[2025] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2019CV00119

BETWEEN	**CVM TELEVISION LIMITED**	**APPELLANT**
AND	**MICHAEL TROUPE**	**1ST RESPONDENT**
AND	**SYLVAN REID**	**2ND RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO COA2020CV0005

BETWEEN	**TELEVISION JAMAICA LIMITED**	**APPELLANT**
AND	**MICHAEL TROUPE**	**1ST RESPONDENT**
AND	**SYLVAN REID**	**2ND RESPONDENT**

Nigel Jones and Jovell Barrett instructed by Nigel Jones and Company for CVM Television Limited

Mrs Georgia Gibson-Henlin KC, Ms Stephanie Williams and Miss Ariana Mills instructed by Henlin Gibson Henlin for Television Jamaica Limited

Leonard Green and Ms Sylvan Edwards instructed by Chen Green and Co for the respondents

16, 17, 18 and 19 January 2023 and 19 December 2025

Civil appeal – Defamation – Allegations that elected political representatives involved in lottery scamming – Broadcast of police operations – Comments by police and journalists regarding police operations and allegations – Whether words defamatory – Fair comment – Whether words uttered were statements of fact or comments – Whether basic facts underlying the comments were substantially true – Reynolds privilege – Whether judge erred in law in

rejecting the defence – Whether media houses were required to verify the statements and allegations included in broadcast – Whether broadcasts were hasty and sensational – Whether broadcasts wrongly included the defamatory material

MCDONALD-BISHOP JA

[1] These appeals are brought by the appellants, CVM Television Ltd ('CVM'), and Television Jamaica Ltd ('TVJ'), from the judgment of Lindo J ('the learned judge') given in the Supreme Court on 13 December 2019, entering judgment for defamation in favour of the respondents, Messrs Michael Troupe and Sylvan Reid.

[2] The claims in the court below were brought by the respondents seeking damages for defamation, false imprisonment, and malicious prosecution. The defendants in the claims were Superintendent Leon Clunis ('Supt Clunis') (the 1st defendant), Owen Ellington ('the Commissioner') (the 2nd defendant), TVJ (the 3rd defendant), CVM (the 4th defendant), and the Attorney-General ('the AG') (the 5th defendant). Supt Clunis, the Commissioner, and the AG ('the state parties') have not appealed and are therefore not parties to these proceedings. Accordingly, the parties to the appeal are CVM and TVJ, the appellants, on the one hand, and Messrs Troupe and Reid as the respondents, on the other.

The factual background giving rise to the claims in the Supreme Court

[3] The facts giving rise to the proceedings are set out in the learned judge's judgment (**Michael Troupe and Sylvan Reid v Leon Clunis and others** [2019] JMSC Civ 240). The facts outlined therein have not been disputed by the appellants' notices of appeal. I therefore adopt them, with modifications where deemed necessary.

[4] The salient facts are these. On 18 July 2012, at 5:30 am, members of the Anti-Lottery Scam Task Force of the Major Organised Crime and Anti-Corruption Agency of the Jamaica Constabulary Force ('the Anti-Lottery Scam Task Force'), under the command of Supt Clunis, along with the Jamaica Defence Force and other state agencies, conducted a joint police and military search and seizure operations in the parish of Saint James.

[5] Operations were conducted at the respondents' residences, as well as at the residence of one of Mr Troupe's sons, in Montego Bay in the parish of Saint James. At the material time, Mr Troupe was, among other things, the Parish Councillor for the Granville Division and the Deputy Mayor of Montego Bay, while Mr Reid was, among other things, a Parish Councillor in the Salt Spring Division, Montego Bay. Arising out of the operation at Mr Troupe's residence, an illegal firearm with ammunition was found in a bathroom. Large sums of money in United States and Jamaican currencies, along with other items which the police suspected were being used in lottery scamming, were found in a room allegedly occupied by one of Mr Troupe's sons, Jevaughn, and seized by the police. US$10,000.00 cash was found concealed in a section of a book with pages cut to fit the size of the bills, and J$380,000.00 cash was found inside an inoperable computer. Mr Troupe and his son, Jevaughn, were arrested and charged with the offences of illegal possession of a firearm and illegal possession of ammunition.

[6] Another son of Mr Troupe, Dwight, was charged with unlawful possession of property. Jevaughn subsequently pleaded guilty to the offences of illegal possession of firearm and illegal possession of ammunition. The prosecution did not pursue the charges against Mr Troupe and he was discharged by the court on 31 July 2012. Mr Troupe had remained in custody for seven days.

[7] From the operation conducted at Mr Reid's home, several items were seized, including laptops and other computers, cellular phones and motor vehicle documents. Mr Reid was charged with unlawful possession of property. The case against him was dismissed at the commencement of the trial. Mr Troupe had remained in custody for five days.

[8] The operation at Mr Troupe's residence was video-recorded by the appellants. The video recordings of Mr Troupe's arrest and images of Mr Reid were broadcast by the appellants on the day the operations took place. Statements were made during the course of the police operations by Supt Clunis, and by the Commissioner at a press briefing held at the Office of the Prime Minister that day. The respective statements were broadcast

by TVJ in its Prime Time News newscast and by CVM in its Midday News and News Watch 8 newscasts on the same day.

The proceedings in the court below

The claims

[9] Mr Troupe filed his claim on 6 December 2012. Mr Reid filed his claim on 20 June 2013. The claims sought to impugn certain words said by Supt Clunis, the Commissioner, and two of CVM's reporters – Fabia Phillips-Lawrence and Kerlyn Brown. The claims also sought to impugn CVM's broadcast of the words uttered by Supt Clunis and the Commissioner, as well as TVJ's broadcast of words said by Supt Clunis.

[10] The claims alleged, among other things, that the words linked the respondents, either directly or indirectly, to corruption, fraud, extortion, money laundering, murder, racketeering, and to criminal cohorts involved in the lottery scam. They also alleged that the words suggested that the respondents operated at a high level in a criminal organisation, which was involved in the lottery scam. Therefore, their personal and professional reputations had been seriously damaged, and they suffered considerable distress, embarrassment, and mental anguish.

[11] The words complained of, as detailed in the respondents' pleadings in the court below, are now set out.

(i) Supt Clunis' words

[12] Two impugned statements by Supt Clunis were uttered in the context of an interview with media personnel at the scene of the operation at Mr Troupe's residence. The first statement, which for convenience is referred to as 'Clunis 1', was:

> "…what I can tell you is that we are guided by the Proceeds of Crime Act, and from the intelligence that led us to the targeted locations, there is no question as to whether or not charges will be laid down the road, charges will be laid that I can tell you."

[13] The second statement, which for convenience is referred to as 'Clunis 2', was:

> "What I can tell you is that whevever [sic] criminality exist [sic] I will be out there as long as I get the authority to go out there and storm it I will do it. Politics has nothing to do with this, do not think colour or partisan when we are going out there a deputy mayor, a Prime Minister, a Commissioner of Police is a member of our society and my duly sworn duty is to deal with law and order, and criminality and wherever it exist [sic] I will be finding it and storming it."

(ii) The Commissioner's words

[14] The Commissioner's words were said at a press briefing held at the Office of the Prime Minister on 12 July 2018, and were:

> "The anti-lottery task force was set up to deal with key actors. Once an individual attracts the attention of the task force, they are classified among the top-tier actors within the scamming operations."

(iii) CVM's broadcasts

[15] In the Midday News programme, a CVM reporter, Fabia Phillips-Lawrence, said the following:

> "Two political representatives are among the latest to be caught in the lotto scam dragnet as the task force continues its sweep across sections of the western end of the island. Arrested are Michael Troupe, the Deputy Mayor of Montego Bay who is also a Councillor for the Granville Division and his two sons."

[16] Later that day, the Commissioner's words and Clunis 2 were broadcast in the News Watch 8 programme. CVM's reporter, Kerlyn Brown, uttered the following words as she introduced the clip of Clunis 2:

> "One superintendent is issuing a strong word of caution to other individuals in high places who may be associated directly or indirectly with the lottery scam."

(iii) TVJ's broadcast

[17] The respondents' claims against TVJ concerned its broadcast of Clunis 1 on its Prime Time News programme on 12 July 2018. The respondents, in their pleaded claims, did not attack any words uttered by TVJ reporters.

(iv) Summary of impugned statements made or broadcast by the appellants

[18] In summary, the respondents' claims against the appellants were as follows:

Claims against CVM	**Claims against TVJ**
Words of Fabia Phillips-Lawrence (broadcast on CVM Midday News)	Broadcast of Clunis 1 (on TVJ Prime Time News)
Broadcast of the Commissioner's words (broadcast on CVM News Watch 8)	
Words of Kerlyn Brown introducing Clunis 2 (broadcast on CVM News Watch 8)	
Broadcast of Clunis 2 (on CVM News Watch 8)	

As can be seen, the claims weighed more heavily against CVM than they did against TVJ.

The defences

[19] The state parties filed joint defences in which they asserted that the words spoken by Supt Clunis were justified, as they were true in substance and in fact. They also asserted that the words of Supt Clunis were fair comments on a matter of public interest.

[20] In their respective defences, the appellants denied that the words published were defamatory. They both averred that the words complained of were substantially true, that the words were published on an occasion of qualified privilege and were fair comments of matters in the public interest. Although the appellants both asserted that the words complained of were substantially true, the learned judge did not treat this as raising the

defence of justification. She found that the defence of justification had only been raised by the state parties. There is no appeal by either of the appellants in this regard.

The trial

[21] The claims were consolidated and tried together pursuant to an order of the Supreme Court dated 11 April 2016. At the trial, the respondents and appellants each led evidence in support of their claims and defences. However, the state parties did not give evidence, either by witness statements or orally, in support of their joint defence.

The learned judge's judgment

[22] The learned judge delivered her judgment on 13 December 2019. The issues she identified and resolved in the judgment were:

(i) whether Supt Clunis and the Commissioner were proper parties (paras. [54] – [60] of the judgment);

(ii) whether the court should proceed to assess damages against the state parties for failure to file witness statements (paras. [61] – [62] of the judgment);

(iii) whether the words uttered by Supt Clunis and the Commissioner were defamatory and whether the subsequent broadcasts and journalistic comments by the appellants were defamatory (paras. [63] – [97] of the judgment);

(iv) whether the defence of justification availed the state parties (paras. [98] – [105] of the judgment);

(v) whether the defence of fair comment availed the appellants (paras. [106] – [119] of the judgment);

(vi) whether the defence established in **Reynolds v Times Newspapers Ltd and others** [1999] 4 All ER 609 ('**Reynolds**') availed the appellants (the

defence is referred to in this judgment interchangeably as 'the **Reynolds** defence' or '**Reynolds** privilege') (paras. [120] – [150] of the judgment);

(vii) whether the state parties were liable for false imprisonment and malicious prosecution (paras. [151] – [171] of the judgment); and

(viii) whether damages should be awarded to the respondents for defamation, false imprisonment and malicious prosecution (paras. [172] – [216] of the judgment).

[23] The learned judge concluded that Supt Clunis and the Commissioner were proper parties to the proceedings; damages should not be assessed against the state parties solely on the basis that they did not file witness statements; and that all the words complained of were defamatory. The learned judge rejected all the defences relied on and found the appellants and the state parties liable for defamation. She also concluded that Mr Reid had proven the state parties' liability for both malicious prosecution and false imprisonment on a balance of probabilities, but that Mr Troupe had not. Based on those findings and conclusions, the learned judge made the following orders in paras. [219] – [222] of the judgment:

> "[219] Judgment for the [respondents] against the [appellants and the state parties] for tort of defamation.
>
> [220] Judgment for the Claimant Sylvan Reid against [the AG] for False imprisonment and Malicious prosecution.
>
> [221] Judgment for [the AG] against the Claimant Michael Troupe in relation to the claim for false imprisonment and malicious prosecution with costs to be taxed, if not agreed, and to be paid by Mr Troupe.
>
> **Award**
>
> [222] Damages for defamation awarded to Mr Troupe in the sum of $11,000,000.00.
>
> Damages for defamation awarded to Mr Reid in the sum of $8,500,000.00.

> Damages for False Imprisonment awarded to Mr Reid against [the AG] in the sum of $1,050,000.00 with interest at 3% per annum from the date of service of the Claim Form to the date of judgment.
>
> Damages for Malicious Prosecution awarded to Mr Reid as against [the AG] in the sum of $2,450,000.00 with interest at 3% per annum from the date of service of the Claim form to the date of judgment.
>
> The Claimant, Mr Reid, is entitled to costs which are to be taxed if not agreed and are to be paid by [the appellants and the AG].
>
> The Claimant Mr Troupe is entitled to costs which are to be taxed if not agreed and are to be paid by [the appellants].
>
> [The AG] is entitled to costs to be taxed, if not agreed, and to be paid by Mr Troupe."

The appeal

[24] The appellants filed notices of appeal on 17 December 2019 and 17 January 2020, respectively, asserting 22 grounds of appeal in total by which they both seek to have the learned judge's findings on liability and the award of damages for defamation, as well as the costs awards, set aside. To avoid considerably lengthening the body of this judgment, the appellants' grounds of appeal are reproduced in appendices to this judgment.

[25] Importantly, because the state parties have not appealed, there is no appeal against the findings of liability and award of damages on the causes of action for false imprisonment and malicious prosecution, or against the learned judge's findings of liability for defamation against them.

[26] After filing their appeals, the appellants applied for a stay of execution of the learned judge's judgment. The stay of execution was granted on 27 April 2020, on condition that the appellants pay certain sums into an interest-bearing account in the joint names of the attorneys-at-law for the parties (see **Television Jamaica Limited v Michael Troupe and Sylvan Reid; CVM Television Limited v Michael Troupe and Sylvan Reid** [2020] JMCA App 20).

[27] The appellants' grounds of appeal overlap in some significant respects and raise the same or similar issues for consideration, regarding the learned judge's rejection of the defences of fair comment and **Reynolds** privilege, as well as on the issue of damages. That being the case, the common grounds of appeal are dealt with together, as their resolution warrants consideration of the same aspects of the learned judge's judgment and principles of law. However, the grounds that stand alone in each appeal will be accorded separate treatment.

[28] With all that said, I have given due consideration to all the grounds of appeal and have distilled five dispositive issues for resolution, which, in my considered view, encompass the entirety of the appellants' challenge to the learned judge's judgment. They are:

(1) whether the learned judge wrongly concluded that the words complained of are defamatory (CVM ground iii);

(2) whether the learned judge wrongly rejected the defence of fair comment (CVM grounds v, vi, vii and viii; TVJ grounds a and i);

(3) whether the learned judge wrongly rejected the defence of **Reynolds** privilege (CVM grounds i and ii; TVJ grounds a, b, c, d, f, g, h and j);

(4) whether the learned judge erred in making an award of damages in the quantum awarded (CVM grounds iv, ix, x and xi; TVJ grounds e and g); and

(5) whether the learned judge erred in her apportionment of the liability for costs among the parties (TVJ ground k).

The relevant legal framework governing liability for defamation and the standard of review on appeal

[29] Issues (1), (2) and (3) challenge the learned judge's findings that the appellants were liable for defamation. Before considering and resolving these issues, it is necessary

to establish the legal framework against which the learned judge's decision on liability and the parties' arguments must be evaluated.

[30] First, the impugned statements were made and broadcast on 18 July 2012, prior to the passage of the Defamation Act 2013 on 29 November 2013. At the time the impugned statements were made, the law of defamation was regulated by the now-repealed Libel and Slander Act 1851 and the Defamation Act 1963. The Defamation Act 1963 was cited and applied by the learned judge in her judgment. The Libel and Slander Act 1851 was neither applied by the learned judge nor cited in the arguments made before this court and, in any event, does not appear to be relevant to the resolution of the issues raised on appeal. Accordingly, the learned judge's judgment will be assessed within the confines of the principles established by the Defamation Act 1963 and any applicable case law to the extent that the cases cited are not modified by or inconsistent with that Act.

[31] Second, on the questions of liability raised under issues (1), (2) and (3), the appellants invite the court to set aside the learned judge's determinations of questions of law. The question for this court, on appeal, is whether the learned judge incorrectly applied the law to the facts before her and reached the wrong conclusion that the appellants are liable for defamation.

[32] The issues raised by the grounds of appeal are analysed bearing these standards of review in mind.

Issue (1) – whether the learned judge wrongly concluded that the words complained of are defamatory (CVM ground iii)

[33] CVM stands alone in its appeal against the learned judge's decision that the words complained of were defamatory, as TVJ filed no grounds of appeal on this issue. The resolution of CVM's challenge has the potential to impact both appeals because a finding that the words complained of are defamatory is fundamental to establishing the tort of defamation against both parties.

[34] After giving detailed consideration to the meaning of the words complained of, the learned judge concluded that they ascribe "criminal conduct, in particular, involvement in lottery scamming" (para. [95] of the judgment) and were accordingly defamatory of the respondents.

[35] CVM contends that the learned judge erred in finding that the words complained of were defamatory in circumstances where they were accurate representations of the status and existence of a police investigation concerning the respondents' involvement in lottery scamming. That investigation led to the respondents' arrests and the seizure of unlawful material, among other things, from their homes. In sum, CVM contends that the report it broadcast was an accurate representation of what was happening in relation to the police investigation. On that basis, the learned judge should not have concluded that the words complained of were defamatory.

[36] In response to CVM's arguments on this ground, the respondents highlight that the state parties raised the defence of justification, and that none of those parties, or any other party, led any evidence to establish that the respondents were engaged in lottery scamming. This failure, they say, is detrimental to the assertion that the words complained of were true and therefore not capable of a defamatory meaning. In any event, the learned judge correctly found that the publications were defamatory, having given careful analysis to all the evidence presented in the case, much of which involved the visual presentation of both respondents. Consequently, the respondents contend that the learned judge's analysis cannot be faulted.

Analysis and conclusion on issue (1)

[37] On this issue, CVM essentially relies on the accuracy or truthfulness of the information contained in the broadcast as the basis for challenging the learned judge's conclusion that the words complained of were defamatory. A careful examination of the relevant principles reveals that this complaint is fundamentally flawed and wholly without merit.

[38] Among the first issues to be determined in a defamation case is whether the words complained of are defamatory. The essential question to be answered by the court was expressed by Lord Atkin in **Sim v Stretch** [1936] 2 All ER 1237 at 1250, and is: "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" The approach to determining, both at first instance, and on appeal, whether the words have met that threshold was outlined by Morrison P in **Jamaica Observer Limited v Joseph Matalon** [2019] JMCA Civ 38 ('**JOL v Matalon**') at paras. [55] and [56], where he stated:

> "[55]… [I]n **Jeynes v News Magazines Ltd & Another** [fn 69: [2008] EWCA Civ 130]… the leading modern authorities are conveniently summarised as follows:
>
> > '14. The legal principles relevant to meaning have been summarized many times and are not in dispute ... They are derived from a number of cases including, notably, **Skuse v Granada Television Limited** [1996] EMLR 278, per Sir Thomas Bingham MR at 285-7. They may be summarized in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…' (see Eady J in **Gillick v Brook Advisory Centres** approved by this court [2001] EWCA Civ 1263 at paragraph 7 and Gatley on Libel and Slander (10th edition), paragraph 30.6). (8) It follows that 'it is not enough to say that by some person or another the words might be understood in a 69 [2008] EWCA Civ 130 defamatory sense.'

> **Neville v Fine Arts Company** [1897] AC 68 per Lord Halsbury LC at 73.
>
> 15. Those are the principles applicable to the determination of meaning at a trial and thus in a jury trial by the jury. …'
>
> [56] To this summary, I would only add two points. First, as Lord Halsbury LC observed in the leading older case of **Lord William Nevill v The Fine Art and General Insurance Company**, Limited [fn 70: [1897] AC 68, 72], 'it is necessary to take into consideration, not only the actual words used, but the context of the words, and the persons to whom the communications were made'. And second, as Lord Nicholls reminded us in **Bonnick v Morris & Others** [fn 71: [2002] UKPC 31, para. 9], a decision on appeal from this court, '[a]n appellate court should not disturb the trial judge's conclusion unless satisfied [that] he was wrong'." (Bolding as in original)

[39] In summary, the required approach is an inquiry into the meaning of the words, bearing in mind the context in which the words were used and the persons to whom the communications were made, using reasonableness as the yardstick for arriving at a conclusion. It is evident from the above that there is no consideration of the truth or falsity of the alleged defamatory words. Therefore, whether the words themselves were an accurate representation of the status and existence of the police investigations was an irrelevant consideration, because in law the words complained of are generally presumed to be false.

[40] The case law demonstrates that the presumption of falsity should be applied as a general rule, except when determining the applicability of **Reynolds** privilege (see the judgment of the England and Wales Court of Appeal in **Jameel and others v Wall Street Journal Europe SPRL** [2005] EWCA Civ 74 at para. 60 – the judgment was ultimately overturned on appeal to the House of Lords, but not regarding the presumption of falsity).

[41] The principle that the words complained of are generally to be presumed to be false is described by the learned editors of the text Gatley on Libel and Slander, 12th Edition ('Gatley'), at para. 11.4 as a "presumption of falsity" which is "firmly entrenched" in the law of defamation. The editors, at para. 1.7 of the text, cite para. [88] of the

Australian case of **Ainsworth v Burden** [2005] NSWCA 174, which explains the impact of the presumption on the question of whether words are defamatory. They explain that "[t]he objective truth or falsity of the matter complained of is irrelevant to its defamatory nature".

[42] CVM's challenge based on the truthfulness of the words is not related to its challenge to the learned judge's rejection of **Reynolds** privilege. Therefore, the general presumption of falsity would apply. Accordingly, in the light of the established principles, it is evident that any consideration of the accuracy or truthfulness of the words was irrelevant when considering whether the words complained of were defamatory.

[43] As a matter of law, the accuracy or truthfulness of the words complained of would only become relevant if it had been established that the words complained of were defamatory, and a defendant sought to avail himself of the defence of justification. In **Lonrho PLC and others v Fayed and others (No 5)** [1993] 1 WLR 1489, Stuart-Smith LJ pithily recognised the interplay between the presumption of falsity and the defence of justification in this way (at page 1502 of the report):

> "...[N]o one has a right to a reputation which is unmerited. Accordingly one can only suffer an injury to reputation if what is said is false. **In defamation the falsity of the libel or slander is presumed; but justification is a complete defence**." (Emphasis added)

[44] As counsel for the respondents correctly submitted, CVM did not plead the defence of justification in the court below. The state parties pleaded that defence, and it was ultimately rejected by the learned judge on the basis that it had not been particularised and proved to the required standards. There is no appeal by those parties against the learned judge's findings in this regard, and this court cannot permit CVM, by side wind, to challenge those findings in circumstances where the defence of justification did not form part of its pleaded defence. Therefore, there is no scope for reliance by CVM on the accuracy or truthfulness of the words complained of in the context of these proceedings,

because the presumption of falsity applies and CVM did not plead the defence of justification in the court below.

[45] In any event, having reviewed the learned judge's reasons for her conclusion on this issue, it is evident that she was guided by the applicable principles when she determined that the words complained of are defamatory (paras. [63] – [72] of the judgment). She considered the words within their context, and reasonably concluded that the words used, collectively and in their context, "ascribe criminal conduct, in particular, involvement in lottery scamming" (para. [95] of the judgment). I can find no basis in law or fact upon which to disagree with the learned judge's assessment. Bearing in mind the principles outlined by Morrison P in **JOL v Matalon**, I am satisfied that there is no basis for interfering with the learning judge's conclusion that the words complained of are defamatory, as it is not apparent that her conclusion is wrong in law or fact (see **JOL v Matalon** at para. [56]).

[46] For all the preceding reasons, the basis for CVM's challenge to the learned judge's conclusion that the words complained of were defamatory cannot be sustained. Accordingly, CVM's appeal must fail on issue (1).

Issue (2) – whether the learned judge wrongly rejected the defence of fair comment (CVM grounds v, vi, vii and viii; TVJ grounds a and i)

[47] The grounds of appeal filed by the appellants under issue (2) challenge the learned judge's rejection of the defence of fair comment. In more recent times, English and other common law courts refer to the defence as "honest comment" (see, for example, the decision of the House of Lords in **Reynolds** at page 614, the decision of the Privy Council in **Panday v Gordon** [2005] UKPC 36, and the decision of the United Kingdom Supreme Court in **Joseph and others v Spiller and another (Associated Newspapers Ltd and others intervening)** [2010] UKSC 53 ('**Joseph v Spiller**')). However, the nomenclature of "fair comment" is used in the Defamation Act 1963, and is accordingly used in this judgment.

[48] The learned judge's analysis of the applicability of the defence of fair comment was limited to CVM's broadcast of Fabia Phillips-Lawrence and Kerlyn Brown's statements, and to TVJ's broadcast of Clunis 1. The learned judge did not explicitly examine the applicability of the defence as it relates to CVM's broadcast of Clunis 2 and the Commissioner's words, notwithstanding that the appellants in their respective defences pleaded fair comment in relation to those statements.

[49] In treating with the defence, the learned judge found that the subject matter of all the impugned words was of public interest. Despite this, she rejected both the appellants' fair comment defences. She did so for two reasons. The first was that Clunis 1, as broadcast by TVJ, and the words of Fabia Phillips-Lawrence broadcast on the CVM Midday News, were "factual statements", not "opinion" or "comments" (para. [116] of the judgment). Therefore, the defence did not apply to those broadcasts.

[50] The second reason was that, although the subject matter of the broadcasts was of public interest, the appellants had a "duty to carry out reasonable investigations to ascertain whether they were true" which they failed to do (para. [117] of the judgment). Therefore, the defence of fair comment was not available to either of the appellants.

CVM's submissions

[51] CVM's grounds of appeal and submissions before this court challenge the learned judge's findings in relation to the words of Fabia Phillips-Lawrence and Kerlyn Brown. Firstly, relying on the authority of **Branson v Bower** [2001] EWCA Civ 791 ('**Branson v Bower No 1**'), CVM contends that the learned judge erred in failing to conclude that Fabia Phillips-Lawrence's words in the CVM Midday News constituted an opinion or comment, based on the fact that the police had arrested the respondents in their efforts to eliminate lottery scams.

[52] Secondly, CVM contends that the learned judge erroneously rejected the defence of fair comment on the basis that the appellants did not carry out reasonable investigations into or verify the information before broadcasting. CVM submits that no

such duty exists in law. By imposing that duty, the learned judge conflated the defences of fair comment, justification and **Reynolds** privilege, thereby depriving the appellants of the fair comment defence. In any event, the learned judge erred by failing to appreciate that the underlying facts relied on by CVM's reporters were an accurate report of the fact of the respondents' arrest by the Anti-Lottery Scam Task Force, the stage of the police investigation had reached, and the position adopted by the police.

[53] Therefore, CVM argues that, had the learned judge correctly determined that Fabia Phillips-Lawrence's statement was an opinion or comment, and properly recognised that the facts underlying the statements of both Fabia Phillips-Lawrence and Kerlyn Brown in the CVM Newswatch 8 were based on accurate facts, she would not have rejected fair comment as a defence.

TVJ's submissions

[54] TVJ aligns with CVM's argument that the learned judge erred in rejecting the defence of fair comment on the basis that the appellants did not carry out reasonable investigations or verify the information before broadcasting. Citing **Monica Dystant v Mary White** [2019] JMSC Civ 222 and **JOL v Matalon**, TVJ accepts that the defence requires that the words "represent the honest opinion of the author" and be "based upon true facts". However, this requirement is no more than that the comment should not "misstate facts" because a comment cannot be fair if it is "built upon facts which are not truly stated".

[55] Additionally, the respondents did not demonstrate that any part of TVJ's broadcast was false or motivated by malice, which they were required to do (citing **McQuire v Western Morning News Company Limited** [1903] 2 KB 100 and **Telnikoff v Matusevitch** [1991] 3 WLR 925).

[56] For those reasons, TVJ argues that the learned judge's rejection of the defence is inconsistent with her findings that the statements made concern matters of public interest. Therefore, she erred in rejecting the defence.

The respondents' submissions

[57] The respondents argue that the learned judge carefully considered the publications in their entirety. Citing the case of **London Artists Ltd v Litter Grade Organisation and others** [1969] 2 QB 375 ('**London Artists v Littler**'), they assert that the learned judge properly addressed the fair comment defence. The learned judge correctly found that the facts stated were not proven to be true, and the appellants have not demonstrated that fair comment was available to them. Therefore, the respondents support the learned judge's conclusion that the appellants failed to establish the defence.

The parameters of this court's review of the issue of fair comment

[58] Some matters of consequence have not escaped attention, which directly bear on the parameters of the court's review of the learned judge's rejection of the defence of fair comment. Each of these matters and their respective impact on the appellate proceedings will now be addressed in turn.

(a) The absence of analysis by the learned judge of CVM's fair comment defence in relation to Clunis 2 and the Commissioner's words

[59] Firstly, and as earlier stated, the learned judge did not analyse the applicability of the defence in relation to CVM's broadcast of Clunis 2 and the Commissioner's words, notwithstanding the deployment of the defence in relation to all four statements raised by the respondents against CVM in their particulars of claim. In its defence, CVM asserted, in part:

> "40. We state further, that the said broadcasts the subject of complaints made in the Particulars of Claim against us, represent fair comment upon matter of public interest."

[60] Notwithstanding the absence of any explicit reference to Clunis 2 and the Commissioner's words, the learned judge's reasoning demonstrates that she rejected the defence of fair comment in its entirety. Therefore, it is implicit that she also rejected the defence regarding Clunis 2 and the Commissioner's words, even though she did not specifically analyse the defence with respect to those statements.

[61] CVM has not appealed the learned judge's failure to address the defence concerning Clunis 2 and the Commissioner's words. In the absence of an appeal on that point, CVM is deemed to have accepted the learned judge's rejection of the defence in relation to those statements. As a result, the court's review of CVM's appeal on the issue of fair comment must exclude any consideration of the defence concerning Clunis 2 and the Commissioner's words.

(b) No challenge to the learned judge's findings that Clunis 1 was a statement of fact and not a comment or opinion

[62] Secondly, TVJ relied on fair comment in defence of its broadcasts of Clunis 1. The learned judge stated at para. [116] of her judgment that "the words of Supt Clunis broadcast by TVJ" (Clunis 1) amounted to a factual statement and not an opinion or comment. Surprisingly, TVJ did not challenge this conclusion by the learned judge in its notice of appeal. There is no mention of this finding by the learned judge in any of the enumerated findings of fact and law which are challenged in the notice of appeal or the grounds of appeal. Such a challenge was required for TVJ to succeed in its attempt to have the court reverse the learned judge's rejection of the defence concerning Clunis 1.

[63] It is well established that the defence of fair comment only applies to comments or opinions, and not to purely factual statements, assertions or imputations. The modern common law requirements for establishing the defence were set out by Lord Nicholls, sitting in the Court of Final Appeal of Hong Kong, in **Tse Wai Chun v Cheng** [2001] EMLR 777, and later refined by the United Kingdom Supreme Court in **Joseph v Spiller**. The second requirement for the defence, as stated by the court, is that:

> "…the comment must be recognisable as comment, as distinct from an imputation of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere, for example, justification or privilege".

(See para. 3 of **Joseph v Spiller**, and the judgment of Lord Nicholls of Birkenhead in **Reynolds** at 615).

[64] The law, therefore, is that a defendant's failure to establish that the words in question are a comment will be fatal to the defence. This means that for TVJ to succeed in its appeal against the learned judge's rejection of the defence, it needed to challenge her conclusion that Clunis 1 was a factual statement. TVJ has not done so.

[65] TVJ has contended, in its written submissions, that "[t]he broadcast by [TVJ] comprised of comments made by [Supt Clunis] and [the Commissioner] in the matter". This appears to be an assertion, contrary to the learned judge's conclusion, that Clunis 1 was a comment and not a statement of fact. In my view, this argument cannot be subsumed under any of TVJ's grounds, as filed, relating to the learned judge's treatment of the defence of fair comment (TVJ's grounds a and i).

[66] Additionally, this argument by TVJ cannot be subsumed under CVM's grounds of appeal pertaining to fair comment (grounds v, vi, vii and viii). CVM's grounds address the learned judge's finding that Fabia Phillips-Lawrence's words were a statement of fact and not a comment, and the words complained of in relation to CVM (of which Clunis 1 that relates to TVJ only was not one).

[67] TVJ's failure to challenge this pivotal finding by the learned judge, on which she based her rejection of its fair comment defence, is fatal to its appeal against the learned judge's rejection of the fair comment defence because Clunis 1 was the only defamatory statement for which the respondents sued TVJ.

(c) Summary of the parameters of the court's review

[68] In summary, for the reasons outlined above, TVJ's appeal fails on the issue of fair comment because TVJ did not appeal the learned judge's finding that Clunis 1 is a factual assertion rather than a comment or opinion, which it was required to do. Furthermore, consideration of CVM's appeal must exclude consideration of the fair comment defence in relation to Clunis 2 and the Commissioner's words because CVM has not challenged the learned judge's implicit rejection of the defence regarding those statements.

[69] With these observations and conclusions in mind, the only matters remaining for the court's determination concern the applicability of the defence of fair comment, which arises on CVM's appeal, in respect of the statements made by the two CVM reporters – Fabia Phillips-Lawrence (CVM ground v) and Kerlyn Brown (CVM ground vi). An examination of CVM's submissions through that lens gives rise to two sub-issues for determination:

(i) whether the learned judge was wrong to conclude that Fabia Phillips-Lawrence's words constituted a factual statement and not an opinion or comment; and

(ii) whether the learned judge erred in law in her rejection of the defence on the basis that the facts underlying the statements of Kerlyn Brown were not proved to be true.

These sub-issues will now be examined.

Sub-issue (i) – whether the learned judge was wrong to conclude that Fabia Phillips-Lawrence's words constituted a factual statement and not an opinion or comment

[70] For convenience, and by way of reminder, the impugned words of Fabia Phillips-Lawrence were:

> "Two political representatives are among the latest to be caught in the lotto scam dragnet as the task force continues its sweep across sections of the western end of the island. Arrested are Michael Troupe, the Deputy Mayor of Montego Bay who is also the councillor for the Granville division and his two sons."

[71] In finding that these words were factual statements, the learned judge did not cite any case law that guided her in distinguishing between a comment and a factual statement. An examination of the case law on this subject demonstrates that the courts have expressed difficulty in drawing a defining line between what amounts to a comment and a statement of fact (see, for example, **Joseph v Spiller** at para. 5). However, it appears that the following propositions reflect the court's usual approach to the question:

(a) Although "comment" is often equated with "opinion", this is an oversimplification. A comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation etc" (see **Branson v Bower No 1** at para. [12]).

(b) A "pure statement of evaluative opinion which represents the writer's view on something which cannot be meaningfully verified", or a statement which, in context, can be viewed as an evaluative opinion, are comments for the purpose of the defence (see para. 12.8 of Gatley).

(c) Another test is whether "the words appear to a reasonable reader to be conclusionary" or represent an inference from facts stated or referred to (see Gatley at para. 12.6, citing the case of **Mitchell v Sprott** (2002) 1 NZLR 766 (CA) at [19]).

(d) A statement which does not indicate with reasonable clarity that it purports to be a comment and not a statement of fact cannot be protected by a plea of fair comment. This means that the comment must not be so mixed up with the facts that the reader cannot distinguish between what is a comment and what is not. If the comment is so mixed up, then it cannot attract the defence of fair comment (see **Davis v Shepstone** (1886) 11 App Cas 187 PC at 190 and **Hunt v The Star Newspaper Company Limited** [1908] 2 KB 309 at 319 – 320).

(e) When determining whether a publication amounts to a statement of fact or comment, the court is usually confined to the context of the particular publication in respect of which the action is brought. It is not legitimate to look outside the publication and the matters to which the purported comment is based to ascertain its recognisability as a comment (see para. 12.2 of Gatley and **Telnikoff v Matusevitch** at 984 – 965).

(f) Because defamation is concerned with the meaning ascribed to the words by the ordinary, reasonable man, the court must also examine the words

complained of from that vantage point. The ultimate question is how the words would strike the ordinary, reasonable reader (see **London Artists v Littler**).

[72] Given these principles, the question is, how would the words of Fabia Phillips–Lawrence strike the ordinary, reasonable listener? Guided by the applicable law, I conclude that the challenged words of Fabia Phillips-Lawrence are recognisable as a statement of fact and not a comment.

[73] The statement is comprised of the following assertions: the police were engaged in continued operations across the sections of the western end of the island regarding lottery scamming; two political representatives were caught in those operations; and Mr Troupe and his two sons were arrested. From the vantage point of the ordinary, reasonable reader, it would appear that what Fabia Phillips-Lawrence said were verifiable assertions of fact regarding the ongoing police activities to investigate and prosecute lottery scamming, which resulted in the arrest of Mr Troupe and his sons. The statements were not conclusory and did not involve any evaluative opinion. There was no deduction, inference, conclusion, observation, criticism, remark or any other indication that would characterise it, in law, as a comment for the purposes of the defence.

[74] Indeed, even if the statement were meant to be a comment, it could not attract the defence of fair comment because the comment must not be so mixed up with the facts that the reader cannot distinguish between what is a comment and what is not. The statement in question, at best, displays these features; and, at worst, it was purely an assertion of fact. Accordingly, the learned judge's finding that the impugned statement was a factual statement and not a comment capable of attracting the defence of fair comment cannot reasonably be disturbed. That finding was open to her.

[75] Based on the preceding reasoning, CVM's appeal on this issue relative to the impugned words of Fabia Phillips-Lawrence fails.

Sub-issue (ii) – whether the learned judge erred in law in her rejection of the defence on the basis that the facts underlying the statements of Kerlyn Brown were not proved to be true

[76] The learned judge found that the words of the CVM reporter, Kerlyn Brown, in the News Watch at 8 broadcast, were comments. As a reminder, Kerlyn Brown said this before broadcasting Clunis 2:

> "One superintendent is issuing a strong word of caution to other individuals in high places who may be associated directly or indirectly with the lottery scam."

[77] The learned judge concluded that this statement constituted "comments made against the background of [Clunis 2]". This conclusion by the learned judge is dubious in light of the principles outlined above for determining whether a statement amounts to a comment and thus engages the defence of fair comment. However, given that this finding has not been challenged by the respondents on appeal, it must be accepted for the present analysis that it is a comment capable of engaging the defence of fair comment.

[78] On the basis of that conclusion, the learned judge proceeded to state the following findings at paras. [117] and [118], which have aggrieved CVM:

> "[117] Notwithstanding that the underlying matter was one of public interest, it is my view that TVJ and CVM had a duty to carry out reasonable investigations to ascertain whether they were true and although CVM was on the scene at Mr Troupe's premises, recording as it unfolded, they should have sought to verify the information prior to broadcasting, in relation to the specific allegations of criminal conduct of the [Respondents], to provide themselves with some degree of protection.
>
> [118] No evidence was led by [the state parties and appellants] to establish the truth of the words complained of and neither did they add any qualification to the effect that the men had been held on suspicion of being involved in lottery scamming. While I accept that the [TVJ and CVM] are entitled to comment freely on matters of public interest, that right must be based on existing facts. Although there was no evidence of malice on the part of TVJ or CVM in their

> publications, even their defences refer to facts within the public domain and their broadcasts are understood as such."

[79] CVM submits that the learned judge erred by (a) imposing on CVM an obligation to establish the truth of the words complained of, (b) imposing an obligation to investigate and verify the information prior to broadcasting; and (c) failing to find that the relevant facts on which the comments were made would have been limited to the fact of the police investigation and the position the police had adopted and not as she found the 'fact' of whether the respondents were actually guilty.

[80] CVM's submissions require a detailed examination of the legal requirements of the defence, in particular, the well-established requirement of the defence of fair comment that the comment must be based on true facts. I will refer to this requirement as "the basic facts rule".

[81] In **London Artists v Littler**, a case on which the learned judge relied, Lord Denning explained the basic facts rule at page 391:

> "In order to be fair, the commentator must get the basic facts right. The basic facts are those which go to the pith and substance of the matter: see *Cunningham-Howie v Dimbley* [1951] 1 K.B. 360, 364. They are the facts on which the inferences are drawn– as distinct from the comments or inferences themselves. The commentator need not set out in his original article all the basic facts: see *Kemsley v Foot* [1952] A.C. 345; but he must get them right and be ready to prove them to be true."

This principle remains a part of the modern common law requirement for the defence (see para. 3 of **Joseph v Spiller**)

[82] A survey of the case law reveals that the rule is not satisfied where a comment is based on facts that are untrue, defamatory, misrepresented, incomplete (and thus misleading), non-existent, or fabricated by the commentator. The rationale for the rule is that "a comment cannot be fair if it is built on facts which are not truly stated" (see **Joynt v Clyde Trade Co** [1904] 2 KB 292 at 294). When the facts on which the comment is based are untrue, "the underlying factual substratum of the comment… collaps[es]" and

the defence fails (see **Branson v Bower** [2002] QB 737 (‘**Branson v Bower No 2**’) at para. 37).

[83] At common law, the rule will be easily satisfied in cases where the facts themselves are “uncontroversial”. In **Branson v Bower No 2**, Eady J explained: “[s]ometimes the facts themselves will be uncontroversial and the point at issue is simply whether the opinion could be held or the inference drawn”. However, where the facts are not uncontroversial, a party relying on the defence is only required to prove that the “basic facts”, which go to the “pith and substance” of the matter, are true. This means that not every fact implicated by the comment needs to be proven true. It will only be necessary to prove any such facts that would be sufficient to support the comment so as to make it fair. In **Kemsley v Foot** [1952] AC 345 at 358, the court stated:

> “Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendant’s plea.”

[84] The basic facts rule is also referenced in section 8 of the Defamation Act. That section, however, applies to the defence of fair comment where the impugned comment consists “partly of allegations of fact and partly of expressions of opinion” (see, generally, **JOL v Matalon** at paras. [112] – [114]). Given the scope of section 8, no further discussion of it is required in this appeal because the learned judge did not find that Kerlyn Brown’s statement was a mixed statement of fact and comment. Therefore, section 8 is not engaged.

[85] The basic facts rule resembles the defence of justification. It, however, differs from the defence of justification for reasons explored by the learned editors of Gatley, in Chapter 12, at para. 12.5:

> “Justification is a defence to any imputation contained in the words complained of whether of comment or fact. To avail himself of that defence, the defendant must show that his comment is ‘true’. The **defendant who pleads honest [fair] comment does not take on this burden:** the issue is not whether the jury agrees with his

> opinion, **but whether it is an opinion which might fairly be held on the facts referred to** [see **Sutherland v Stopes** [1926] AC 47 at 62 per Lord Finlay, among others].” (Emphasis added)

[86] Based on the extract from Gatley, and all the other principles stated above, the essence of the distinction is that the defence of justification requires proof that the defamatory comment made is true. In contrast, the defence of fair comment does not require a defendant to prove that his comment is true. What is required is proof of the truth of the basic factual substratum of the comment, only to the extent that it is necessary to determine whether the comment was fairly made on the facts on which it was based.

[87] For completeness, two additional points should be made. The first is that when a defamatory comment is combined with or based on defamatory statements of fact, a defendant must not only prove the truth of the basic facts underlying the comment to defend fair comment but will be required to rely on the defence of justification to establish the truthfulness of the defamatory statements of fact (see **JOL v Matalon** at paras. [112] – [114], considering section 8 of the Defamation Act and applying dicta from **Broadway Approvals Ltd and another v Odhams Press Ltd and another** [1965] 2 All ER 523). Consequently, the circumstances may require a defendant to establish both the basic facts rule and the more demanding requirements of the defence of justification.

[88] The second point is this. Although no complaint has been made regarding the appellants’ pleaded defence in the court below, it is also important to note that the basic facts rule also impacts the manner in which a defendant must plead their defence. Rule 69.3 of the Civil Procedure Rules 2002 states that a defendant (or, in the case of a counterclaim, the claimant) who claims that, insofar as a statement involves expressions of opinion, they are fair comment on a matter of public interest, or pleads to like effect, must give particulars stating which of the words complained of are alleged to be statements of fact and the supporting facts and matters relied upon to establish the truth of those words.

[89] These principles will now be applied to CVM's submissions.

(a) The imposition of the requirement to establish the truth of the words complained of

[90] First, it is evident that, on the strength of all the authorities reviewed above and the rules, a party relying on the defence of fair comment has an obligation both procedurally and substantively to assert and demonstrate the truthfulness of the basic facts underlying the comment. Therefore, the learned judge would have been correct when she identified that the basic facts rule, as stated in **London Artists v Littler**, had to be satisfied for the fair comment defence to succeed.

[91] However, in applying the rule, the learned judge required the appellants to adduce evidence to "establish the truth of the words complained of" (para. [118] of the judgment). The words complained of, as the learned judge clearly opined, were in relation to the "specific allegations of criminal conduct", namely, the respondents' involvement in lotto scamming. In her application of the basic facts rule, therefore, the learned judge elevated the defence to one of justification for proof of the truth of the defamatory words complained of, rather than the truth of the underlying facts or statement on which the comment was based, as required for the defence of fair comment. Proof of the truth of the defamatory words was not required in the circumstances because the appellants did not plead the defence of justification. Therefore, there was no need to satisfy the requirements of justification in this case, and, therefore, no requirement to prove the truth of the words complained of, as distinct from the truth of the basic factual substratum of the comment.

[92] Accordingly, there is merit in CVM's contention that the learned judge erred in requiring CVM to prove the truthfulness of the defamatory statements complained of, in relation to Kerlyn Brown's comments.

(b) The imposition of the duty to carry out reasonable investigations

[93] Turning to CVM's second complaint, there is merit to CVM's position that the learned judge erred in imposing a duty on it to "carry out reasonable investigations" to ascertain whether the words complained of were true. The authorities do not disclose a requirement for reasonable investigations to be conducted by the maker of the comment (commentator) with a view to verifying the truth of the facts on which the comment is based for the purposes of the defence of fair comment. The commentator is simply required "to get the basic facts right" and be ready to "prove them to be true" (**London Artists v Littler** at 391).

[94] This is not to say that it will never be the case that a party commenting on a set of facts will not have the obligation to verify facts that are relied on. Indeed, prudence and the protection of the defence of fair comment will often require a commentator to have taken steps to do some form of inquiry into the facts that underlie their commentary. However, in this case, given the basic facts on which Kerlyn Brown's comments were based (Clunis 2), the learned judge erred insofar as she found that CVM had a "duty to carry out reasonable investigations" and dismissed the defence of fair comment on the basis that they did not. Indeed by requiring CVM to carry out reasonable investigations in order to prove the truth of the defamatory words complained of, she placed an unreasonable and onerous burden on CVM, which was not required by law.

(c) Error in determining the basic facts underlying Kerlyn Brown's statement

[95] By virtue of my reasoning above, I must also accept CVM's third contention that the learned judge erred in her determination as to what amounts to the basic facts. By requiring CVM to prove the truth of Kerlyn Brown's statements, the learned judge paid no attention to the basic facts that gave rise to her statements. Therefore, there is merit in CVM's contention that the learned judge erred in her determination of the facts that formed the basis of Kerlyn Brown's statements.

[96] In applying the basic facts rule, the critical question on the strength of **London Artists v Littler** is whether Kerlyn Brown got the basic facts right. The basic facts

pertinent to this comment would be the facts on which it was based. Focus must be on the underlying facts that prompted the comment. In this case, the comment was triggered by Clunis 2, which encapsulated the position and stated the police's approach or intention in dealing with persons who may be directly or indirectly involved in lottery scamming activities.

[97] I accept CVM's submission that the basic facts underlying Kerlyn Brown's statements were limited to the fact of the police investigation and the position the police had adopted, and not the 'fact' of whether the respondents were actually guilty of or involved in any offences related to lottery scamming. So the question is, did Supt Clunis issue a warning to individuals in high places, like the respondents, about involvement in lottery scamming? I think the answer is in the affirmative. Could it honestly be characterised as a strong warning? I am sure any reasonable mind would conclude it could be so characterised.

[98] The comment was grounded in the basic premise that the police had expressly taken a stance against persons associated with lottery scamming, regardless of their standing in society. Supt Clunis' "strong warning" would, according to the comment, be to "other individuals in high places" who "may be" engaged in such activities. The word "other", as the learned judge opined, could be understood to mean that the respondents were individuals in high places involved in lottery scamming.

[99] But even if the words would be so understood by the ordinary, reasonable viewer as imputing criminality to the respondents, they cannot destroy the fairness of the comment in the context they were uttered. As the learned editors of Halsbury's Laws of England, Third Edition, Volume 24 explained at para. 134, "a personal imputation does not as a matter of law destroy a plea of fair comment. On the contrary, the need for the plea does not arise unless there is an imputation on the claimant". So, although Kerlyn Brown's comment may have amounted to a personal imputation by use of the words "other individuals in high places" in a context where the police had detained the respondents, that does not destroy the defence. It is this imputation that gave rise to

the need for the defence of fair comment. As the editors explained, "It is where the criticism would otherwise be actionable as libel or slander that the occasion for the plea arises". Therefore, the fact that the comment may be said to include personal imputation on the respondents is not the end of the matter.

[100] In any event, although the statement referred to "other individuals in high places", it did not say "who are" involved in lottery scamming, rather it says "who may be" involved, which denotes that there was no acceptance that the respondents were actually involved in lottery scamming.

[101] Based on the foregoing reasoning and conclusion, there was nothing in the statement of Clunis 2 that would warrant CVM having to establish the truth of whether the respondents were involved in or guilty of lottery scamming, or to use such terms as "suspicion" and "allegations" as suggested by the learned judge before Kerlyn Brown could have made the statement she did. Accordingly, the comment was not premised on a misstatement of fact, as the learned judge found. From this perspective, it cannot be said that the learned judge was correct in law in rejecting the defence of fair comment in relation to what she found to be comments from the CVM reporter, Kerlyn Brown, based on Clunis 2.

[102] Accordingly, having reviewed Kerlyn Brown's statements against the background of the applicable law, I would conclude that there is merit in CVM's appeal that the learned judge erred in rejecting the defence of fair comment as she did regarding that publication.

Conclusion on the issue of fair comment

[103] TVJ's appeal fails on the defence of fair comment.

[104] CVM's appeal on the issue partially succeeds. The learned judge was correct to find that Fabia Phillips-Lawrence's statements were factual assertions and not comments. Therefore, her rejection of CVM's fair comment defence on that basis cannot be disturbed. Accordingly, CVM's appeal fails on ground v.

[105] The learned judge was, however, wrong to reject the defence of fair comment on the basis that she did in relation to Kerlyn Brown's statements, which she concluded were comments. Having so concluded, she applied the wrong legal test and arrived at the wrong conclusions on crucial requirements of the fair comment defence in that regard. Therefore, in relation to the statements of Kerlyn Brown, CVM's appeal succeeds on grounds vi, vii, and viii.

[106] Nevertheless, it must also be recognised that although there is merit in CVM's appeal regarding Kerlyn Brown's comment, CVM still fails to entirely avoid liability for defamation on the grounds of fair comment, as this defence does not apply to the other contested statements, which have already been discussed. However, resolving this issue concerning the fair comment defence in relation to the Newswatch 8 broadcast is necessary because CVM had raised it, and the finding of the learned judge regarding it had the potential of affecting the extent of CVM's liability in damages.

[107] Concerning all the other statements that the learned judge concluded did not qualify as fair comment, the issue is whether a defence could properly be established through qualified privilege, on which reliance was also placed. This question will now be examined.

Issue (3) – whether the learned judge wrongly rejected the defence of Reynolds privilege (CVM grounds i and ii; TVJ Grounds a, b, c, d, f, g, h and j)

[108] The current issue under examination is whether the appellants properly established **Reynolds** privilege for the statements and broadcasts in question, particularly those considered not to qualify as fair comment. A summary of the applicable law is deemed useful in order to understand the bases on which the learned judge rejected the defence and the appellants' challenge to her decision.

Reynolds privilege – the law

[109] **Reynolds** privilege is a specific form of the broader defence of qualified privilege that was clearly established in common law jurisprudence by the House of Lords.

[110] An occasion is considered privileged when the recipient of a statement has a particular interest in receiving the honestly held views of another person, even if those views are defamatory of someone else, and when this interest is sufficiently important to outweigh the need to protect reputation. The privilege can be either absolute or qualified, with qualified privilege being overridden if the defendant demonstrates malice. The principle underlying the defence is traditionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in the making of the communication (see **Reynolds** at pages 615 and 616).

[111] The case of **Adam v Ward** [1917] AC 309, is generally cited for this principle, which Lord Atkinson frames in this way (page 334 of the report):

> "… a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

[112] Following on this, Lord Nicholls opined in **Reynolds** that (page 616):

> "The essence of this defence lies 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….The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end. Thus the court has to assess whether, in the public interest, the publication should be protected in the absence of malice."

[113] The sole test for determining whether a publication is privileged, as stated by Lord Nicholls in **Reynolds**, is to assess whether the duty-interest test is satisfied, or simply put, whether the public was entitled to know the impugned information. In Lord Nicholls'

words, "a claim to privilege stands or falls according to whether the claim passes or fails this test. There is no further requirement" (page 619).

[114] Later, Lord Hoffmann, in the House of Lords' decision in **Jameel and others v Wall Street Journal SPRL** [2006] UKHL 44 ('**Jameel**'), aimed to refine the boundaries of **Reynolds** privilege. He opined that although Lord Nicholls used the word "privilege", he did not mean privilege in the traditional sense. Instead, according to Lord Nicholls' interpretation, it is the material that is privileged, not the occasion on which it was published. Lord Hoffmann explicitly supported the view expressed in **Loutchansky v Times Newspaper Ltd (No 2)** [2001] EWCA Civ 1805 at [35], that **Reynolds** privilege is a "different jurisprudential creature from the traditional form of privilege from which it sprang" (para. [46] of **Jameel**). In Lord Hoffmann's view, it might be more accurate to refer to it as the "Reynolds public interest defence" rather than as an occasion of privilege. He stated his views in these terms (para. [50]):

> "In answering the question of public interest, I do not think it helpful to apply the classic test for the existence of a privileged occasion and ask whether there was a duty to communicate the information and an interest in receiving it. The Reynolds defence was developed from the traditional form of privilege by a generalisation that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House having made this generalisation, it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist."

Lord Hoffmann went on to opine that **Reynolds** privilege is not as narrow as traditional privilege, nor is there a burden upon the claimant to show malice to defeat it.

[115] It follows from the authorities that the most important question in determining whether **Reynolds** privilege applies is to establish whether the public had a right to know the information. The crux of the defence is, therefore, the publishing of the information in the public interest, even if it is defamatory.

[116] There is, however, a safeguard for the balancing of the reputation of persons who may be the subject of the impugned publication, on the one hand, and the media's fundamental right to freedom of expression in sharing matters of public interest, on the other. In this regard, **Reynolds** has categorically established that once the public interest criterion is satisfied, the standard the common law requires is that of responsible journalism—nothing higher. This test was later repeated by Lord Nicholls in **Bonnick v Morris and others** [2002] UKPC 31 ('**Bonnick v Morris**') at para. [23] in these terms:

> "Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals... It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care."

[117] According to Lord Nicholls in **Reynolds**, in determining whether the test of responsible journalism is satisfied, the court must have regard to all the circumstances, and the circumstances "must be viewed with today's eyes" (page 617). The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions, he stated (page 617). Therefore, various factors must be considered when determining whether the test is satisfied, and the test cannot be carried out in isolation from these factors or without regard to them. Depending on the circumstances, the factors to be considered include, in outline, the following:

(1) The seriousness of the allegation.

(2) The nature of the information and the extent to which the subject matter is a matter of public interest.

(3) The source of the information.

(4) The steps taken to verify the information.

(5) The status of the information.

(6) The urgency of the matter.

(7) Whether the comment was sought from the claimant.

(8) Whether the article contained the gist of the claimant's side of the story.

(9) The tone of the article.

(10) The circumstances of the publication, including the setting.

[118] Lord Nicholls further posited that the list is not exhaustive, and that the weight to be given to the factors above and any other relevant factors will vary from case to case. Above all, he said, the court should take into account the importance of freedom of expression. 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 doubt should be resolved in favour of publication (page 626).

[119] In **Flood v Times Newspaper Ltd** [2012] UKSC 11 ('**Flood**'), the court also endorsed the statement of principle that the overriding test for the application of **Reynolds** privilege is that of responsible journalism. Lord Phillips usefully directed that not all the "items in Lord Nicholls' list in *Reynolds* were intended to be requirements of responsible journalism in every case". According to him, each case would turn on its own facts. Lord Phillips' dictum squarely aligns with Lord Hoffmann's viewpoint, expressed in **Jameel** (at para. 56), that Lord Nicholls' 10 factors are not tests that the publication has to pass. Lord Hoffmann noted that Lord Nicholls did not intend the factors he listed to constitute 10 hurdles at any of which the defence might fail. According to him, the standard of conduct required of the journalists must be applied in a practical and flexible manner and must have regard to practical realities, as Lord Nicholls had said in **Bonnick v Morris**.

[120] Even closer to home, in **Edward Seaga v Leslie Harper** [2008] UKPC 9 ('**Seaga v Harper**'), Lord Carswell, speaking on behalf of the Judicial Committee of the Privy Council, similarly opined that Lord Nicholls' factors should not be examined as hurdles to be crossed, but rather as elements to be considered holistically (para. 12).

[121] The authorities are clear that once the public interest criterion is met, the test for **Reynolds** privilege is responsible journalism, and not all factors enumerated by Lord Nicholls in **Reynolds** are requirements in every case; what is required turns on the facts of each case.

Overview of the learned judge's findings

[122] In rejecting the defence, the learned judge found that the appellants did not take the required steps to verify the information; no opportunity was given to the respondents to comment or present their side of the story before the broadcasts; the appellants' publications were hasty and for the sake of sensationalism; and the broadcasts unjustifiably included the defamatory words.

The parties' submissions

[123] The parties made extensive written submissions on this issue, and the issue dominated their oral submissions before the court. I accord due respect to the industry of counsel. However, I will not reproduce all those submissions, and will instead give a broad overview of their arguments relative to the issue under review. In broad overview, the appellants challenge the learned judge's decision, with the main points of their collective challenge being that the learned judge:

(i) misunderstood the law and/or its application concerning the principles of responsible journalism as established in **Reynolds**;
(ii) erred by adopting a narrow interpretation that makes the privilege meaningless and/or its application unclear;
(iii) erred in applying a restrictive "box ticking approach" to the 10 considerations set out by Lord Nicholls and seemingly treated each as a mandatory element;
(iv) failed to properly consider the **Reynolds** public interest test; and
(v) erred in her conclusion that the appellants did not meet the required standard of journalistic responsibility.

[124] These arguments rely heavily on the decisions and judicial pronouncements in several cases, most notably, those cited above: **Reynolds**; **Bonnick v Morris**; **Jameel**; **Flood**; **Seaga v Harper**; and **Serafin v Malkiewicz and others** [2020] UKSC 23.

[125] The respondents defended the learned judge's conclusions, arguing, among other things, that journalists are required to act responsibly and verify the truth of the information they publish, especially when it involves serious allegations. They contend that the appellants failed to demonstrate that they acted responsibly or verified the facts before publishing the defamatory statements and to give the respondents an opportunity to give their side of the story They also maintained that the appellants did not justify naming and presenting visual representations of the respondents and acted hastily and for sensationalism The learned judge was, therefore, correct to find that they did not satisfy the requirements of responsible journalism.

Analysis and conclusions

[126] The learned judge rightly concluded that there was a public interest in making the publication regarding the police operation and the subsequent arrest of the respondents. Essentially, then, the duty-interest test acknowledged in **Reynolds**, as the starting consideration and primary criterion for the deployment of the defence, was satisfied.

[127] The next question, therefore, must be whether the standard of responsible journalism was met in making the publication, that is to say, whether the publication struck a fair balance between the appellants' right to freedom of expression and the respondents' right to protect their reputation. In resolving this central issue, the court would need to consider, as relevant, the 10 factors listed by Lord Nicholls in **Reynolds**, along with any other factors the court deems pertinent.

[128] In considering whether there has been responsible journalism, the primary and first question to be asked and answered in the context of this case is whether the specific requirements of responsible journalism, which the learned judge found were not satisfied by the appellants, are legally necessary to be fulfilled in this case. If the answer to that

question is yes, then the follow-up question is whether the appellants met those requirements. Addressing these questions involves evaluating each requirement the learned judge found was not fulfilled, which is now the subject of the appeals.

(a) The verification requirement

[129] The initial consideration concerns Lord Nicholls' fourth factor in **Reynolds**, which requires the publisher of the impugned information to have taken steps to verify it prior to publication. In examining the defence, the learned judge reasoned, in part, concerning this requirement at para. [129] of the judgment:

> "The serious allegations as would be understood by the reasonable television viewer are that the [respondents] attracted the attention of the task force and were 'caught in the lotto scam dragnet'. These were presented as facts by [the appellants] and there is no indication that even the very obvious step to verify what charges had been laid against the [respondents] was undertaken. The tone of the publications in my view is not investigative and fell below the threshold expected of responsible journalism. The reasonable man would be convinced that the [respondents] were involved in lottery scamming activities."

[130] Before treating with this defence, the learned judge had already opined in the context of her reasoning regarding the defence of fair comment that, though the case involved matters of public interest, the appellants were obligated to reasonably investigate the facts. In her view, even though the events were recorded live at Mr Troupe's premises, they should have verified the information about the specific criminal allegations before broadcasting to ensure some level of protection.

[131] Then, the learned judge at para. [140] of her judgment, in concluding that the appellants failed to practice responsible journalism, reasoned:

> "…they have not shown that they carried out any, or any reasonable investigations to ascertain whether the statements made by the police and reported by them were, in fact, true and neither was any evidence presented by them that they investigated whether the [respondents] had committed offences related to lottery scamming."

[132] From the general tenor of the learned judge's reasoning, she believed that the appellants ought not to have taken the words of the police, without more, but to conduct their own investigation to ascertain whether the respondents had committed lottery scamming (as she found was conveyed in the defamatory publications) and were charged with criminal offences to that end.

[133] In analysing the learned judge's findings on the issue of verification, the first question is whether there was an obligation on the appellants to verify the impugned statements in the circumstances. I agree with the appellants' submissions that there was none, primarily on the basis that this falls within the category of reportage.

[134] In **Flood**, on which both appellants rely, the court explained that when Lord Nicholls, in **Reynolds**, included in his list of relevant factors the steps taken to verify the information, he was dealing with a case in which the relevant allegations were made or, at least, adopted by the publisher. The publication was not merely reporting allegations made by another, as in this case.

[135] Citing the case of **Al-Fagih v HH Saudi Research and Marketing (UK) Ltd** [2001] EWCA Civ 1634, Lord Phillips, in giving the lead judgment, explained (para. 34):

> "…the Court of Appeal, by a majority, found that Reynolds privilege was made out in respect of a report in a newspaper of defamatory allegations made in the course of an ongoing political debate, notwithstanding that the publishers had made no attempt to verify the allegations. **The newspaper had not adopted or endorsed these allegations….The public interest that justified publication was in knowing that the allegations had been made, it did not turn on the content or the truth of those allegations. A publication that attracts Reynolds privilege in such circumstances has been described as 'reportage'. In a case of reportage qualified privilege enables the defendant to avoid the consequences of the repetition rule**." (Emphasis added)

[136] Lord Phillips, guided by dicta of Ward LJ in **Roberts v Gable** [2008] QB 502, then rehearsed the important statement of principle that reportage: "is a special example of

Reynolds privilege, a special kind of responsible journalism but with distinctive features of its own" (para. 35). He explained that reportage is "an example of circumstances in which the public interest justifies publications of facts that carry defamatory inferences without imposing on the journalist any obligation to attempt to verify the truth of those inferences". Those circumstances, according to Lord Phillips, "**may include the fact that the police are investigating the conduct of an individual, or that he has been arrested, or that he has been charged with an offence**" (emphasis added).

[137] Further, Lord Phillips made it clear that where there is reportage, that is, where the public's interest lies in the fact that an allegation was made and not the contents of the allegation, the publisher is protected if he has taken proper steps to verify the mere making of the allegations, provided that he does not adopt them. Lord Phillips explains the law as it relates to the requirement for verification in these terms:

> "77. … Just as in the case of reportage, the publishers did not need to verify that aspect of the publication that was defamatory.
>
> 78. The position is quite different where the public interest in the allegation that is reported lies in its content. In such a case the public interest in learning of the allegation lies in the fact that it is, or may be, true. It is in this situation that the responsible journalist must give consideration to the likelihood that the allegation is true. *Reynolds* privilege absolves the publisher from the need to justify his defamatory publication, but the privilege will normally only be earned where the publisher has taken reasonable steps to satisfy himself that the allegation is true before he publishes it."

[138] His Lordship then recited Lord Hoffman's pronouncements in **Jameel**, noting that Lord Hoffmann had "put his finger on this distinction", when he stated:

> "78. … In most cases the Reynolds defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true, **but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth**." (Emphasis added)

[139] Then, at para. 80, he continued, in part:

> "80. … Where a journalist alleges that there are grounds for suspecting that a person has been guilty of misconduct, the responsible journalist should satisfy himself that such grounds exist, but this does not necessarily require that he should know what those grounds are. Their existence can be based on information from reliable sources, or inferred from the fact of a police investigation in circumstances where such inference is reasonable."

[140] From the above, a publication will qualify as reportage, and thus will not give rise to an obligation to verify, if: (i) the public interest that justified the publication was in knowing that the allegations had been made, and did not turn on the truth of the allegations; and (ii) the publisher did not adopt or endorse the allegations. On the facts of this case, both requirements are satisfied.

[141] As it relates to the public interest, the learned judge, at several points in her judgment, accepted that the broadcasts concerned a matter of public interest (see, for example, para. [142]). However, in her analysis, she did not identify whether the public's interest was in knowing that the allegations had been made or the contents and truth of the allegations. In my view, given the contents of the broadcasts, it is evident that the public's interest, at that stage, was in the fact that the police were making the allegations contained in the broadcasts, and not the truth of the allegations.

[142] The appellants' broadcasts constitute a paradigm case of reportage, indicating, as they did, "the fact that the police are investigating the conduct of an individual, or that he has been arrested, or that he has been charged with an offence" (per Lord Phillips in **Flood** at para. 35). The broadcasts' contents were, as both appellants contend, limited to conveying the fact of the police operations, what was discovered in the course of those operations, the arrests, and the police's assertions regarding their investigations, future intentions and approach in the investigative process.

[143] The allegations and statements at issue in this case were intrinsically tied to the police's activities and official reports during their investigation and to the subsequent

press conference, which were broadcast live. It is clear that the police undertook operations and, as a result, discovered various items typically associated with lottery scamming. These discoveries provided unmistakable evidence of an active police investigation, which would have been readily apparent to the appellants from the police's actions and the material uncovered at the scenes. The broadcasts were based on information provided directly by the police, who supplied all relevant details regarding the occurrences at the time and their future intentions in an ongoing investigation.

[144] The police did not provide any specifics regarding the contents of any allegations of lottery scamming against either respondent. The only alleged involvement in lottery scamming deduced from the statements of the police that were held to be defamatory was that persons who attracted the Task Force's attention were considered "top-tier actors". No specificity or details regarding the nature and extent of such persons' alleged involvement in lottery scamming were supplied.

[145] Further, following questions from one TVJ reporter regarding the strength of the police's evidence, the Commissioner indicated that the process of gathering evidence in the course of the ongoing investigation would ultimately determine the nature of any charges to be brought and the individuals against whom such charges might be laid. Significantly, therefore, there was no conclusive assertion by the police or by either of the appellants at the time of the challenged broadcasts that the respondents had, in fact, committed lottery scamming.

[146] The next question relates to any adoption or endorsement by the appellants. Having considered the broadcasts, I am satisfied that at no point can it be said that the appellants had adopted, as their own, or endorsed any claim or statement indicating that the respondents were involved in or had committed an offence related to lottery scamming. In the words of Lord Hoffman in **Jameel**, there is no indication that the appellants "subscribed to any belief" in the truth of the allegations presented.

[147] Although she did not say so explicitly, the learned judge's judgment evidences her view that the expression "caught in the lotto scam dragnet", used by Fabia Phillips-Lawrence, signified CVM's adoption of the police's allegations that the respondents were involved in lottery scamming activities. She reasoned that some steps would have been necessary to "verify what charges had been laid against the [respondents]" and that the "reasonable man would be convinced that the [respondents] were involved in lottery scamming activities". To the extent that her reasoning suggests that CVM had adopted the police's allegations, it is, in my view, unacceptable.

[148] In my view, the conclusion that Fabia Phillips-Lawrence's words suggested the respondents' involvement in lottery scamming activities is an unreasonable extension of the words when examined in their context. The reporter's statement indicated that the respondents and Mr Troupe's sons were arrested. In that context, being "caught in the lotto scam dragnet" would have signified, to the ordinary, reasonable listener, that the respondents were detained on suspicion of lottery scamming activities, following the Task Force's operation in the western part of the island and certain discoveries at the targeted residences. The indication that the respondents were "arrested" could not give rise to any imputation that the respondents were involved in lottery scamming, and would, at best, suggest that the respondents were suspected of lottery scamming. Viewed through this lens, Fabia Phillips-Lawrence was merely describing the state of affairs as it stood, based on the police's utterances regarding the state of their investigations. Because her words could not reasonably be interpreted as an assertion, by her, of the respondents' involvement in lottery scamming, she could not have adopted or ascribed truth to any such assertion, and therefore, be required to verify them. Accordingly, to the extent that the learned judge's reasoning suggests that she had arrived at the contrary conclusion, her conclusion is erroneous.

[149] Based on the authorities considered above, the appellants' broadcasts amounted to nothing more than reportage. This is because the truth of the contents of the allegations were not being relied on, or adopted by the appellants in their broadcasts. The public's interest lay in the fact that the police were making certain allegations against

the respondents, and the broadcasts served the sole purpose of bringing the public's attention to the fact that those allegations had been made or were being made. Therefore, the obligation to verify the truth of the allegations themselves, as opposed to confirming that the allegations had, in fact, been made, did not arise in these circumstances. Therefore, there was no requirement imposed on the appellants to verify whether the respondents had actually committed lottery scamming or any offence, whether implicitly or explicitly, alleged by the police.

[150] The foregoing reasoning constitutes a sufficient basis upon which to conclude that the learned judge erred as a matter of law in her treatment of the issue of verification. However, a closer examination of the impugned statements must be done against the backdrop of two other of Lord Nicholls' factors in **Reynolds** that are closely linked to this verification requirement, namely, the source of the information that had been published (factor (3)) and the circumstances of the publication, including the setting (factor (10)).

[151] Referring to factor (3) (the source of the information), Lord Nicholls made the pragmatic point that some informants might have had no direct knowledge of the events; others may have their own axes to grind or are being paid for their stories (page 626). In this case, the source was the police (including its high command), which disclosed their operations, investigations, findings, and approach to operations concerning lottery scamming. The source also included a police high command press briefing featuring government ministers responsible for information and security. The source was, therefore, the legitimate agents of the State with responsibility for national security.

[152] The appellants both argue that the information they published came from that source, which they reasonably regarded as credible. This contention regarding the source's credibility cannot be ignored, because the source of the impugned information, as already stated, is a relevant consideration. In my view, the appellants' belief that the police, from whom the information was received, provided a reasonably credible source of information regarding their investigations into suspected criminality cannot be said to have been unreasonably held.

[153] Against the background of the source of the information, the context and setting within which the statements of the police and the broadcast were made now assume significance. The police operations were conducted publicly, with the clearly visible involvement of the Task Force at the respondents' residences. Questionable or incriminating items (some of which, the learned judge stated are "admittedly used in lottery scamming" (para. [94])) were also discovered at the respondents' premises, as well as an illegal firearm with ammunition at Mr Troupe's premises. Mr Troupe's son reportedly admitted the firearm and ammunition were his, but at the time of the broadcast, no one had claimed responsibility for the other, "admittedly" incriminating articles found at both premises. It was within this context and setting that Clunis 1 was published. That publication from the senior police officer indicated that, in conducting the operations, the Task Force acted on intelligence, was guided by the Proceeds of Crime Act, and that charges would be laid. He, however, did not indicate which charges would be laid and against whom.

[154] Furthermore, at the subsequent press conference, the Commissioner, when asked by Dashan Hendricks, a TVJ reporter, about the status of the police investigations that led to the respondents' arrest, stated that the investigations were ongoing to gather evidence. He added that a decision would ultimately be made, based on the evidence, to determine whether to proceed with prosecution and, if so, against whom. Therefore, although in Clunis 1, it was indicated that charges would be laid, by the time of the press conference, neither Supt Clunis nor the Commissioner had specified that any charges would be brought against the respondents specifically, nor what those charges might be. The police's statements left open the possibility that charges could be laid against the respondents, which might influence the perception of a reasonable viewer watching the broadcast. The fact, however, remains that charges were eventually laid, although none for any offence of lottery scamming, as no such offence existed at the time.

[155] Supt Clunis' statement that charges would be laid (Clunis 1) was a general indication of the police's intention or plans to lay charges. It was an evaluative statement of opinion based on known facts at the time. He never specifically stated that charges

had been laid or were to be laid against any of the respondents, and the appellants did not report that charges were, in fact, laid or that the respondents had committed lottery scamming. It must be borne in mind that persons other than the respondents were detained by the police. In a context where seemingly incriminating articles were found, it was not unreasonable or irresponsible for TVJ to report on Clunis 1, having not had the benefit of hindsight that the learned judge had.

[156] Following the statements in Clunis 1, Clunis 2 was published with Supt Clunis sending a warning to others (including influential persons) who may be involved in criminality, particularly lottery scamming. CVM reporter Kerlyn Brown introduced Clunis 2 with what the learned judge concluded was a defamatory comment.

[157] However, when the impugned broadcasts made by the appellants, including the statements of the relevant reporters, are evaluated within the wider context of all the reports they carried on the occurrences at the time, it is clear that they never indicated as their own views or repeated any assertion of the police that the respondents had, in fact, committed any offences relating to lottery scamming. Neither did they broadcast that the respondents were charged or would be charged with any such offence. Therefore, even if the respondents were ultimately not charged with any offence known as lottery scamming or any at all, the appellants should not be held liable for defamation based on the outcome of those subsequent investigations, police decisions, and court cases. They would have had no knowledge of the likely outcome of the investigation and police action at the relevant time. As Lord Nicholls reminded us in **Reynolds**:

> "…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."

[158] In this case, the appellants acted "without the benefit of the clear light of hindsight", and when considering their actions, regard must be had, above all, to the importance of freedom of expression as well as the freedom to receive and disseminate

information in any media, albeit admittedly, these are not absolute rights. It is accepted that these rights can be limited if reasonably required in a free and democratic society. Therefore, the lurking and overarching question in this case is whether the freedom of the press (media) to report on a matter of public interest, which emanated from what they reasonably saw as credible reports from the police, should give way to the respondents' right to an unsmeared reputation as a matter of necessity in a free and democratic society.

[159] Accordingly, I agree with the appellants that the learned judge's approach to **Reynolds** privilege was not only overly restrictive but also legally flawed. It was unreasonable and erroneous for the learned judge to require the appellants to take steps to verify whether the respondents were involved in lottery scamming, or charged with lottery scamming, as this was not demanded by law on the facts of this case. There was no information shared with or by the appellants that the respondents were charged. Demanding verification as to what charges were laid against the respondents in these circumstances would threaten press freedom to an unjustifiable extent in a free and democratic society.

[160] Based on the above reasoning, I conclude, contrary to the respondents' contention, that the learned judge placed excessive and improper emphasis on the verification factor in the circumstances of this case, and in doing so, erred. In my view, this aspect of both appeals is meritorious.

(b) No opportunity given to respondents to comment before broadcast

[161] The learned judge also rejected the defence based on what she saw as the non-fulfilment of Lord Nicholls' seventh and eighth factors concerning whether an opportunity was presented by the appellants for the respondents to comment on the allegations against them and to present their side of the story before the publication of the impugned broadcasts. The learned judge placed significant emphasis on this factor. At paras. [129] and [131] of her judgment, she reasoned:

> "[129] The serious allegations as would be understood by the reasonable television viewer are that the [respondents] attracted the attention of the task force and were 'caught in the lotto scam dragnet'. These were presented as facts by [TVJ and CVM] and there is no indication as to what steps if any, were taken by them to get the [respondents] account or that any comment was sought from the [respondents]. In fact, the evidence is that no comment could be sought from the [respondents] as they were in police custody. I cannot agree with the submission of Queen's Counsel on behalf of [CVM] when he indicates that [CVM], 'without the benefit of Mr Troupe's input, was able to present his side of the story'. The large crowd of persons boisterously advocating Mr Troupe's innocence and their support for him cannot be said to have served the purpose of presenting his side of the story.
>
> [130] …
>
> [131] While I accept that it may have been difficult to interview the [respondents], as they were in police custody, I believe the public should have had the benefit of hearing their side, or, at the very least, their response to the proceedings. The broadcast by CVM included comments from persons present at the scene at Mr Troupe's premises, including the description of the arrest being described as 'embarrassing' by some. It is clear that the publications did not contain the gist of the Respondents' side of the story."

[162] To properly assess the grounds of appeal on this issue, it is important to recognise, once again, that the police provided the information regarding the respondents. As such, the impugned reporting by the appellants was confined to live presentation of the operation (by CVM at Mr Troupe's residence), the police's report of their investigation and intended actions. Against this background, the learned judge, at para. [129] of her judgment, regarded the comments of Fabia Phillips-Lawrence to be:

> "…serious allegations as would be understood by the reasonable television viewer that the [respondents] attracted the attention of the Anti-Lottery Scam Task Force and were caught in the lotto scam dragnet."

[163] This, she said, was presented as fact by the appellants without soliciting comments from the respondents regarding the police allegations.

[164] At para. [83] of her judgment, she had previously stated:

> "It is clear that the Claimants attracted the attention of the Task Force and at the time they were taken into custody they were classified as 'top-tier actors'. The public would have been alerted to the fact that the men caught the attention of the task force having been part of their investigations related to lottery scamming."

[165] The learned judge's reasoning on this point constitutes factual findings that were clearly open to her on the evidence. However, her acceptance of the respondents' contention that there was an absence of responsible journalism because the appellants did not obtain the respondents' comments or side of the story cannot be sustained upon closer examination. The circumstances leading to the defamatory statements are particularly significant in this context. These events unfolded amid an active police investigation. According to the police, their actions were based on intelligence that directed them to target and conduct operations at the premises in question. During these operations, items regarded as incriminating were found. As a result of these discoveries, all persons associated with the raided locations, including the respondents, were detained and taken into police custody. It is important to note that no charges were brought against any individuals at the scene during these operations.

[166] During their explanation of the operations and subsequent arrests, the police indicated that the persons who attracted their attention were considered top-tier actors in lottery scamming. In assessing the value of obtaining the respondents' comments or versions of events prior to the appellants' broadcasts, it is apparent that such contributions would have been limited in substance. Any rebuttal from the respondents would likely have consisted of denials, namely that the police did not target them, they were not apprehended as part of a lottery scamming operation, and they were neither top-tier actors, facilitators, nor involved in lottery scamming at all. In this context, it is questionable whether such a rebuttal would have had any meaningful effect, either on the public's understanding of the events as they unfolded or on their perception of the respondents themselves.

[167] Furthermore, media personnel documented the operations that took place when the questionable or incriminating items were discovered, some of which were accepted to be typically linked to lottery scamming. Under such circumstances, it would not have been feasible for a reporter at the scene to attempt to interview persons, including the respondents, who were in police custody or otherwise under the direct control of law enforcement. The constraints of the situation made it impossible for the appellants to obtain the respondents' perspective at that stage of the media reporting process.

[168] There were further practical limitations on seeking the respondents' side of the story in subsequent occurrences at the material time. After each operation was concluded, the respondent, in question, was removed from the location and was detained for a period that extended beyond the time during which the impugned publications were broadcast. During this period, while the respondents were in police custody (between five and seven days), the appellants would have had in their knowledge information of significant public interest. Given the nature and source of the information, therefore, they would have had a duty to report it to the public.

[169] It is important to emphasise that the appellants, at the time of their broadcasts, could not have foreseen the eventual outcome of the investigations or any subsequent court proceedings. The absence of lottery scamming charges being brought against the respondents, or their subsequent exoneration by the courts, does not retrospectively establish liability for defamation on the part of the appellants. The assessment of their actions must be grounded solely in the facts and circumstances as they existed at the time of publication as well as the source of the information.

[170] A crucial consideration in evaluating whether the appellants fulfilled the comment requirement is the respondents' status at the material time. Once the respondents were taken into police custody as suspects, they were simply not in a position to freely provide interviews or comments, either at the scene of the operations or at any point during that day. Therefore, as contended by the appellants, the lack of comments from the respondents was a direct consequence of their detention and not due to any omission by

the appellants in obtaining their comments. This situation leads to the central question, which is: Given that the respondents were in police custody and unreachable for comments, were the appellants required under the law governing **Reynolds** privilege to delay publication of the story until the respondents were able to comment or provide their side of the story?

[171] The answer to this question hinges on the practical realities faced by the appellants at the time of reporting, and the nature and urgency of the news. Given that the respondents were detained and unavailable for comment during the period when the news was being prepared and broadcast, it cannot be said that the appellants failed in their duty to seek out the respondents' perspective. The inability to obtain comments, according to the appellants, was not simply due to a lack of effort or diligence on their part of but rather a direct result of the respondents' arrest and continued custody. At no time did the learned judge find that the appellants were not credible in their contention that they could not reach the respondents for comments and the reason for that. Indeed, she accepted that the respondents were not available around the time of the broadcast. In all the prevailing circumstances known to the learned judge, I refuse to accept that there was any obligation for the appellants to first obtain the respondents' side of the story about the allegations against them while they were unavailable in police custody, before news of their arrests and the circumstances surrounding the arrests could be published.

[172] This conclusion, and how the law requires the issue under review to be resolved, necessitate an insight into the facts of **Reynolds** that led Lord Nicholls to establish the need to satisfy the requirement for comment before publication as a necessary criterion. In summary, the facts were as follows. Mr Reynolds, the claimant, was the Prime Minister of Ireland in a coalition government. He announced his resignation as Prime Minister and the reasons for the resignation in the House of Representatives.

[173] Three days after Mr Reynolds announced his resignation, the appellants published an article about the political crisis and his resignation. The article failed to mention the

prior explanation Mr Reynolds gave to the House of Representatives when he announced his resignation, because its authors rejected his version of events and concluded that he had been deliberately misleading. Thereafter, Mr Reynolds instituted libel proceedings against the appellants, claiming that the article intimated that he had knowingly misled the House of Representatives and his coalition colleagues by suppressing information.

[174] The appellants contended for a wide qualified privilege at common law for 'political speech'. The trial judge ruled that publication of the article was not privileged and awarded Mr Reynolds £1.00 in damages, as well as ordering him to pay the appellants' costs. Mr Reynolds successfully appealed to the Court of Appeal, contending that the trial judge had misdirected the jury in certain respects. The appellants cross-appealed against the trial judge's decision on the qualified-privilege point. The Court of Appeal set aside the trial court's judgment and ordered a new trial, holding that the appellants would not be able to rely on qualified privilege at the retrial. The appellants appealed to the House of Lords to determine whether a libellous statement of fact made in the course of political discussion was free from liability if published in good faith. So, the question of whether the appellants could rely on qualified privilege at the retrial was for the House of Lords to determine. The House, through a majority decision reflected in Lord Nicholls' lead judgment, held that neither qualified privilege (in the traditional sense) nor what we now refer to as the **Reynolds** privilege did not arise on the facts of the case, and so the appellants could not rely on privilege at the retrial.

[175] Insofar as it is relevant to the issue under review in the instant case, that defence could not avail the appellants because, among other things, the House held that the defendants had failed to record Mr Reynolds' own account of his conduct as described by him when addressing the Parliament in the debate that preceded the publication. The defendants did not, between the debate and the publication of the article, alert Mr Reynolds to their "highly damaging conclusion" that he had lied to his coalition colleagues and knowingly misled the Parliament so as to obtain his observations on it. Accordingly, in **Reynolds**, the appellant's failure to publish Mr Reynold's explanation, that was available from his speech in Parliament at the time of publication, or to alert him of their

conclusions about his actions and obtain his side of the story, was fatal to their reliance on the defence of qualified privilege (including the public interest privilege endorsed by the House).

[176] The most crucial feature of **Reynolds** that makes it clearly distinguishable from the instant case regarding the comment requirement is that Mr Reynolds' side of the story or explanation for his behaviour was available before the disputed publication. Mr Reynolds was not in police custody at the relevant time and was therefore able and willing to give his side, which the publishers intentionally did not ask for, obtain, or publish. In contrast to **Reynolds**, the respondents in the instant case were in police custody or under police control at all relevant times, and there was no evidence that they were available for media comment after they were detained and before the news could reasonably be broadcast. In my view, it would not have been reasonable to expect the publications to include the respondents' side of the story or any comments from them, given their status as suspects in police custody and the lack of specific allegations for them to respond to. As Lord Nicholls noted in **Reynolds**, "an approach to the [claimant] will not always be necessary". That was the situation here.

[177] Furthermore, Lord Hoffmann's guidance in **Jameel** underscores that the standard of conduct expected of the media should be applied in a practical and flexible manner, taking into account real-world constraints. Here, the practical reality was that the respondents, from whom any comments would have had to be sought, were arrested and taken into custody by the police for a criminal investigation. The situation, as it unfolded at the locations in question, inherently prevented the reporters from approaching the respondents and obtaining their comments. Therefore, it was simply impracticable and unnecessary for the appellants to seek to obtain the respondents' side of the story under these conditions before publishing the news of their arrest.

[178] Indeed, once the fact of the arrests was announced, the public would have needed to know the reasons for the arrests. The learned judge herself acknowledged the evidence of Miss Michelle Thomas from CVM, who defended CVM's decision to air Clunis 2 before

charges were laid, because it provided context to the arrests and reflected the significance of the operation (para. [132] of the judgment). Miss Thomas also emphasised the Government's involvement in the press briefing as evidence of the importance of the matter. I share the view that the context of the respondents' arrest and the reasons for the arrest had to be provided, which the appellants did by directly presenting the report from the police themselves. In this context, the unavailability of the respondents for interview regarding their side of the story or comments should not be used against the appellants to deny them the protection of the **Reynolds** defence.

[179] In the premises, I accept the appellants' submissions that the learned judge wrongly viewed those two interrelated factors as hurdles that had to be surmounted for the defence to succeed, rather than as relevant considerations among several. Those factors were not, in and of themselves, conclusive. The appellants' criticisms of the learned judge's approach to these requirements in the circumstances of this case are, therefore, justified. Accordingly, I would hold that the learned judge erred in concluding that the appellants' reporting fell below the standard of responsible journalism because they failed to secure the respondents' side of the story or obtain their comments on the allegations or publications.

[180] The appeals succeed on this issue.

(c) Whether the appellants' publication was hasty and for sensationalism, and there was no duty to include the defamatory words in the broadcast

[181] The urgency of publishing the defamatory statement is a factor to be considered in evaluating responsible journalism. The learned judge found no evidence of urgency to justify what the respondents classified as the hasty broadcast by the appellants. She concluded that the actions of both appellants amounted to media sensationalism. The learned judge concluded that the broadcasts by the appellants were hasty and sensational because (a) they failed to verify the accuracy of the information before airing it; and (b) they were aware that the investigations were incomplete, yet they presented the story as "leading stories" and "breaking news" without confirming the charges against the

respondents (paras. [130] and [147]). The learned judge also noted that the tone of the publications was not investigative and fell short of the standards expected of responsible journalism. The tone was a relevant consideration in accordance with **Reynolds** prescription (para. [130]).

[182] Connected to the learned judge's finding that the broadcasts were hasty, sensational and lacked the requisite tone, was her conclusion that aligns with the respondents' argument, that the appellants did not need to include the defamatory statements in the broadcasts. As already indicated, the respondents had argued before the learned judge that the inclusion of their images and references to them as key players and top-tier actors in lottery scamming was defamatory and unnecessary. It is, therefore, not surprising that they defended the learned judge's findings in this court.

[183] The appellants, however, remain unrelenting in their position that the publications were not broadcast for sensationalism, in haste, or unnecessary. In criticising the learned judge's findings and countering the respondents' position, the appellants argue, in summary, that they had a duty to report the events and the broadcasts were justified due to the seriousness of the situation as well as the urgency and public interest of the matter. They also contend that the finding that the broadcast was hasty is inconsistent with the evidence, as the events were public and urgent, involving operations at the homes of elected representatives and a press conference by high-ranking police officials and the Minister of National Security.

[184] The appellants also emphasise the high public importance of the subject matter, given the national and international concern over lottery scamming at the time. The urgency, according to TVJ, was further supported by a report by journalist, Dan Rather, which highlighted the serious impact of lottery scamming on Jamaica's reputation. CVM maintained that news is a "perishable commodity" and that the urgency of reporting matters of public interest, such as the arrests of public officials, should not be hindered by overly strict requirements. CVM also argue that its broadcasts accurately represented the police investigation and did not sensationalise the events. The broadcasts focused on

the arrests and the police's position regarding the investigation, rather than making unverified claims about the respondents' involvement in lottery scamming. Therefore, the broadcasts were not hasty and did not cross into sensationalism.

[185] The inclusion of the defamatory material, both appellants maintained, was essential to provide a complete and accurate account of the events and provide the background to the respondents' arrest by the police.

(i) Sensationalism and hasty publication

[186] I am persuaded by the appellants' arguments that the learned judge erred in her conclusion regarding the timing of the broadcast and its tone. The respondents' contention that there should have been a delay in broadcasting the fact of their arrests is difficult to accept. The matter of police operations and the arrests of the respondents, as two elected representatives in the context of an anti-lottery scamming operation, was of significant public importance and thus a matter in the public interest. Lottery scamming by itself was, at the time, a topical issue in Jamaica's media landscape and elsewhere.

[187] As TVJ contends, and I agree, the evidence reveals that the reported events did not happen secretly or within private confines; the security forces were present at the locations in full force and in marked vehicles. The police alerted the media. The activities attracted public attention, independent of the appellants' involvement, and led to a police press conference. So, even though it was the appellants' broadcast that would have brought the police's actions to a wider audience, the events were already in the public domain, with community members observing them and, in a position, to share the news of the operations through other media, which is a characteristic of modern Jamaican society. Additionally, and as already established, the occurrences were of public interest.

[188] Furthermore, the significance of the events was underscored by the subsequent police press conference, which further cemented the public interest value of the situation. The activities and the actions of the authorities were thus not only observable but also subject to open discussion, both within the immediate community and through wider

media reporting. Furthermore, the fact that investigations were incomplete and ongoing was not a bar to the publication of the arrests and circumstances surrounding them. On the strength of persuasive authorities such as **Flood**, **Reynolds** privilege can avail the appellants even with the police investigations incomplete at the time of the broadcasts.

[189] Therefore, within the context of the social realities of the time, with the high public interest value of the events, perishability of news, the source of the information, and the nature and status of the investigation, it would be unreasonable to hold that the appellants should have delayed the broadcasts. Given the prevailing social and media landscape at the time of publication, and the importance of freedom of expression, to which the court must have regard, the insistence on such a requirement by the court would set an impractical or unrealistic standard for responsible journalism. In my opinion, the learned judge had set an unreasonably high bar for responsible journalism in matters of public interest on this basis, which cannot be accepted. There is merit in the appeal on this ground.

(ii) Inclusion of the defamatory material

[190] I now turn to the question of whether the appellants failed to exercise proper journalistic responsibility by publishing the defamatory material and images of the respondents. I have considered the sub-issue and the arguments advanced by the parties in relation to them in the light of the principles deduced from the relevant authorities. At para. [51] of **Jameel**, Lord Hoffmann gives invaluable guidance on this issue, when he explains:

> "[51] If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article. **But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may**

> **have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented.** And on that question, allowance must be made for editorial judgment. If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting." (Emphasis added)

[191] Upon careful evaluation of the impugned publications within the context of the principles outlined above, it can be said that the impugned defamatory statements formed an integral part of the police report. Specifically, the contested utterances reflected: (a) the intelligence received by the police which prompted them to target the specific scenes of the operations; (b) the police's assertions regarding the alleged involvement of unnamed individuals regarded as key actors in lottery scamming who have attracted their attention; (c) the intention to pursue charges against individuals following the discovery of questionable articles at the premises of the operations; (d) the ongoing nature of the police investigations into lottery scamming; and (e) the general approach adopted by the police towards addressing such criminal activities.

[192] Taking all relevant factors into account, including that individuals other than the respondents were also taken into police custody, it is difficult to identify any aspect of the impugned publications that would justify a finding that the appellants introduced (or "dragged", to use Lord Hoffman's wording) damaging allegations into the broadcasts that do not have a legitimate public interest purpose. Therefore, the broadcasts did not serve to sensationalise or include gratuitous claims or allegations unconnected to the police story at hand regarding the police operations and actions. The challenged material contributed to the public interest element of the publications and was, therefore, reasonably included in the relevant broadcasts.

[193] As Lord Hoffmann reminded us in **Jameel**, on this issue of what should be included in a news story, some allowance must be made for editorial judgment, and the decision

and editorial judgment of the publisher cannot be evaluated from the vantage point of the trial judge who sits with the advantage of "leisure and hindsight". It is fair to say that the learned judge in the instant case had seemingly assessed the appellants' actions from that position of leisure and hindsight that the appellants did not enjoy, and by doing so arrived at a conclusion that cannot be sustained.

[194] Accordingly, in my opinion, the appellants' decision not to delay broadcasting the occurrences was not driven by a need for sensationalism and was not hasty. The sharing of the police activities, investigations, and assertions with the public was urgent in the circumstances. The inclusion of the impugned statements by the police and reporters was consistent with sound editorial judgment on a matter of significant public interest. The media publications at the time they were made were reasonably justified in a free and democratic society that values freedom of the press. Moreover, given the fleeting nature of news as a perishable commodity, it cannot be reasonably argued that the broadcasts of such significant occurrences were driven by sensationalism. The fact that the respondents were not charged with lottery scamming and were later exonerated by the court cannot, in retrospect, be used to judge journalistic responsibility for a decision that had to be taken in the heat of the moment and made without the benefit of hindsight. Consequently, the learned judge erred in concluding that the broadcasts of the police operations and arrests, as well as the press conference, which included the defamatory statements, fell below the standard of responsible journalism because their publication was hasty, unnecessary and for the sake of sensationalism.

[195] I conclude there is merit in the grounds of appeal, which give rise to these issues.

Conclusion on issue (3)

[196] **Reynolds** privilege relies on a careful balance between freedom of expression and the protection of reputation, governed by the standard of responsible journalism. The authorities require a practical, flexible, and fact-sensitive approach that accounts for the realities of news gathering and reporting on public-interest issues. In this case, the learned judge's application of the **Reynolds** principles was unnecessarily rigid and

imposed requirements not supported by the facts or the law. The verification obligation did not apply in the context of reportage, which I found the impugned broadcasts to be. The respondents could not have made comments or given their side of the story before publication because they were detained in police custody. Moreover, the requirement for the respondents to comment or provide their side was impractical and unnecessary at the relevant time. Indeed, the question as to whether it would have been prudent for them to comment at the time is also ripe for contemplation, but is outside the scope of this analysis. It suffices to say that, in my view, the broadcasts were not motivated by sensationalism but by their public interest value, and the urgency of the publications was not inconsistent with proper editorial judgment or discretion.

[197] I conclude that the appellants' combined challenge to the learned judge's treatment and rejection of their defence based on **Reynolds** privilege is justified. Accordingly, I would allow the appeal on this issue and order that the learned judge's decision that the appellants are liable to the respondents for defamation be set aside.

Issue (4) – whether the learned judge erred in making an award of damages in the quantum awarded (CVM grounds iv, ix, x and xi; TVJ grounds e and g)

[198] The appellants have both challenged the award of damages, arguing that the learned judge erred in both fact and law in granting the sums awarded to the respondents. However, since the issue of liability is central to the appeal, it is sufficient to note that the awards of damages against the appellants cannot stand without establishing liability. Therefore, there is no need to examine the various grounds of appeal challenging the awards, as it logically follows that if the learned judge erred on liability, she also erred in awarding damages against the appellants.

Issue (5) – whether the learned judge erred in her apportionment of the liability for costs among the parties (TVJ ground k)

[199] TVJ is also aggrieved by the costs order made against them by the learned judge. However, TVJ's ground of appeal, which concerns the learned judge's failure to appropriately apportion costs among the parties based on the causes of action, need not

be ventilated, given the findings above regarding liability. It follows, based on my findings in relation to liability, that TVJ would not be liable for costs as the successful defendants in the court below, in keeping with the general rule that costs follow the event, and there is nothing in the circumstances to invoke any exception to that rule.

[200] In the circumstances, because TVJ is not liable to the respondents, the costs order against them must be reversed, and the unsuccessful respondents must bear the costs of the claims they brought against TVJ, as a successful party to the claim. Therefore, the TVJ's ground of appeal on this point is meritorious.

[201] Even though CVM did not specifically challenge the learned judge's costs order in its notice of appeal, it is evident from the notice of appeal that it sought to challenge the learned judge's orders in their entirety. It follows that the costs order against CVM must also be reversed since they ought to have succeeded in the court below.

[202] Accordingly, the learned judge's orders for costs to be borne by the appellants must be set aside and substituted therefor with an order that the respondents pay the appellants' costs on each claim.

Disposal of the appeal

[203] I conclude that CVM had a valid defence in fair comment for the words uttered by Kerlyn Brown. However, both appellants have a valid defence to the claims based on **Reynolds** privilege, which the learned judge should have upheld. In the premises, the learned judge's decision that the appellants are liable to the respondents for defamation is incorrect in both fact and law and should be disturbed.

[204] Considering all the reasons outlined above, the appeals should be allowed, the decision by the learned judge regarding the appellants made on 13 December 2019 should be set aside, and the costs of the proceedings in the court below should be awarded to the appellants to be borne by the respondents on their claims.

[205] Regarding the costs of the appeal, I would order the respondents to pay 75% of the costs of the appeal. In my view, such an apportionment appears reasonable to take account of:

(i) the general rule that the successful party is entitled to the costs of the appeal;

(ii) CVM's success in its appeal against the learned judge's rejection of the fair comment defence in relation to the utterances of Kerlyn Brown (issue (2));

(iii) the appellants' success on the issue of **Reynolds** privilege (issue (3)), which occupied most of the parties written and oral submissions, and constituted 10 of the 22 combined grounds of appeal filed by the appellants); and

(iv) the appellants' resulting success in overturning the findings of liability, the award of damages, and the costs orders against them in the court below.

[206] The deduction of 25% takes into account:

(i) the respondents' success in resisting CVM's appeal concerning whether the words the words complained of were not defamatory because they were true (issue (1)); and

(ii) the respondents' success in resisting TVJ's appeal on the issue of fair comment, and CVM's appeal on that issue in relation to the utterances of Fabia-Phillips Lawrence (issue (2)).

[207] I would also recommend that if any party is of the view that some other costs order should be made, the party seeking such other order should be permitted to file written submissions on the apportionment of costs, within 14 days of the court's order, failing which, the apportionment of costs proposed of 75% shall stand. I would propose that these orders be incorporated into the final orders of the court. The stay of execution

of the learned judge's judgment should now be discharged with concomitant orders relating to any conditions that were imposed for the grant of the stay.

[208] On behalf of the court, I offer sincere apologies to the parties for the delay in the delivery this judgment. While some of the constraints which prevented a more expeditious resolution of this matter are well known, I will not offer any of them as an excuse, because I am mindful that no excuse can lessen the inconvenience and anxiety caused by the delay.

SIMMONS JA

[209] I have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusions and have nothing to add.

LAING JA (AG)

[210] I have read the draft judgment of McDonald-Bishop JA. I, too, agree and have nothing to add.

MCDONALD-BISHOP JA

ORDER

1. The appeals are allowed.

2. The order made at para. [219] in the judgment of Lindo J ('the learned judge'), delivered in the Supreme Court on 13 December 2019, entering judgment for the claimants against all the defendants for the tort of defamation, is varied as follows:

   > "Judgment for the claimants against the 1st, 2nd and 5th defendants, and judgment for the 3rd and 4th defendants, Television Jamaica Limited ('TVJ') and CVM Television Limited ('CVM'), on the claim for the tort of defamation."

3. The costs orders made in the court below at para. [222] of the judgment, against the 3rd and 4th defendants, TVJ and CVM, are set aside.

Substituted therefor is an order that the said defendants, TVJ and CVM, are entitled to costs of the proceedings in the court below to be paid by the claimants on their respective claims.

4. 75% of the costs of the appeals to CVM and TVJ, to be agreed or taxed UNLESS a party is of the view that some other order for costs should be made.

5. The party seeking such other order as to costs should file and serve written submissions in that regard within 14 days of the date of this order, and any responding party should file its submissions within 14 days of service of the opposing party's submissions.

6. Unless the court receives submissions within 14 days of the date hereof, the order at para. 4 above as to costs of the appeal shall stand as the final order of the court.

7. The stay of execution of the judgment of the learned judge, granted by this court on 27 April 2020, is discharged, and any sums paid by the appellants in fulfilment of the conditions imposed for the stay of execution pursuant to the said order of the court shall be returned forthwith.

APPENDIX 1

CVM Television Limited's ground of appeal

"i. The learned judge erred in failing to have sufficient or proper regard to the public interest test set out in ***Reynolds v Times Newspaper Ltd*** in that:

a) the 4th Defendant had a social duty to publish the material to the public at large so that the public could be said to be entitled to the information;

b) in the circumstances the 4th Defendant met the required standard of journalistic responsibility [***Jameel v. Wall Street Journal Europe***];

c) the 4th Defendant merely reported on the fact of a police investigation, the position adopted by the police and the inclusion and involvement of the two public officials in the police's investigation and operations. In any event incriminating and illegal material etc. were found at the Claimants [sic] house

d) the 4th Defendant did not broadcast that the Claimants were actually charged with lottery scamming as found by the learned Judge at paragraph 140 but instead the publication communicated and surrounded the suspicion which the police had.

e) an approach to the Claimants was not necessary in the circumstances where the Claimants had been arrested, were unavailable and the matter was urgent – news being perishable commodity;

f) the source of the information was the police which indicated that it had carried out an investigation and which investigation commanded respect;

g) she found at paragraph 129 that the serious allegation would be understood by the reasonable television viewer as that the Claimants attracted the attention of the task force and were caught in the lotto scam dragnet were stated as facts by the 4th Defendant required verification and contact with the Claimants even though this was an accurate report

of the stage that the police investigation had reached and the position adopted by the police.

h) the fact that the police was, at the material time, of the view that the Claimants would be charged/prosecuted for scamming etc. having regard to its investigation was itself a matter of public concern.

i) there was an over emphasis (effectively sole emphasis) and insistence by the learned judge on the steps taken if any, to get the Claimants' account or comment notwithstanding uncontroverted evidence that the Claimants were not available and notwithstanding the position established in **Reynolds** and related cases [that] a finding that one or more of the '10 considerations' was not fatal to the public interest defence.

j) that the learned judge wrongfully concluded at paragraph 143 that there was no evidence or pleading to support that there was a duty to publish the words complained of in the public interest, and the public had an interest in receiving it, even though amongst other things she accepted that there was evidence that lottery scamming was a a common problem and had been the subject of a Dan Rather international feature and even though throughout her Judgment she accepted that the matter was one of public interest.

ii. The learned judge erred in finding that the 4th Defendant did not have a duty to make the broadcasts, notwithstanding her finding at paragraph 83 of the Judgment that '*it is clear that the Claimants attracted the attention of the Task Force and at the time they were taken into custody they were classified as 'top-tier actors'. The public would have been alerted to the fact that the men caught the attention of the task force having been part of their investigations related to the lottery scamming.*'

iii. The learned judge erred in not finding that the words complained of were not defamatory in circumstances where they were accurate representations of the status and existence of a police investigation in relation to lottery scamming which had been conducted involving and concerning the Claimants and persons directly and/or indirectly connected to them, and which investigation led to their arrests and the seizure of unlawful material etc., from their homes.

iv. That despite finding that there was no evidence that the publication of the offending words have affected the Claimants' standing in society, their political life or business the learned judge erred by making a finding for compensation anguish, humiliatation and injury to one's reputation which are very personal and unique to the person defamed.

v. That the learned judge fell into error in her assessment of the words uttered by Fabia Phillips-Lawrence in the CVM midday news (regarding the Claimants being caught in the lotto scam dragnet) as being assertions of fact even though she was entitled to conclude that the statement was, in its context, one which could only be reasonably be [sic] regarded as a comment, because a listener could be in no doubt that the imputation was an inference drawn by the 4th Defendant from the fact that the Claimants were arrested as a part of the police's stated general effort to eliminate lottery scams.

vi. That despite otherwise finding that the other words complained of in relation to the 4th Defendants' broadcasts were comments and that the matter was one of public interest, the learned judge erred by not finding that the relevant facts on which the comments were made would have been limited to the FACT OF THE POLICE INVESTIGATION AND THE POSITION THE POLICE HAD ADOPTED and not as she found the 'fact' of whether the Claimants were actually guilty.

vii. The learned judge erred by, at paragraph 117 of the Judgment applying the **Reynolds test** to the defence of fair comment imposing an obligation on the 4th Defendant to carry out investigations and verify information prior to broadcasting, and thereby deprived the 4th Defendant of the fair comment defence.

viii. That the learned judge erred by, at paragraphs 117 and 118 of the Judgment in imposing an obligation on the 4th Defendant to justify/establish the truth of the words complained of in circumstances where '*the Defendant who pleads fair comment does not take upon himself this burden; the issue is not whether the jury agrees with his opinion of the Claimant's conduct but whether it is a comment which might fairly be made on the facts referred to [Gatley on Libel and Slander – Eleventh Edition @ page 336 – para 12.3 –* ***Fair Comment distinguished from justification****]*

ix. The learned judge erred in not accepting that the presumption of damages to the Claimants' reputation had been rebutted by their own evidence, which evidence the learned Judge acknowledged.

x. That the learned judge in not relying on the authority of **Rantzen v. Mirror Group Newspaper** for the purpose of significantly reducing the award below the level of those awards which were granted in previous cases cited at the trial.

xi. The learned judge erred in granting awards in damages which were inconsistent with previous awards and which were not in keeping with any harm suffered."

APPENDIX 2

Television Jamaica Limited's ground of appeal

"a. The learned judge's decision is inconsistent with her findings that:

i. there was no dispute that the words ascribed to the Appellant concerning the Respondents were on a matter of public interest; [111]

ii. the matter is of national public importance; [134]

b. The learned judge erred as a matter of fact and/or law in her finding that the Appellant published misinformation and moreso on the basis that the Claimants were not charged with any offence in relation to lotto scamming.

c. The learned judge erred as a matter of fact and/or law in failing to take into account that at the time of the raids, press conference and broadcasts there was no specific offence relating to lotto scamming even though the activity was prevalent and a scourge on society and no assertion was made or reported that they would be charged for any such offence.

d. The learned judge erred as a matter of fact and/or law when she found that in relation to the Respondent Michael Troup, the Appellant did not observe the tenets of responsible journalism so as to be able to place reliance on the defence of 'Reynold's privilege' having regard to all the circumstances of the case including:

i. the items seized at his home and the admission of this Respondent that the items are normally associated with lotto scamming;

ii. the Appellant does not have to prove that the statement is true in order to avail itself of the defence of qualified privilege or Reynolds privilege;

iii. the evidence that the police are considered reliable sources in addition to the fact that the Minister of Information and the Minister of National Security were present at the press conference in effect authenticating the details provided;

iv. the Appellant's representative was among a group of journalists who pressed the Commissioner of Police for further

information in light of prior failed prosecutions and he declined to be more forthcoming on the basis that there was an ongoing investigation;

v. it was impossible for the Appellant's reporter Miss Shippy to get an interview from or the gist of the Claimant's story. This Respondent's evidence is that the raid started at 5:00 am and he was taken out of the premises in handcuffs;

vi. the Respondent remained in custody for the next five days;

vii. the matter was urgent and lit up the headlines nationally all day;

viii. the Appellant's constituents were present at the home and gave glowing commendations on air including stating that the Appellant is a good citizen.

ix. The judge erred as a matter of fact when she failed to look at all the circumstances as a whole including the fact that the raid was carried out by the Anti-Lottery Scamming Task Force and that their cars with those words were present at the Respondent's premises.

e. The learned judge erred as a matter of fact and/or law in awarding $11,000,000.00 to the Respondent Michael Troupe.

f. The learned judge erred as a matter of law when it found that the Appellant did not observe the tenets of responsible journalism in relation to the Respondent Sylvan Reid so as to be able to place reliance on the defence of 'Reynolds privilege' having regard to all the circumstances of the case including:

i. the items seized at the locations(s), where the items were found and the admission of the Respondent that the items are normally associated with lotto scamming and that this evidence that it would be naïve to suggest otherwise;

ii. the Appellant does not have to prove that the statement is true in order to avail itself of the defence of qualified privilege or Reynolds privilege.

iii. the evidence that the police are considered reliable sources in addition to the fact that the Minister of Information and the Minister of National Security were present at the press conference in effect authenticating the details provided;

iv. the Appellant's representative was among a group of journalists who pressed the Commissioner of Police for further information in light of prior failed prosecutions and he declined to be more forthcoming on the basis that there was an ongoing investigation.

v. it was impossible for the Appellant's reporter Miss Shippy to get an interview from or the gist of the Respondent's story. The raid started at 5:00 am and the Respondent's evidence is that he could not take or send out calls although he was permitted to take a one call. The Respondent's evidence is that he was in his yard but he was not free to leave. He was thereafter taken in the car to the soldier camp and then handcuffed and taken to the Freeport Police Station.

vi. The Respondent was in custody for the next five days. The matter was urgent and lit up the headlines nationally all day.

vii. The judge erred as a matter of fact when she failed to look at all the circumstances as a whole including the fact that the raid was carried out by the Anti-Lottery Scamming Task Force and that their cars with those words were present at the Respondent's premises.

g. The learned judge erred as a matter of fact and/or law in awarding $8,500,000.00 to the Respondent, Sylvan Reid.

h. The learned misunderstood the law and/or its application as regards the tenets of responsible journalism as laid down in the "Reynolds" case by adopting a restrictive interpretation such as to render the privilege meaningless and/or its application unclear.

i. The learned judge erred as a matter of fact and/or law in finding that the Appellant's comments should be based on statements that are proved to be true as there is no such burden on a defendant who pleads fair comment.

j. The learned judge erred as a matter of fact and law in her finding that the Appellant cannot rely on the Defence of qualified privilege because there is no duty to publish or broadcast charges of criminality to the public especially if they are not properly investigated or even made the subject of sufficient enquiry and where the comments of the Claimants were not sought having regard to all the circumstances of the case including:

i. the Appellant's right to freedom of expression as protected by the Charter and the freedom to receive, distribute information and ideas through any media.

ii. the immediate incarceration of the Respondent's;

iii. the importance of the matter to the public; and

iv. the police and the Minister of National Security.

k. The learned judge erred in all the circumstances in failing to apportion costs among the parties taking into account that there are additional causes of action in relation to some parties such as the Attorney General of Jamaica or to afford the Appellant a hearing on costs in this [sic] circumstances."