the allegation that the respondent bolstered BWIA's bottom line by booking income from frequent sale and leaseback of assets. In fact, there was no frequent sale and leaseback of assets, but only one such transaction involving two aircrafts. This was conceded by the fourth appellant in cross-examination. She had also conceded that BWIA's accounts separated operating profits from profits from the sale and leaseback arrangement and from the Equant shares. She further conceded that the latter two were declared under non-operating expenses/income and that the separation was clear and obvious under the appropriate heads in the accounts. But in the first article of the 6th April, 2003, she quoted Ved Seereeram suggesting that the sale of the Equant shares was improperly recorded to inflate profit. She also quoted him as saying that the whole transaction was a clear sign that the books were manipulated for the same purpose. The trial judge also made the important finding that the articles were also written as though the accounts were prepared personally by the respondent who manipulated them in order to obtain a bonus. Throughout the articles, there was the suggestion that the respondent bolstered profits (*suspicious profits*) for personal gain, given that his contract had a bonus link to profit.

62. As to the *ownership of aircraft 9Y-WIZ,* I am also of the view that the trial judge was correct. The judge traced the ownership of the aircraft[14], finding that there was "*no maze of offshore companies"* nor was any of the companies "*secret"* as alleged by the fourth appellant.[15] The judge found that the existence of these companies was disclosed in BWIA's annual reports. WIAAL No. 2, however, was the only company not referred to in BWIA's annual report for the year 2001, which had been handed to the fourth appellant by the respondent. The certificate of ownership certified by the Director of Civil Aviation showed that WIAAL No. 2 was listed as owner of the aircraft in 2001 but the fourth appellant relied on a certificate which was marked "cancelled". The trial judge also observed that in the interview, the respondent had fully and clearly explained the tax implications behind the formation of the companies in the Cayman Islands and the leasing arrangements. There were three other Dash-8 aircraft which were also

[14] See paragraph 104 of the trial judge's judgment: Owned by WIAAL No. 2, leased to BWIA and subleased to Tobago Express; Aircraft Acquisitions Ltd later acquired the aircraft and leased it to Tobago Express and subsequently to Caribbean Airlines Limited.
[15] See paragraph 104.

disclosed in the 2001 annual report. Yet the suggestion in the first article was that the planes might have been held in some *"secret offshore company"*.

63. As to the judge's findings on the concessions made by the fourth appellant in cross-examination, Mr. Fitzpatrick's approach was that the concessions (general and specific) had to be considered in the context of all the articles, looking at them as a whole. In addition, he contended that the concessions were innocuous, led nowhere, and did not speak towards any failure by the journalist to act responsibly. Mr. Fitzpatrick took issue with the judge's finding of the specific concession relating to *Tobago Express*. The trial judge had found that the fourth appellant had conceded that she never told the respondent in the interview that Minister Valley was concerned about Tobago Express. In my view, Mr. Fitzpatrick argued correctly that the fourth appellant never reported that Minister Valley had concerns about Tobago Express and the trial judge was wrong to so find.

64. However, I do not agree with Mr. Fitzpatrick that the concessions were innocuous and led nowhere. Despite saying in her witness statement that in writing the articles she omitted information that she was unable to verify,[16] the fourth appellant conceded in cross-examination that *a lot of the information she used in her article could have been verified (but was not) by checking them against published documents in her possession*. She also conceded in response to Mr. Martineau's suggestion that she did not verify her information before publication that *"there were some honest errors but given the time frame, I did my best to verify the information"*. The trial judge observed that she did not detail how.

65. I have also looked at the several specific concessions made by the fourth appellant and set out above[17]. For example, with respect to Tobago Express, the fourth appellant admitted to calling it a *"paper company"* even though she was aware that a number of parties had made significant investments to the tune of US700,000.00. She also conceded that she had no accounts to show that the Tobago airbridge was *lucrative*. Yet the fourth appellant in the second article of the 13th April, 2003, expressed concern for "*BWIA's practice of sharing money-spinning*

[16] See paragraph 22 of her witness statement.
[17] See paragraph 50 of this judgment.

opportunities with private individuals" and for persons *"getting rich off the financially stricken public-listed company"*. The trial judge found that it was being suggested that there were *"behind-the-scenes"* arrangements to sell off profitable subsidiaries for the secret benefit of the respondent and other persons.[18]

66. Another important concession made by the fourth appellant was as to the *virtual give-away of BWIA's catering concerns*. She could not find or verify in any BWIA's published accounts (or in any document for that matter) that BWIA's catering concern was worth US$360,000,000.00. She also conceded that on the basis of the information she had at the time of writing the articles, she could not say that BWIA had a small stake in Katerserv. The trial judge found that the fourth appellant was posing an enquiry, sceptically, as to why BWIA would subcontract its entire facilities to Katerserv. According to the judge, the implication was that the purchase by the Goddard Catering Company of US$1million worth of shares from the failed IPO, resulted in that company being given 45% of Allied Caterers' shares as a *quid pro quo*.[19]

67. As to the steps taken by the fourth appellant to verify, I have considered her many concessions, both general and specific. In particular, I have borne in mind the fourth appellant's concession that a lot of the information she used in her article could have been verified (but was not) by *checking them against published documents in her possession*. I have also considered her admission that there were some *honest errors* but given the time frame, she did her best to verify the information.

68. I have also borne in mind certain steps taken by the fourth appellant prior to the publication of the series of articles. At paragraph 20 of her witness statement, the fourth appellant said:

> ***"Having conducted the full length interview with the Claimant, I set about putting all the information that I had collected together for the purpose of writing the articles. I adopted the approach of considering the major concerns raised by my investigations***

[18] See paragraph 41 of the trial judge's judgment.
[19] See paragraph 40 of the trial judge's judgment.

> ***including the Claimant's interview. The articles were to be presented as part of a series. Each article was to examine the different concerns I had prior to the interview with the Claimant, documentary and other information from several sources - these sources were persons working within BWIA, including serving and former directors on the board, financial analysts and persons with expertise in the airline industry. I also conducted searches of the various company files maintained at the Companies Registry, where information about incorporation, shareholding, status of the companies and the identity of directors were relevant to the matters raised in the articles."***[20]

69. The fourth appellant also relied on the issue of urgency which, according to her, impacted on the steps she was able to take to verify information prior to publication. I propose therefore to consider urgency at this stage.

Urgency

70. The trial judge found that despite claims of urgency by the fourth appellant that BWIA was falling apart, there was no urgency with respect to the publication of the articles such as to have required quick judgment calls under pressure. According to the judge, the articles were published in April, 2003, but concerned the financial years 1999 to 2001. Further, the judge found that even if a decision had to be taken with respect to the bailout of BWIA, the government appeared to be in no hurry. There was no undue pressure to go to print expeditiously. In his judgment, the facts could have been checked and verified with a lot more care and the articles presented with far more detachment.

71. Mr. Fitzpatrick criticised the judge's findings and contended that the judge failed to consider that the articles were written in the context of BWIA, after having received some months before $18.5 million from the Government, were again requesting Government to bail them out. He argued that it was urgent that the articles be published during the period when the

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[20] Several documents which the fourth appellant had in her possession were referred to by the fourth appellant and exhibited in the appellants' bundle of documents which were before the trial judge.

request was made to the Government and Government was still in the process of considering that request.

72. On the other hand, Mr. Martineau on behalf of the respondents argued that in the fourth appellant's witness statement[21], she had said that since late November, 2002, BWIA had approached Government to provide financial assistance to keep the airline in operation. According to her, Government agreed to provide financial assistance in the form of a loan in the sum of US$13.75 million on the condition that the airline cut its costs by a minimum of US$1.4 million a month. She added that the events leading up to this approach were given widespread coverage in the media.

73. In the fourth appellant's witness statement,[22] she went on to say that in or about March, 2003, BWIA was again in financial difficulty and approached the Government. A delegation from BWIA held a meeting with the Ministry of Finance in or about late March, 2003. BWIA's situation and the outcome of the meeting were reported in the Daily Express and Sunday Express newspapers, and in other daily newspapers published in Trinidad and Tobago. The fourth appellant referred[23] to several newspaper articles from various newspapers published in Trinidad and Tobago starting with an article in the Daily Express dated 12th August, 2002, and ending with an article in the Newsday dated 17th April, 2003.

74. According to Mr. Martineau, there could be no urgency. The matters were already in the public domain since the 12th August, 2002, and had received widespread coverage in the press. Not only were matters concerning BWIA in the public domain for some time, but allegations about the respondent had been in the public domain since the shareholders' action was filed in 2002 and withdrawn in February 2003. I agree. These articles ran over a five-week period, Sunday after Sunday and that, that in itself, demonstrated no urgency to publish. It was in this context that the trial judge came to his decision and I am of the view that he cannot be faulted. Whilst it is accepted that news is a perishable commodity, there is nothing which suggests that

[21] Paragraph 3.
[22] Paragraph 4.
[23] At paragraphs 3 and 4 of her witness statement.

any delay caused by steps which might have been taken by the journalist to verify information would have adversely affected the news worthiness of this story.

The Tone of the Articles and the Opportunity given to the Respondent to Comment

75. I propose to deal with these factors together. The trial judge found that the tone and style of the articles in the series were sensationalised. There was no restraint or detachment. He found that the respondent's side of the story was never put in a neutral or restrained manner but presented in a shrill and aggressive style. The effectiveness of his account, when given, was often attenuated by immediate rebuttals of the author herself or by comments from unnamed sources[24]. He also found that there was no neutrality in the tone of the article such as to allow the reader to come to his own conclusion; the articles led inexorably to a negative conclusion about the respondent.

76. In **Flood**, Lord Mance cited the case of **In re Guardian News and Media Ltd** [2010] 2 AC 687, where Lord Rodger said:

> "***...Lord Hoffmann observed in Campbell v MGN Ltd, [2004] 2 AC 457, 474, para 59, 'judges are not newspapers editors.' See also Lord Hope of Craighead in In re British Broadcasting Corpn [2010] 1 AC 145, para 25. This is not a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest readers of their particular publication and to help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."***

[24] See paragraph 128 of the trial judge's judgment.

77. Lord Mance went on to conclude[25] that the courts give weight to the judgment of journalists and editors not merely as to the nature and degree of the steps to be taken before publishing material, but also as to the content of the material to be published in the public interest. He added however that the courts must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, but within those boundaries the judgment of responsible journalists and editors merits respect.

78. Mr. Fitzpatrick relied on the above passage and argued that the courts should be slow to interfere with the style of the journalist. He argued however that the courts had to see if the tone itself was unfair in relation to the allegations that were made and in relation to the responses given by the respondent. Mr. Fitzpatrick contended that the fourth appellant fairly reported the respondent's responses and that the trial judge's findings were unjustified.

79. On the other hand, Mr. Martineau submitted that the trial judge was correct. He argued that the fourth appellant unfairly *"diluted"* or *"watered down"* the respondent's responses by applying various techniques including:

(a) After giving the respondent's side of the story, she would almost immediately interject *"But insiders say..."* or she would say that some named person has made a remark or posed a question on some allegation. She would not then give any further response from the respondent.

(b) She used emotive language to describe the respondent's responses, such as, *"thumbing his nose at critics"* in respect of his pay package and as dismissively maintaining *"that his pay is nobody's business"*. She also portrayed his responses as *"furious"*; and that he *"scoffed at"* certain reports.

80. Mr. Martineau argued that looking at the articles as a whole, the fourth appellant's style undermined the respondent's statements and responses. He contended that there was no balance in the articles. He also submitted that the message conveyed by the fourth appellants to her readers was that they should not take the respondent seriously and that he was making those

[25] See paragraph 137 of **Flood**.

responses out of pique and ill will.

81. In considering editorial judgment, the trial judge made the point that the fourth appellant was not assisted by any senior member of staff in the decision of what material should have been included in the story or how it should have been presented.[26] The judge also observed that good sense and good judgment were sometimes better exercised with the participation of members of the editorial and publishing staff who were themselves detached from the story. The judge found that unfortunately the fourth appellant was *a virtual one-woman show*. That, according to the judge, while it may have assisted the appellants in rebuffing the allegations of malice made against the second appellant, it did not enhance their defence on the question of responsible journalism[27].

82. The trial judge also criticised the fourth appellant's approach to the interview with the respondent[28]. He noted that by her own admission the fourth appellant had not confronted the respondent with a number of matters raised in the articles. In cross-examination, the fourth appellant had said that the style of interviewing was to obtain information from the respondent without necessarily letting him know that she had other information relevant to the topic. The trial judge found that the manner in which the interview was conducted was quite unsatisfactory. He found the fourth appellant's approach unfair. According to the judge, if the reporter had information which contradicted or called into question or even supplemented what the interviewee might say or affected him in any material way, it should have been put to him so that he could have given his side of the story or voice an opinion. The judge concluded that public interest could never be served by the presentation of information to the public which was not balanced or even-handedly presented.

83. The judge also observed that from a reading of the written transcript of the interview, it was apparent that much of what was said by the respondent in the interview, was left hanging in

[26] See paragraph 125 of the trial judge's judgment.
[27] See paragraph 126 of the trial judge's judgment.
[28] See paragraph 129.

the articles[29]. The judge gave one example. The transcript of the interview had shown that the respondent had expressed sober concerns for not divulging his pay package. The articles never portrayed those concerns, but the impression was given to the reader that the respondent was truculent, arrogant and dismissive about what were legitimate issues surrounding his pay package.

84. Looking at all these matters, the question that has to be answered is, having regard to the tone and style of the articles, was the respondent's side put fairly. I agree with the trial judge that there was no neutrality or balance in the articles. While I agree that it is not for the court to direct how and whether editorial judgment should be carried out or how interviews should be conducted, I do not believe that the trial judge can be faulted for his conclusions. Looking at the matters in the round, I do not believe that the tone was fair or balanced or that the respondent was given a fair opportunity to comment. I agree with Mr. Martineau that the techniques applied by the fourth appellant unfairly undermined the respondent's side of the story and left the reader with the impression that the respondent's responses to these serious issues should not be taken seriously. In addition, the fourth appellant's failure to raise with the respondent crucial information which she had garnered and which contradicted what the respondent had previously said, resulted in the respondent's side of the story not being fairly put.

Sources of the information

85. The trial judge found that the fourth appellant took no account of the fact that some of her sources, including the airline executives and union officials, had axes to grind with the respondent, although she had stated that she was aware of those facts.[30]

86. At paragraph 82 of his judgment, the judge considered the evidence of the fourth appellant as to her sources. Prior to her interview with the respondent, she had documentary and other information from several sources which she declined to name. These sources included persons working within BWIA, including serving and former directors on the board of directors,

[29] See paragraph 130.
[30] See paragraph 134 of the trial judge's judgment.

financial analysts and persons with expertise in the airline industry. She conducted searches of various company files maintained at the companies' registry, where she obtained information about incorporation, shareholding, status of the companies and the identity of directors. Before writing, she checked the information from the sources against the documents obtained. She sought to verify her sources' information by seeking corroborative information from independent sources as well as available public records from Trinidad and abroad, omitting information she was unable to verify.

87. The fourth appellant had conceded that a lot of her sources of information were persons who were critical of the respondent or antagonistic towards him: Captain Kelshall, Abraham and former employees of BWIA who had been retrenched. She also conceded that the unions had an axe to grind with BWIA and the respondent. However, when cross-examined on the *minority shareholders action*, she had said that she did not believe that she included in her articles information given to her by Goddard and Kelshall, but she did include some of Mr. Abraham's concerns.

88. The trial judge also noted that the fourth appellant had conceded that she was told by Ved Seereeram and industry analysts that the Equant shares were not properly recorded. Although she could not say whether Mr. Seereeram was an accountant she was prepared to write the articles on the basis of what he said. In her first article (April 6, 2003) the fourth appellant had described Mr. Seereeram as a financial analyst and former Citi-banker. The trial judge did not make any finding whether Mr. Seereeram had an axe to grind. In the respondent's witness statement[31], however, he said that the fourth appellant told him that the allegations in the shareholders' lawsuit would not be the purpose of the article she was writing, and that everyone knew that Mr. Seereeram, who had given advice/evidence in support of that lawsuit, was a bit of a questionable character. According to the respondent, it was on that basis that he agreed to the interview. This evidence was not challenged at the trial.

89. As to the recording of the sale of the Equant shares in the accounts, Mr. Martineau

[31] See paragraph 7

criticised the fourth appellant for relying on persons whose qualifications she did not know and who were not accountants. I do not agree. According to the evidence of the fourth appellant, some of her sources were industry analysts. She refused to name them as well as some of her other sources. But it must be noted that a journalist is entitled to rely on an anonymous source and that fact is not to be weighed against him[32].

90. Looking at the evidence as a whole, I cannot entirely agree with the trial judge that the fourth appellant took no account of the fact that some of her sources had axes to grind with the respondent. As far as Kelshall and Goddard were concerned, she appeared to have taken that into account. As regards Ved Seereeram, though, she appeared not to have considered that he gave advice/evidence in support of the shareholders' lawsuit (which was eventually withdrawn) and that accordingly, he must be considered to have had some conflict of interest and indeed an axe to grind.

CONCLUSIONS

91. In **Flood**, Lord Phillips issued a postscript as to the approach of an appellate court to the decision of the trial judge[33]. Lord Phillips questioned whether an appellate court ought to approach the decision of a trial judge on **Reynolds** privilege on a similar footing as the exercise of a discretion or a finding of fact. Not having entertained any argument on the issue *in a context where it mattered*, Lord Phillips did not consider that he should lay down any general principle as to the approach to be adopted by the appellate court. He observed that context was all important and referred to a spectrum, well identified in **In re Grayan Building Services Ltd.** (In Liquidation) [1995] Ch 241, 254, where Hoffmann LJ stated that

> ***"generally speaking, the vaguer a standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards [i e the relevant legal standards or test] have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision."***

[32] See Mendonça JA in **Kayam Mohammed and ors. v Trinidad Publishing Co. Ltd.** Civ. App. 118/2008 (para. 72).
[33] See paragraphs 100-106.

92. Having regard to the balancing operation to be carried out by the trial judge and the several factors to be taken into account when a trial judge considers whether the defence of **Reynolds** privilege has been made out[34], the dictum of Hoffman LJ *"generally speaking"* would seem to make much sense in the context of this appeal. Although the dictum of Hoffmann LJ is attractive in the circumstances of this case, I bear in mind that there has been no argument on this issue and that this court should not lay down in these circumstances any general principles as to the approach to be adopted by an appellate court to a trial judge's finding on a defence of **Reynolds** privilege.

93. Looking at the articles as a whole, and considering the balancing operation carried out by the trial judge, I am of the view that he was entitled to come to the conclusion that the articles were not the product of responsible journalism. In my view, the fourth appellant failed to take reasonable steps to verify certain aspects of the story which the trial judge had highlighted. As mentioned before, I do not believe that there was any urgency to publish. In any event, I do not think that urgency justified the inclusion of the many inaccuracies published in the articles. Having regard to the articles as a whole, and approaching the matter in the round in a flexible and practical manner, I do not consider that the steps taken by the fourth appellant to gather and publish the information were responsible and fair or that the articles were the product of responsible journalism.

DAMAGES

General Damages

94. The successful claimant in a defamation action is entitled to recover as general compensatory damages, such sum as will compensate him for the wrong he suffered. That sum must compensate him for the damage to his reputation. It must also vindicate his good name and take account of his distress, hurt and humiliation. In assessing the appropriate damages for

[34] See Lord Nicholls in **Reynolds.**

injury to reputation, the most important factor is the gravity of the libel. The more closely it touches the claimant's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant. [Sir Thomas Bingham M.R. in **John v MGN Ltd** [1997] Q.B. 586, 607]

95. The trial judge found that the libels were of a serious nature. He considered that the respondent was a professional, a chartered accountant who would have been expected to display the highest level of integrity. He bore in mind that the respondent was the chief executive officer of BWIA, a job which gave him a high public profile. He took into account that the libels took place over a five week period in which the same allegations were repeated again and again. The judge also considered that the effect on the respondent's credibility was shattering and accepted the respondent's evidence in this regard.[35] The respondent was devastated. His professional integrity and character were called into question. He was called a "*thief*" in public and referred to as a *"smart man"*. He began to avoid social interactions and public appearances. Most importantly, he felt that he had lost the moral authority to run BWIA. The articles so destroyed his credibility at BWIA that his position became untenable and he had to resign.

96. The trial judge also accepted the evidence of witnesses Michael Dolsingh, Clint Williams, Neil Gajadhar, Esther Maharaj and Julia Maharaj. He found that the Sunday Express enjoyed a large readership, having the largest circulation of all the newspapers in Trinidad and Tobago. It was also available on the internet thus expanding its readership beyond Trinidad and Tobago. The judge observed that the Sunday Express commanded considerable respect and that such a series of articles would have carried great credibility.

97. The trial judge observed further that the fourth appellant enjoyed a reputation for independence and credibility and had received awards for her work. The combination of the reputability of the Sunday Express with that of the fourth appellant would have had a devastating effect on the respondent's reputation. The judge found that the evidence of damage was

[35] See paragraphs 13, 14 and 15 of the respondent's witness statement.

abundant. The respondent was unable immediately to obtain a job. He was regarded as damaged goods.

98. The trial judge concluded as to general damages at paragraph 141:

> "***I do not believe that the claimant could ever reclaim the reputation he once had. There will be many who will continue to harbour doubts about his integrity. The claimant deserved to be appropriately compensated for the damage. As a very senior executive who operated at the highest level, the damage to his reputation was significant. Moreover, I did not consider that any of the precedents to which I was referred could quite compare in terms of damage, having regard to the period of time over which the libel spanned. I also considered that those awards are quite low and, having regard to the lapse of time since those awards and the fall in the value of money, my award should be significantly higher. At the other end of the spectrum, I took into account that the award should not be so high as to act as a disincentive to investigative journalism. In all the circumstances, the claimant was entitled to the sum of four hundred and fifty thousand dollars ($450,000.00).***"

99. It is well established that an appellate court will only interfere with an award of damages where it is satisfied that the trial judge erred in principle or made an award so inordinately low or unwarrantably high that it cannot be permitted to stand.[36] In coming to this conclusion**,** the Board endorsed the dictum of Greer LJ in **Flint v Lovell** [1935] 1 KB 354 at page 360:

> ***"In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

100. In **TnT News Centre Ltd v John Rahael** Civ. App. No. 166 of 2006, the Court of

[36] See **Terrence Calix v Attorney General of Trinidad and Tobago** [2013] UKPC 15 paragraph 28.

Appeal reduced the general damages of $400,000.00 awarded by the trial judge to $250,000.00. Kangaloo JA observed that such an award served to affirm the court's recognition that an allegation that a person was involved in the drug trade was an extremely serious libel. There was however an absence of direct evidence of the full extent of the injury to the respondent's feelings and reputation. Kangaloo JA added that had there been such evidence, the sum of $400,000.00 or more might have been deserved.

101. In **Panday v Gordon** [2006] 1 AC 427 (PC) Mr. Gordon had been called a *"pseudo-racist"*. The Court of Appeal reduced the trial judge's award of $600,000.00 to $300,000.00. The Board refused to interfere with the award. The Board observed that Hamel-Smith JA had noted that awards in Trinidad and Tobago had tended to be on the conservative side over the years, probably because defamation actions had not been as prolific as in other jurisdictions. Hamel-Smith JA added that times had changed and the press no longer exhibited the restraint normally associated with responsible journalism. Before the Board, it had been argued that there was no evidence of pecuniary loss or psychiatric injury, and that Mr. Gordon remained a successful business and highly-respected throughout the Caribbean in the media field. Hamel-Smith JA had noted that he had no doubt whatsoever that Mr. Gordon's feelings were seriously injured and his reputation tarnished to some extent, but Mr. Gordon's loss was cushioned by an outpouring of support received from the media in Trinidad and Tobago and abroad.

102. In my view, this was an extremely serious libel touching the respondent's personal integrity, professional reputation, honour, loyalty and the core attributes of his personality. There were serious doubts whether the respondent could ever reclaim his reputation which had been significantly damaged. Many persons would continue to harbour doubts about his professional integrity. The libels took place over a five week period in which the same allegations were repeated again and again. The respondent's feelings were seriously injured and his reputation tarnished to such an extent that he felt that he had to resign his position at BWIA and for good reason avoided social functions and public appearances.

103. Although I recognise that the libels in **TnT News Centre Ltd v Rahael** and **Panday v**

Gordon were of a serious nature, I am of the view that the gravity of this libel and the impact and devastation on the respondent far outweigh those cases. Mr. Martineau has submitted that the sum awarded is insufficient to vindicate the respondent's reputation and to console him for the wrong done to him. I agree. Mr. Martineau has also submitted that the sum awarded did not take sufficient account of certain aggravating features which are present in this case. I also agree. I have borne in mind the following aggravating features.

104. On the 7th April, 2003, the respondent's attorney had forwarded a letter to the editor of the Sunday Express complaining that the first article was a serious libel. The respondent in his witness statement[37] complained (and I agree) that in the second article the fourth appellant made a half-hearted attempt to cover her unfair and inaccurate comments in the first article about the Cayman WIALL companies. The trial judge had found that in the interview, the respondent had fully and clearly explained the tax implications behind the formation of the companies in the Cayman Islands and the leasing arrangements. In addition, the ownership of the four Dash-8 aircraft had been disclosed in the 2001 annual report.

105. The respondent relied on a press release issued by BWIA on the 9th April, 2003, which appeared in all the daily newspapers and which sought to correct the inaccuracies and/or libels contained in the first article. The respondent complained that the fourth appellant mockingly referred to the press release in the second article and ignored it.

106. The respondent has also pointed to the banner headlines advertising the next article, the recycled material and allegations from the recently withdrawn shareholders' action and the failure of the appellants to adduce any hint of editorial judgment. I also agree with Mr. Martineau that this was a unique case of libel in that the articles were published over a five week period, Sunday after Sunday, adding to the respondent's distress, hurt and humiliation.

107. In addition, the respondent complained that the appellants ignored the protest of the Board of BWIA and repeated the allegations *"over and over again"*. By letter dated the 28th

[37] See paragraph 18.

April, 2003, the Chairman of BWIA's Board had complained that *"the recent history of similar articles printed in previous editions of your newspaper leads one to wonder whether there is some personal vendetta being waged by your newspaper against BWIA and its CEO..."*

108. Bearing in mind these aggravating features which the trial judge ignored for the most part, the seriousness and impact of this libel, and the fall in the value of money since the awards referred to in this judgment were made, I am of the view that the award of general damages of $450,000.00 granted by the trial judge was inordinately low and was an entirely erroneous estimate of the damage to which the respondent was entitled. In these circumstances, an appellate court ought to interfere with the trial judge's award. I am of the view that an award of $650,000.00 (which takes into account the aggravating features already set out) would be appropriate in this case to compensate the respondent for the damage to his reputation, vindicate his good name and take account of his distress, hurt and humiliation.

Exemplary Damages

109. The trial judge found that this was a case for exemplary damages and awarded the sum of $200,000.00. He found that the articles were intended as a means of boosting sales on a matter which had generated great interest among members of the public. In the words of the trial judge, *"there was a clear intention that the series should attract and keep the reading public's attention thereby boosting sales"*.[38] He also noted that some of the articles were given prominence with banner headlines and that the articles were written in a sensational style with eye-catching headlines. The quantum of damages should therefore reflect the court's concern for what was seen as "*revenue earning opportunity"* at the respondent's expense.

110. It is well settled that exemplary damages can only be awarded if the claimant proves that the defendant, when he made the publication, knew that he was committing a tort or was reckless whether his action was tortious or not, and decided to publish because the prospects of material

[38] See paragraph 143 of the trial judge's judgment.

advantage outweighed the prospects of material loss. What is necessary is that the tortious act must be done with guilty knowledge for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical, penalty. If the case is one where exemplary damages can be awarded the court should consider whether the sum which it proposes to award by way of compensatory damages is sufficient not only for the purpose of compensating the claimant but also for the purpose of punishing the defendant. It is only if the sum proposed by way of compensatory damages (which may include an element of aggravated damages) is insufficient that the court should add to it enough to bring it up to a sum sufficient as punishment. The sum awarded as damages should then be a single sum[39] which will include, where appropriate, any elements of aggravated or exemplary damages. [See Lord Bingham M.R. in the case of **John v MGN Ltd** (supra) at page 616 citing **Duncan & Neill on Defamation** 2nd ed. (1983) p. 136, para. 18.27].

111. In my view, the trial judge was entitled to find that the articles were extended over the five week period as a means of boosting sales on a matter which had generated great interest among members of the public and that there was the clear intention that the series of articles should attract and keep the public's attention thereby boosting sales.

112. The trial judge made no finding of recklessness. It was submitted on behalf of the respondent that having regard to the findings of fact of the trial judge as to the main allegations which he found to be inaccurate, this was a case where the fourth appellant knew that she was committing a tort or was reckless whether her action was tortious or not, and decided to publish because the prospects of material advantage outweighed the prospects of material loss. I agree.

113. In this regard, I have borne in mind the inaccuracies and the general and special concessions of the fourth appellant. In particular, the fourth appellant's concession that *a lot of the information she used in her article could have been verified (but was not) by checking them*

[39] In Trinidad and Tobago, the usual practice is not to award a single sum, but to award a sum for compensatory damages - general and aggravated damages - and another sum for exemplary damages [see de la Bastide C.J. in **Thaddeus Bernard and the Airports Authority of Trinidad and Tobago v Nixie Quashie** Civ. App No 159 of 1992 where he suggested that it was better to adhere to the traditional practice of making one award of compensatory damages (page 5).

against published documents in her possession. When these inaccuracies and concessions are considered in the context of the letter written by the respondent's attorney dated the 7th April, 2003, the Press Release of BWIA issued on the 9th April, 2003, and the letter of the Chairman of the Board of BWIA dated the 28th April, 2003, I am of the view that recklessness had been established.

114. I have borne in mind the principle that it is only if the sum proposed by way of compensatory damages (which may include an element of aggravated damages) is insufficient not only for the purpose of compensation but also for the purpose of punishing the defendant that the court should add to it enough to bring it up to a sum sufficient as punishment. It is my view a sum of $850,000.00 is appropriate to achieve that result.

COSTS

115. An issue arose as to whether the respondent was entitled to costs under the **Rules of the Supreme Court 1975** ("the 1975 Rules") or the **Civil Proceedings Rules 1998** (" the CPR"). The trial judge ruled that the parties had all proceeded on the basis that the CPR applied and even if the action had been wrongly brought under the CPR, it would still not have been appropriate to award costs under the 1975 Rules since the parties had conducted themselves in such a way as to have adopted the CPR. The judge also found that the matter had not been set down for trial until after the commencement of the CPR and therefore the CPR was the appropriate regime in respect of costs.

116. Rule 80.3(1)(a) provides that the CPR shall apply to proceedings begun before the commencement date:

> (a) upon a request being made to have the matter set down for trial; or
>
> (b) if a judge or master so orders;

and the court office issues a notice to the parties requiring them to attend a case management conference or pre-trial review.

117. The respondent filed a request to set the matter down for trial by notice dated the 2nd November, 2005 (after the commencement date of the CPR 1998) and the Civil Court Office issued a notice to the parties dated the 25th July, 2006 requiring them to attend a case management conference. In the circumstances, the judge held that CPR 80.3(1)(a) applied and the appropriate order was one for prescribed costs under the CPR 1998.

118. Prescribed costs are generally awarded where rule 67.4 does not apply (see CPR Rule 67.5). Rule 67.4 provides for the award of fixed costs. Fixed costs are applicable where the claim is for an specified sum of money and the defendant does not defend the claim.

119. The respondent has contended that the trial judge should have awarded assessed costs based on CPR 67.2 and/or 67.12 rather than on the prescribed scale under 67.5. The respondent contended that the judge should have awarded reasonable costs based on the fact that:

i. The claim was six years old at the time of his order on the 16th April, 2009 (the writ of summons and statement of claim were filed on the 16th May, 2003);

ii. The CPR came into effect on the 16th September, 2005, after the case had been on foot for two years; and

iii. The oral evidence was completed after 23 trial days on the 12th December, 2008, and after 9 days of oral submissions, the trial concluded on the 20th February, 2009.

120. In the alternative, the respondent submitted that the judge should have awarded that costs in part or in whole be taxed under Order 62 of the 1975 Rules for work done up to the 2nd November, 2005, and thereafter, reasonable costs to be assessed in accordance with CPR 67.12.

121. On the other hand, the appellants submitted that it was open to the respondent to make an application at the first case management conference on the 13th November, 2006 for an order for budgeted costs pursuant to CPR 67.8. Such an application could have included the costs incurred under the 1975 Rules since Rule 67.8 requires a breakdown of the costs incurred to date. The appellants also contended that at the first case management conference, the respondent did

not dispute the transfer of the matter from the 1975 Rules to the CPR. In these circumstances, the appellants argued that at the time of judgment the judge was correct to award costs on the prescribed scale in the sum of $82,250.00.

122. The appellants relied on **Edward Boucher v The Attorney General** of Trinidad and Tobago CV 2005-0111 where the matter had been transferred from the 1975 Rules to the CPR. Stollmeyer J (as he then was) found that prescribed costs applied even though he was of the view that costs in the sum of $1,027.03 was inappropriate and was not commensurate with the time and effort which the attorney-at-law must necessarily have expended on the matter.

123. Stollmeyer J said at page 8:

> ***"As to the issue of costs, those of the Claimant are to be paid by the Defendant. An issue arises as to how those costs are to be quantified given that the claim before me was originally begun as a writ action that was subsequently ordered to proceed under the Civil Proceedings Rules. There is an argument to be made that work done on behalf of the Claimant prior to the date of that order should be taxed in accordance with the provisions of the Rules of the Supreme Court, but it appears to me, harsh though it may be, that the Claimant's costs in these proceedings fall within the "Prescribed Costs" regime set out as provided at Rule 67.5 of the Civil Proceedings Rules. This is because "Fixed Costs" under Rule 67.4 are not applicable where a claim is for an unspecified amount, and no application was made either for a Budgeted Costs Order under the provisions of Rule 67.8 or for the fixing of the value of the claim under the provisions of Rule 67.6. The Rules contain no provision for otherwise assessing the costs of a matter. It would appear to me that any order reflecting the argument I have referred to will require an amendment to the Civil Proceedings Rules."***

124. I believe that the trial judge was correct to apply the CPR regime and to award prescribed costs. I agree with the appellants that it was open to the respondent at the first case management conference to make an application for budgeted costs pursuant to CPR 67.8 and that such an application could have included the costs incurred under the 1975 Rules. There was indeed no such application and no objection to the transfer of the matter from the 1975 Rules to

the CPR. Accordingly, the prescribed costs regime was applicable. I do not think that an appellate court should interfere with the exercise of the judge's discretion in the award of costs in these circumstances. I am not persuaded that the trail judge was plainly wrong.

DISPOSITION

125. The appeal is dismissed. The cross appeal is allowed on the issue of general damages. The order of the trial judge is affirmed, save for the award of general damages and the quantum of prescribed costs. The appellants shall accordingly pay to the respondent general damages in the sum of $650,000.00, exemplary damages in the sum of $200,000.00 and prescribed costs in the sum of $97,750.00. The appellants will pay the respondent's costs of the appeal and the cross appeal in the sum of $65,167.00, representing 2/3 of prescribed costs below.

....
M. Rajnauth-Lee, J.A.