JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 21/98

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	**MARGARETMORRIS**	**1ST DEFENDANT/ APPELLANT**
AND	**THE GLEANER COMPANY LIMITED**	**2ND DEFENDANT/ APPELLANT**
AND	**KEN ALLEN**	**3RD DEFENDANT/ APPELLANT**
AND	**HUGH BONNICK**	**PLAINTIFF/ RESPONDENT**

John Vassell, Q.C., with Richard Ashenheim and Ingrid Mangatal
Instructed by **Dunn, Cox, Orrett & Ashenheim** for the Appellants

Dennis Goffe, Q.C., instructed by R. Manderson-Jones for the Respondent

October 13, 14, 15, 16, 1998, February 22, 23
September 20, 22, 23, 1999 & April 14, 2000

FORTE, P.:

On the 19th April, 1992, the article the subject of this action was published in the Sunday Gleaner. It was authored by Margaret Morris, the first defendant/appellant. The Sunday Gleaner is published by the second defendant/appellant, and the third

defendant/appellant was its Editor at the relevant time. The article is set out hereunder in full:

> "JCTC SUES BELGIAN MILK COMPANY
>
> THE Jamaica Commodity Trading Company (JCTC) has confirmed that they have filed suit against a Belgian company in respect of a breached contract to supply milk powder.
>
> The faxed response to the Sunday Gleaner from JCTC's Legal Officer, Karen Ford-Warner said: 'We do not feel ourselves able to answer your questions at this stage as the matter is in the hands of our attorneys who have already filed a court action.'
>
> The Newsletter Insight reported that the suit is for US$13 million and that the Belgian company Prolacto SA has filed a counter suit. Eagle Commercial Bank, named as a co-defendant with Prolacto in the Insight report, told the Sunday Gleaner that JCTC has withdrawn the suit against them.
>
> The Sunday Gleaner has learned that Mr. Alfred Rattray of Rattray Patterson Rattray is representing Prolacto.
>
> A source close to JCTC confirmed that the dispute centres on two supply contracts – the first for 3,000 tonnes at US$1,264 per tonne awarded in August 1990 and the second for the same amount at US$1325 per tonne agreed in December 1990.
>
> The attractive feature of both was that payment could be made in Jamaican dollars but the contracts were 'very unusual.' Both were cash contracts and as such, prices were lower than average in a recovering and volatile world market.
>
> In respect of the first contract, JCTC was required to lodge the full amount (over J$30.2 million) in Eagle Commercial Bank and appropriate disbursements from the deposit were to be credited to Prolacto's account at the time of each shipment leaving Europe. At the same time, interest on the deposit was paid to JCTC.

In the second deal Prolacto demanded that the interest on the deposit of approximately J$31.8 million should accrue to their account.

According to one authoritative source, 'nobody at JCTC could be so mad as to agree to that.' He also contended that the contracts were arranged without the normal participation of the Purchasing Department and that Prolacta was not on JCTC's list of approved suppliers.

Mr. Hugh Bonnick, then managing director of the JCTC told the Sunday Gleaner that there had been a mistake in the implementation of payments on the first contract and interest should have gone to the suppliers, not to JCTC. He said that he had 'opened up the restricted lists' of all suppliers when he assumed the position at JCTC.

Mr. Bonnick also emphasised that the Prolacto contracts were both put out to tender, evaluated and awarded according to the rules and that the auditors were present on all occasions. He indicated that he will sue anybody who suggests otherwise. Mr. Bonnick's services as managing director were terminated shortly after the second contract was agreed.

An authoritative source pointed out other departures from the norm in respect of these contracts: the fact that Prolacto was late in starting delivery and then requested a price hike to cover increased transportation costs because of the Gulf War. Much pressure was brought to bear on JCTC officers to accede to this request but the Sunday Gleaner was unable to find out the actual outcome.

The second contract was agreed just weeks after delivery on the first contract had started. In the absence of any official release, it is assumed that Prolacto terminated supplies when JCTC refused to agree to release their financial conditions – for example agreeing to Prolacta getting the bank interest.

Skim milk under these contracts is supplied to the condensery and ice-cream manufacturers and the import price impacts heavily on the cost of living."

The respondent thereafter filed this action in defamation alleging that the words of the article in their natural and ordinary meaning would be understood to mean:

> "(a) The Plaintiff's services as Managing Director of Jamaica Commodity Trading Company Limited (JCTC) were terminated because of his impropriety in the formation, conclusion and implementation of very unusual contracts with Prolacta SA for the supply of milk powder.
>
> (b) The Plaintiff caused the contracts to be entered into and implemented irregularly and in breach of normal procedures.
>
> (c) The Plaintiff acted irregularly and improperly in having JCTC enter into these very unusual contracts without the normal participation of the Purchasing Department and with a company which was not on JCTC's list of approved suppliers.
>
> (d) The Plaintiff is insane or stupid and would be so viewed by an authoritative source insofar as the Plaintiff agrees that under the contracts interest should have gone to the suppliers.
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> (e) The Plaintiff is insane, stupid or incompetent in having JCTC enter into contracts in which the supplier could be entitled to interest on the deposits.
>
> (f) The Plaintiff is guilty of impropriety and irregularity in bringing pressure to bear on JCTC officers to accede to requests from the supplier which were departures from the norm and irregular."

He also alleged inter alia that by the publication of the words, he had been much injured in his credit and reputation and has been brought into public scandal, odium and contempt.

In determining the natural and ordinary meaning of words in a libel action, the Court should not be concerned with the fact that a combination of words may mean

different things to different people but must give the "right meaning" to those words, the "right meaning" being the meaning which an ordinary reasonable fair-minded reader would give to them.

This principle was settled in the House of Lords case of ***Charleston v. News Group Newspapers Ltd and another*** [1995] 2 All E.R. 313. The following dicta of Lord Bridge at page 317 speaks clearly to this principle. He stated:

> "... where no legal innuendo is alleged to arise from extrinsic circumstances known to some readers, the 'natural and ordinary meaning' to be ascribed to the words of an allegedly defamatory publication is the meaning including any inferential meaning, which the words would convey to the mind of the ordinary reasonable, fair-minded reader. This proposition is too well established to require citation of authority. The second principle, which is perhaps a corollary of the first, is that, although a combination of words may in fact convey different meanings to the minds of different readers, the jury in a libel action, applying the criterion which the first principle dictates, is required to determine the single meaning which the publication conveyed to the notional reasonable reader and to base its verdict and any award of damages on the assumption that this was the one sense in which all readers would have understood it."

In arriving at this conclusion, Lord Bridge for his second principle adopted the dicta of Diplock, L.J. (as he then was) in the case of ***Slim and Others v. Daily Telegraph, Ltd And Another*** [1968] 1 All E.R. 497. In that case as far back in time as 1968 Diplock, L.J. stated:

> "Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings. But none of this matters. What does matter is what the adjudicator at the trial thinks is the

> one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel."

The question therefore, is whether the words published in the article, in their natural and ordinary meaning as understood by an ordinary, reasonable fair-minded reader, would bear the meaning ascribed to them by the respondent, with the result of injuring the reputation of the respondent and bringing him into public scandal, odium and contempt.

The learned judge came to that conclusion thus:

> "It seems quite clear to me that the words mean and would be reasonably understood by the ordinary man to mean that the plaintiff, Managing Director despite his assertions that the contracts were put out to tender, evaluated and awarded according to the rules and his threat to sue anybody who suggests otherwise, an authoritative source close to JCTC states that the contracts were arranged without the normal participation of the Purchasing Department and without Prolacta being on JCTC's list of approved suppliers. As a result of these and other irregularities the plaintiff was dismissed as managing director shortly after the second contract was agreed.
>
> In my judgment, notwithstanding the submissions by Mr. Vassell to the contrary, the ordinary meaning pleaded by the plaintiff in paragraph 3 of the statement of claim is sustainable and that meaning is clearly defamatory.
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> The plaintiff is a Management Consultant by calling and the words in the article and their imputations are capable of disparaging him in his calling and if true they would in fact tend to disparage the plaintiff in his calling and injure his reputation or would tend to make people think the worse of him."

It is difficult not to agree with the learned judge's conclusion that the words would be understood by the ordinary reasonable reader to have the meaning ascribed to them by the respondent. In coming to this conclusion, the article has to be considered in

its full text. It alleges that on the second contract, interest by agreement was paid to the suppliers, Prolacto, in circumstances where an "authoritative source" at the JCTC expressed the view that "nobody could be so mad as to agree to that." To the ordinary reasonable man this must have conveyed the meaning that some improper motive would have been present if anyone at JCTC had agreed to that; or at the least some careless or less than sensible person must have done so. The article then alleges another irregularity in that it states the "authoritative source", as saying that the contracts were entered into without the normal participation of the purchasing department, and this in circumstances where Prolacto, the awardee of the contract was not on JCTC's list of approved suppliers. Later in the article it alleges that Prolacto was late in starting deliveries, and requested a "price hike" to cover increased transportation cost and that pressure was brought to bear on JCTC's officers to accede to the request. In my view, the meaning that the ordinary reasonable man, would ascribe to this is that the respondent entered into contracts with Prolacto which was not on the list of suppliers, giving them unusual benefits to wit the interest on the deposit in respect of the second contract, and concluding the contract without the normal procedure which required the participation of the purchasing department.

The article states the respondent's account that interest was properly paid to the supplier in the second contract and that he had opened up the restricted list of all suppliers when he assumed his position at JCTC. It also stated that the respondent maintained that the contracts were put out to tender, evaluated and awarded according to the rules. It then erases all "balance" that those disclosures may have given to the article, by immediately thereafter stating that the services of the respondent were

terminated shortly after the second contract. This in my view, would convey to the ordinary reasonable reader that the respondent was dismissed because of the irregularities disclosed in the article and this inspite of his contention that the contracts were entered into in keeping with the rules. To compound it, the author omits to publish in the article the contention of the respondent that his dismissal was in no way connected to the contracts.

I would agree with the conclusion arrived at by the learned Judge that the natural and ordinary meaning pleaded by the respondent in paragraph 3 of his Statement of Claim is sustainable and clearly defamatory.

QUALIFIED PRIVILEGE

I turn now to deal with the question of qualified privilege, and propose to deal at the same time with the second ground of appeal of the appellants, as well as the respondent's notice. In coming to his conclusion the learned judge found that the occasion of the publication was privileged, but that the appellants were guilty of malice, and so found in favour of the respondent.

The appellants now challenge the finding that the defence of qualified privilege was defeated by express malice on their part. On the other hand, the respondent challenges the finding of the learned judge, that the publication was the subject of qualified privilege.

The law has always recognized that an individual's reputation is a cherished asset, and that there should be no debasing of that reputation, by the publication by another, of reports which are untrue and which brings that person into disrepute and lower him in the estimation of right thinking members of the society. As a result, a

person so defamed has a cause of action against the author of such a report. However, in certain circumstances, where depending on the occasion on which such a publication is made, the law recognizes that the author would enjoy a position of privilege, either absolute privilege in which event he would be free from liability, or qualified privilege which would remove a presumption of malice on the part of the author, and place the burden on the plaintiff to show that though the occasion was privileged, the author acted by reason of express malice, and therefore would nevertheless be liable to the plaintiff in damages.

A good starting point in the development of this principle is the case of ***Toogood v. Spyring*** decided on June 5, 1834, and conveniently reported in [1824-34] All E.R. Rep. 735. It is sufficient for these purposes to refer to the following dictum of Baron Parke in delivering the judgment of the Court of Exchequer in which the case was brought. He stated at p. 738:

> "... an action lies for the malicious publication of statements which are false in fact and injurious to the character of another ... and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice."

Baron Parke expressed the opinion that to remove the inference of malice the publication must have been fairly made by a person in discharge of a public or private duty, whether legal or moral. Significantly, Baron Parke spoke of no requirement that the recipient of the statement should have an equal interest or duty to be informed of the

subject matter of the statement, and was content to say that the statement must be made by the author "in the conduct of his own affairs, in matters where his interest is concerned". However, in March 1917 Lord Atkinson made this condition quite clear in his speech in the House of Lords in ***Adam v. Ward*** [1916-17] All E.R. Rep. 157 at page 170:

> "It was not disputed in this case on either side that a privileged occasion is, in reference to qualified privilege, 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 made has a corresponding interest or duty to receive it. This reciprocity is essential. Nor is it disputed that a privileged communication, a phrase often used loosely to describe a privileged occasion, and vice versa, is a communication made upon an occasion which rebuts the prima facie presumption of malice arising from a statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact ...".

Lord Atkinson then credits this dictum to Baron Parke made in the case of ***Wright v. Woodgate*** [1835] 2 Cr. M & R at page 577.

As the law developed, more recognition was given to the individual's right to express an opinion and to report on matters which were of interest to the public, particularly in matters which it was felt that the author had a duty to bring to the public's notice, and of which the public had an equal duty and interest to be informed. The Courts therefore had to balance the competing rights of the individual, to freedom of expression, as against the individual's right not to have his reputation tarnished, and consequently, the right also to have his reputation vindicated. Lord Diplock in the case of ***Horrocks v. Lowe*** [1975] A.C. 135 recognized this in his speech in the House of Lords at page 149:

> "The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion."

In an effort to balance these two competing rights and to determine whether the occasion of the publication of a statement is privileged, the Court must look at all the circumstances of the case in order to ascertain whether –

(i) the maker of the statement had a duty or an interest either legal, social or moral to make it to the person to whom it is made and

(ii) the persons to whom it is made had an equal interest or duty to receive it.

In this regard Dunn, L.J. in the case of ***Blackshaw v. Lord*** [1983] 2 All E.R. 311 at 334 had this to say:

> "This review of the authorities shows that, save where the publication is of a report which falls into one of the recognised privileged categories, the court must look at the circumstances of the case before it in order to ascertain whether the occasion of the publication was privileged. It is not enough that the publication should be of general interest to the public. The public must have a legitimate interest in receiving the information contained in it, and there must be a correlative duty in the publisher to publish, which depends also on the status of the information which he receives, at any rate where the information is being made public for the first time."

On the question of the status of the information Stephenson, L.J. in the above cited case expressed the view (page 327) that "where damaging allegations or charges have been made and are still under investigation or have been authoritatively refuted

there can be no duty to report them to the public." There would of course be the extreme case, where for instance the urgency of communicating a warning is so great or the source of the information so reliable that publication of suspicion is justified e.g. distribution of contaminated food.

I turn now to a consideration of the case of ***Reynolds v. Times Newspaper Ltd and Others*** [1999] 4 All E.R. 609. At the end of the arguments in this appeal, counsel on both sides requested that this decision should await the decision in the ***Reynold's*** case (supra). This request was granted.

The primary consideration in that case, concerned the question of whether a new or generic category of privileged occasion concerning political information should be developed. The House of Lords ruled against this contention but in any event that does not concern the issues in this case. The other point was the validity of the Court of Appeal's stressing the importance of the factors of the nature, status and source of the material published and the circumstances of the publication, and treating them as matters going to a question separate from and additional to the conventional duty-interest questions, a test which the Court of Appeal called "the circumstantial test". In rejecting this test Lord Nicholls in his speech at page 619 stated:

> "With all respect to the Court of Appeal, this formulation of three questions gives rise to conceptual and practical difficulties and is better avoided. There is no separate or additional question. These factors are to be taken into account in determining whether the duty –interest test is satisfied or, as I would prefer to say in a simpler and more direct way, whether the public was entitled to know the particular information. The duty-interest test, or the right to know test, cannot be carried out in isolation from these factors and without regard to them. A claim to privilege stands or falls according to whether the claim passes or fails this test. There is no further requirement."

The above dictum recognizes however that the nature, status, and source of the material published, and the circumstances of the publication are all factors to be considered in determining whether the public was entitled to know the published information. The House, in detailed speeches of the learned Law Lords, once again confirmed the "duty-interest" test, as described by Lord Nicholls. In this regard the speech of Lord Nicholls sets out the matters to be considered in determining whether the occasion of the communication is privileged. Though the learned Law Lord was cautious enough to indicate that the list is not exhaustive I set it out hereunder:

(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 concern.

(3) The source of the information

(4) The steps taken to verify the information

(5) The steps of the information

(6) The urgency of the matter

(7) Whether comment was sought from the plaintiff

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

(9) The tone of the article

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

Lord Nicholls was also concerned that the Court in these cases should have particular regard to the importance of freedom of expression, opining that the press discharges vital functions as "a bloodhound as well as a watchdog." This of course is giving

emphasis to the competing interest as has been adumbrated in the earlier cases. A man's reputation the cases suggest will sometimes have to give way to another's right to freedom of expression especially in circumstances which establish the particular communication as having been made on a privileged occasion. The following dicta of Lord Nicholls in the ***Reynold's*** case (supra) at page 622 in this regard is of relevance:

> "Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.
> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others."

On the basis of the principles of law expressed heretofore, I now turn to consider the instant case and whether the learned judge was correct in concluding that the

occasion of the publication was a privileged occasion. But first, I must refer to the learned judge's conclusion in this regard. He stated:

> "The law provides that statements that are made fairly by a person in the discharge of some public or private duty, whether legal or moral are protected. However, the privilege is lost if the defendant was actuated by malice or an improper motive, either by intrinsic or extrinsic evidence of the circumstances in which the statement was made.
>
> The plaintiff has agreed that if the Managing Director was dismissed for impropriety that would be a matter of public interest. He agreed that the press had a duty to report matters of public interest. This moral duty of the defendant and its reporter to publish matters of public interest is implicitly recognised in the cases: ***Trevor Munroe v. The Gleaner Company*** S.C.C.A. 67/89 and ***Smart v. Sibbles and the Gleaner Company*** S.C.C.A 32A and 32D of 1979. It follows in the instant case, that the fact that the JCTC is a public institution is sufficient to make the conduct of its management in their office a matter of public interest and the occasion is therefore privileged."

The learned judge came to his decision, it appears, merely on the basis that the JCTC is a public institution and consequently the management of the office was a matter of public interest. This simple conclusion seems to avoid a consideration of all the circumstances in order to determine whether the respondents had a moral, social or legal duty to publish the article and that the public had an interest in hearing the information therein. There is no doubt that the JCTC was a public company charged with the important public duty of importing many necessary products into the island, and consequently any irregularity in the management of the company, would necessarily be a matter which would be of great concern to the public. That by itself, however would not necessarily give the publication the status of qualified privilege, as the occasion of the publication may not acquire that status, given other circumstances under which the

statement was published. Such circumstances may exist for instance where the article was published without the required investigation into the allegations, or without consulting the plaintiff as to his/her account, or having done so, omitting to publish it. As Lord Nicholls indicated in the ***Reynolds*** case (supra) there are a number of considerations, depending on the circumstances, before a conclusion as to a public or private duty to inform, can be concluded. In the instant case, the appellant Morris, in her testimony, averred that her source was a usually reliable source from the offices of the JCTC. Having consulted with the plaintiff, who gave her an entirely different account, she made no further investigation in order to get to the truth of the allegations but chose to publish both accounts so that "people could make up their minds." In my view the protection of the reputation of the plaintiff, demanded that further investigation be undertaken to discover further facts which may have given confirmation to the plaintiff's account, given the uncertainty of the appellant's source of information.

Significantly the learned judge made a finding adverse to the appellants in this regard, though he did so in determining whether malice had been proven. Here follows what he stated:

> "I accept Dr. Manderson-Jones submission that the defendant at this stage would be duty bound to make further enquiries either of her anonymous source or of an independent source, rather than go to print with unverified and contradicted defamatory allegations against the plaintiff. However in as much as she believed the plaintiff's statement she could not possibly have believed that of her annoymous source on the disputed facts of 'departures from the norm'. In the circumstances there was neither any need for further enquiry nor for her to print the allegations which she clearly did not honestly believe to be true in view of her belief in the truth of the plaintiff's statement."

This finding in relation to the question of malice is a finding which in my view goes to the question of whether the occasion was privileged. It was argued in the ***Reynold's*** case (supra) that such a matter was properly considered on the question of malice, counsel relying on the following passage in the judgment of Lord Buckmaster, L.C. in ***London Association for Protection of Trade v. Greenlands Ltd*** [1916] 2 A.C. 15 at 23, [1916-17] All E.R. Rep. 452 at 456:

> "Again, it is, I think, essential to consider every circumstance associated with the origin and publication of the defamatory matter, in order to ascertain whether the necessary conditions are satisfied by which alone protection can be obtained, but in this investigation it is important to keep distinct matter which would be evidence of malice, and matter which would show that the occasion itself was outside the area of protection."

In answering this point, Lord Cooke expressed disagreement with the contention. He said:

> "Hitherto the only publications to the world at large to which English courts have been willing to extend qualified privilege at common law have been fair and accurate reports of certain proceedings or findings of legitimate interest to the general public. In ***Blackshaw v. Lord*** [1983] 2 All E.R. 311, [1984] QB 1, ***Templeton v. Jones*** [1984] 1 NZLR 448 and now the present case, the law is being developed to meet the reasonable demands of freedom of speech in a modern democracy, by recognising that there may be a wider privilege dependent on the particular circumstances. For this purpose I think it reasonable that all the circumstances of the case at hand, including the precautions taken by the defendant to ensure accuracy of fact, should be open to scrutiny." (Emphasis added)

In this statement Lord Cooke was endorsing the dicta of Lord Nicholls in the same case, Lord Nicholls having itemized as two of the matters to be considered in determining the

question of qualified privilege (i) the steps taken to verify the information and (ii) the status of the information.

In my view this finding of the learned judge, is sufficient upon which he ought to have concluded that the occasion of the publication of the article was not privileged for the reason that the public cannot be said to have an interest in a report which is the subject of inadequate investigation and made in circumstances where the report itself demonstrates that further investigation ought to have been undertaken. Nor can the lack of further investigation be excused for the purpose of urgency for this report came a long time after the events described in the article had taken place and a law suit had already been filed in the matter between JCTC and its supplier. Additionally, although the respondent's account was outlined in the article, it was followed by information which stated as follows:

> "Mr. Bonnick's services as managing director were terminated shortly after the second contract was agreed."

This was published despite the fact that in Miss Morris' interview with the respondent, she was told by the respondent that the termination of his contract had nothing to do with the Prolacto contracts which were the subject matter of the article. The omission to report the respondent's assertion in that regard found no place in the article instead the information about his dismissal was juxtaposed in the article, in such a way as to leave the clear impression that there was a connection between the two, and that it was his conduct in relation to the Prolacto contracts that led to his demise. In my judgment, given all the circumstances surrounding the publication of this article, the learned judge fell into error when he found that the occasion was privileged.

In any event the evidence supports the finding of the learned judge that the respondent at the end of the case had proven malice in the appellant.

In ***Horrocks v. Lowe*** [1975] A.C. 135 at 149 Lord Diplock in dealing with the question of malice stated thus:

> "The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.
>
> Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false."

The appellants on this point rely on the dicta of Carey, J.A. in the case of ***Caven v. The Gleaner Co*** [1983] 20 J.L.R. 13. In that case, the Court was dealing with a case of statutory privilege, concerning a report of a speech made at a public meeting, and where the editor of the defendant's newspaper admitted that he did not believe that the statements made at the meeting were true. The issue was whether the admission was sufficient to prove malice.

After examining the authorities including ***Horrocks v. Lowe*** (supra) and ***Botherhill v Whitehead*** [1879] 41 L.T. 585, Carey, J.A. concluded as follows:

> "It seems to me therefore beyond dispute that in point of law a belief in the falsity or for that matter, the truth of the

> allegations contained in the defamatory matter, is not decisive of malice vel non where the occasion is one of privilege. What is to be borne in mind is the occasion of qualified privilege is not to be used for a purpose other than that which is relevant to the occasion."

The learned judge of appeal was saying no more than that the belief in the falsity of the report, is not necessarily sufficient to prove malice, and as he later stated "the search for the motive for publication is a question of fact and must be determined by a consideration of the particular facts and circumstances of the case." This is not inconsistent with the dicta of Lord Diplock in ***Horrocks v. Lowe*** (supra) as that learned Law Lord did say that it is "generally" conclusive evidence of malice. In the instant case, the learned judge did not find the existence of malice merely upon the admission of the appellant Morris that she believed the account of the respondent and by inference that she did not believe the "reliable" but anonymous source in the disputed facts of "departures from the norm". While he put that into the equation he considered other matters which led him to his conclusion. His finding of malice is also supported by the inclusion in the article of information concerning the termination of the respondent's employment in such a way as to create the inference that his termination was connected to the Prolacto contracts. This is compounded by the fact that the author of the article, who testified that she believed what he had said, nevertheless omitted from the article the fact that she was told by him that there was no such connection.

In my view, the evidence supports the finding that the appellant Morris published the statements as to the irregularities, either knowing that they were false, or being reckless as to whether they were or not. In respect to the respondent's dismissal, she published it in the article giving a clear impression that his dismissal was connected to

the Prolacto contract, well knowing from her interview with him that his dismissal had nothing to do with it. The latter demonstrates that the article was not published out of a moral, legal or social duty to do so, but out of some extraneous motive to inform the public that the respondent had been dismissed because of irregularities. I would consequently agree with the learned judge that malice was proved.

In conclusion, I reiterate that though there was sufficient evidence to ground the learned judge's finding of malice, such a consideration in my judgment was not necessary as the evidence does not support his finding that the defence of qualified privilege availed the appellants.

JUSTIFICATION:

To understand the complaint by the appellants on this point it is necessary to set out extracts from the written submissions of counsel. It states as follows:

> "In the orthodox plea of justification the Defendant seeks to justify the sting of the libel as pleaded by the plaintiff or some other sting which the Defendant sets out in his defence together with the facts which justify it or them. In this case, the Appellants did not plead justification in this sense. What was pleaded was that the words in their ordinary meaning are true but they conveyed no defamatory sting whatever – neither those pleaded by the Plaintiff nor any other meaning."

This contention seems to be a repetition of the first ground that the words used in the Article in their ordinary meaning conveyed no defamatory sting, but with an addition that the words used, given their ordinary meaning are nevertheless true. Any consideration of this contention, must by necessity be consistent with the finding in the first ground that the words in their ordinary meaning are defamatory. A determination of whether there was justification i.e. that they conveyed the truth, must be on the basis of

the meaning given to them in the consideration of that ground. In my view the sting of the article is that the respondent was fired by JCTC because of irregularities in which he was involved, a view which is consistent with that of the findings of the learned judge. On that basis the learned judge made a detailed analysis of the evidence in determining whether the truth of the statements in the article was proved, and came to a negative finding which was supported on the evidence.

In this ground, the appellants attempt to state that their plea of justification was based on the ordinary meaning of the words, as they have advanced. That having been rejected, this ground must fail.

DAMAGES:

In determining the quantum of damages to be awarded in a libel action such as this, the primary consideration must be the vindication of the plaintiff for the damage to his reputation which is man's most cherished asset. Consequently, consideration as to how serious the libel is, the degree of damages done to the plaintiff's reputation, the magnitude of the publication, any genuine apology offered including a declaration of the falsehood of the publication, and in some cases any injury to his mental health which is directly connected to the libel are some of the factors to be taken into account, this of course not being an exhaustive list, as each case has to be considered on its own facts.

The appellants complain that the award of $750,000 by the learned judge is excessive, inordinate and arbitrary. The ground then states:

> "It is arbitrary because the award was not based upon any authority or stated principle and is in fact against the weight of several local and regional appellate cases which were cited to the learned judge and which he did not refer to in his judgment."

The omission to refer to cited cases, cannot per se be a cause of interfering with a decision of a court except of course it demonstrates the judges error in coming to some incorrect finding in law. The appellants however, argue that the judge ought to have found some guidance in the cited cases. In my view it is difficult given the nature of libel and its effects which must have direct bearing on the particular circumstances, including the person defamed as also the occasion and magnitude of the publication, to be guided by another case in which different circumstances existed. Even of more difficulty, would be to use decisions in other countries as guidelines to damages in our jurisdiction. This would be unwise given the difference in cultural backgrounds and the variation in the ability to publish the material to greater or lessor audiences depending on the size of the country.

I would be constrained therefore to look only at cases decided in this jurisdiction, in so far as the facts and resulting award of damages are concerned, but having said so, I must emphasise that the same would not apply in looking at principles of law which deal with the method by which damages are to be assessed. On this aspect, I agree with the following statement of Carberry, J.A. in the case of ***The Gleaner Company Ltd v. Small*** [1981] 18 J.L.R. 347, at page 370:

> "It is clear then what are the principles which the Court of Appeal applies in reviewing the award of damages made by a judge sitting alone. It is in general reluctant to do so unless it comes to the conclusion that the judge has acted on some wrong principle of law, as by taking into account some irrelevant factor or leaving out of account some relevant one, or has misapprehended the facts, or made a wholly erroneous estimate of the damage suffered. Further, if the appeal court thinks the damages are radically wrong, it ought to interfere even if the error cannot be pinpointed."

In respect of the cases from this jurisdiction relied on by counsel for the appellants with perhaps the exception of the case of ***Hopeton Caven v. Dr. Trevor Munroe*** Suit C.L. 1975/C043, I find great difficulty in concluding that the damages awarded therein even when approved or substituted by this Court [($5000 in the ***Small*** case (supra)] would be adequate guidelines in determining the correctness of the learned judge's award in this case. This view gets some support from the dicta of Sir Thomas Bingham, M.R. in the case of ***John v. MGN Ltd*** [1996] 2 All E.R. 35 at p. 51:

> "... As was pointed out in the course of argument, however, comparison with other awards is very difficult because the circumstances of each libel are almost bound to be unique."

I say so for the additional reason that the economic decline in Jamaica aggravated by the massive decrease in the value of the Jamaican dollar since those cases were decided, even with a calculation of money values then, as opposed to the present would result in the range of damages awarded in those cases being completely inadequate to vindicate the damage done to the respondent's reputation.

I turn now to a determination as to whether the complaint made in relation to the award of $750,000 in damages to the respondent is valid. In doing so I must have regard to the criteria stated above with specific consideration as to how this particular libel touches the respondent's personal integrity, professional reputation and honour (See ***John v. MGN Ltd*** (supra))

In this regard the learned judge found that after the publication the respondent's business associates shied away from him because they were having reservations about his reputation and in relation to "overseas people", the reaction was worse. Invitations

to social functions to which he was accustomed ceased. The learned judge also took into consideration the following:

(i) The publication was in a newspaper which enjoyed wide circulation in Jamaica and overseas.

(ii) The article was published on the front page of the newspaper.

(iii) The effect the article had on the respondent.

(iv) The words used in the article.

(v) The persistence of the plea of justification even at the trial.

In stating (v) the learned judge commented that such a situation attracted aggravated damages which suggests that the amount awarded included aggravated damages.

Given these findings can it be said that the damage is "excessive, inordinate and arbitrary"?

Firstly, some mention should be made of the ***Caven*** case (supra) cited by counsel for the appellant. In that case it was alleged in a statement made by the defendant Dr. Munroe, a trade unionist who had been attacked and wounded, that the attack was instigated and planned by Hopeton Caven a rival trade unionist. Liability was conceded and damages of £25,000 awarded to Caven. That figure as calculated by counsel would be equal to $700,000 in 1998, at the date of trial of this case. Mr. Vassel however contended that that was a more serious libel than the instant case. I do not agree. The respondent has been accused of indulging in irregularities concerning the

importation of goods on behalf of the government, irregularities which are capable of suggesting corruption. This, the article implied led to the termination of his employment. In my view the effect of the libel would not be greater in any of the two cases. In the event I would not be moved by that reason to interfere with the judge's finding in damages.

It is obvious that the article had a great effect on the respondent's relationship with his peers and that the latter held him in very low esteem as a result of the publication. The content of the article concerned his integrity and attacked him in respect of the conduct of his managerial duties, which would necessarily affect his ability to be so employed in the future without receiving vindication for the libel committed upon him. There has been no apology nor any offer of one. On the other hand, though the appellants pleaded justification and continued in that plea at the trial, the contention related to the meaning of the words which the appellants contended for, and the plea of justification, they expected, could only succeed if the meaning they put on the words were accepted by the Court. Apart from that, there was no serious attempt to prove justification, the real thrust of the appellants' case being that the occasion of the publication was privileged. In addition, the respondent admitted in evidence that his services were terminated, though not for the reason inferred in the article, but because the new Minister wanted his "own man."

In my judgment, in these circumstances the learned judge erred in considering the plea of justification and a "persistence in that plea at trial" as a reason for aggravated damages.

For those reasons I would find that the damages awarded is excessive and substitute therefor a sum of $650,000. I would dismiss the appeal with a variation in the judgment which would substitute a sum of $650,000 in damages and award costs to the respondent to be taxed if not agreed.

DOWNER, JA.

The appellants are Margaret Morris who is a journalist employed by the Gleaner Company Limited, the publisher of the Sunday Gleaner and Ken Allen its Editor. They are aggrieved by damages of $750,000 awarded for libel by Langrin J. to Hugh Bonnick, a Management Consultant. It is necessary to cite in full the article in the Sunday Gleaner of 19th April, 1992 as the appellants relied on the whole article in their defence while the respondent, Bonnick pleaded it fully save for three paragraphs in his Statement of Claim. The article was introduced in paragraph 2 of the Statement of Claim thus:

> "2. On the 19th day of April, 1992, the Defendants falsely and maliciously wrote, printed and published on page 1 of the issue of the said newspaper dated that day, of and concerning the Plaintiff the words following, that is to say:
>
> JCTC SUES BELGIAN COMPANY
>
> BY MARGARET MORRIS
> Sunday Gleaner Staff Reporter
>
> THE Jamaica Commodity Trading Company (JCTC) has confirmed that they have filed suit against a Belgian company in respect of a breached contract to supply milk powder.
>
> The faxed response to the Sunday Gleaner from JCTC's Legal Officer, Karen Ford-Warner said 'We do not feel ourselves able to answer your questions at this stage as the matter is in the hands of our attorneys who have already filed a court action.'
>
> The newsletter Insight reported that the suit is for US$13 million and that the Belgian company Prolacto SA has filed a counter suit. Eagle Commercial Bank, named as a co-defendant with Prolacto in the Insight report, told the

Sunday Gleaner that JCTC has withdrawn the t against them.

The Sunday Gleaner has learned that Mr. Alt Rattray of Rattray Patterson Rattray is representing Prol

A source close to JCTC confirmed that t e a. pute centres on two supply contracts – the first for 3,000 tonnes at US$1,264 per tonne awarded in August 1990 and the second for the same amount at US$1325 per tonne agreed in December 1990.

The attractive feature of both was that payment could be made in Jamaican dollars but the contracts were "very unusual. Both were cash contracts and as such, prices were lower than average in a recovering and volatile world market.

In respect of the first contract JCTC was required to lodge the full amount (over J$30.2 million) in Eagle Commercial Bank and appropriate disbursements from the deposit were to be credited to Prolacta's account at the time of each shipment leaving Europe. At the same time, interest on the deposit was paid to JCTC.

In the second deal, Prolacto demanded that the interest on the deposit of approximately J$31.8 million should acrue to their account.

According to one authoritative source, 'nobody at JCTC could be so mad as to agree to that.' He contended that the contracts were arranged without the normal participation of the Purchasing Department and that Prolacto was not on JCTC's list of approved suppliers.

Mr. Hugh Bonnick, then managing director of the JCTC told the Sunday Gleaner that there had been a mistake in the implementation of payments on the first contract and interest should have gone to the suppliers not to JCTC. He said that he had "opened up the restricted lists" of all suppliers when he assumed the position at JCTC.

Mr. Bonnick also emphasised that the Prolacto contracts were both put out to tender, evaluated and awarded according to the rules and that the auditors were present on all occasions. He indicated that he will sue anybody who

> suggests otherwise. Mr. Bonnick's services as managing director were terminated shortly after the second contract was agreed.
>
> An authoritative source pointed out other departures from the norm in respect of these contracts: the fact that Prolacto was late in starting delivery and then requested a price hike to cover increased transportation costs because of the Gulf War. Much pressure was brought to bear on JCTC officers to accede to this request but the Sunday Gleaner was unable to find out the actual outcome.
>
> The second contract was agreed just weeks after delivery on the first contract had started. In the absence of any official release, it is assumed that Prolacto terminated supplies when JCTC refused to agree to release their financial conditions – for example agreeing to Prolacto getting the bank interest.
>
> Skim milk under these contracts is supplied to the condensery and ice-cream manufacturers and the import price impacts heavily on the cost of living."[Emphasis supplied]

An important fact to note was that when the article was published on April 19, 1992 Bonnick was no longer employed to JCTC and this fact was expressly stated. He had left December 24, 1990. The other important date to note was that legal proceedings between JCTC and Prolacto were commenced on 28th August 1991.

Was the finding that the article contained a libel correct?

In determining this issue valuable guidance can be found in the dicta of the judges in **Slim v. Daily Telegraph Ltd.** [1968] 2 Q.B. 156. At 187-188 Salmon L.J. said:

> "No doubt, even when a libel action has been tried by a judge alone an appellate tribunal may sometimes approach the case by considering, as a matter of law, whether the words complained of are capable of the defamatory meaning which they have been found to bear. If they are, the appellate tribunal will not lightly interfere with the

> judge's finding of fact. If however, the appellate tribunal is satisfied that the judge's finding of fact is wrong, it is its duty to reverse him. There is no sensible reason why a judge's finding of fact in a libel action should be more sacrosanct than in any other action. For the reasons I have indicated, I am as satisfied as I can be that the judge's decision was wrong. I say "as I can be" because I am very conscious of the difficulty which a judge faces in trying to ascertain the meaning which the ordinary layman would attribute to words which he reads in his newspaper. Much of a judge's time is spent in construing statutes and legal documents – an apparently similar task to the one which now confronts us, but a task which, in reality, requires a different technique."

Then Diplock L.J. supplies the answer as to how a judge without a jury should approach the task. At page 176 His Lordship put it thus:

> "But where a judge is sitting alone to try a libel action without a jury, the only questions he has to ask himself are: "Is the natural and ordinary meaning of the words that which is alleged in the statement of claim? And: 'If not, what, if any, less injurious defamatory meaning do they bear?"

Then earlier the learned Lord Justice said at 173:

> "Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings. But none of this matters. What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel."

Lord Denning M.R. approached the matter thus at page 168:

> "In the first place, I think that, when a plaintiff complains of the words in their natural and ordinary meaning, he must accept that meaning as it is with all the derogatory

> imputations that it conveys. He cannot select some of the imputations and reject others as he pleases. The reason is because, when he complains of libel, he complains of the injury which the words do to his reputation in the minds of the ordinary reader."

Then the Master of the Rolls continues:

> "Now the ordinary reader takes the imputations as a whole. He does not divide them up into bits. Nor should the plaintiff be able to do so. It is not a case where he is relying on any other defamatory sense, such as to require particulars under R.S.C., Ord. 19, r. 6 (2), now R.S.C. (Rev. 1965), Ord. 82, r. 3 (1). He is relying on the natural and ordinary meaning of the words. In such case the customary form of pleading has been for the pleader to say: 'That the said words meant and were understood to mean' so and so, setting out all the derogatory imputations that he can think of. Such has always been the practice to my certain knowledge. The pleader in my time at the Bar never tried to select some of the imputations and reject others: and I do not think he should be allowed to do so now. I find nothing in ***Lewis v Daily Telegraph Ltd. [1964] A.C. 234; [1963] 2 W.L.R. 1063; [1963] 2 All E.R. 151, H.L.(E.)*** to warrant it. When the defendant comes to plead his defence, he cannot select some of the imputations and reject others. If he justifies, he pleads in the customary form: The said words in their natural and ordinary meaning were true in substance and in fact' without specifying any particular imputations. So we see that, in the customary form of pleading, neither plaintiff nor defendant is allowed to make selections of some of the derogatory imputations. Each must accept the words as conveying all such imputations as the jury think they bear: and make his claim or defence accordingly. Only in this way can we avoid the complications which have disfigured this case."

I now put myself in the shoes of the ordinary reader and reading the article as a whole I do not find that they lowered Mr. Bonnick's reputation in the eyes of right thinking members of the community. Since, however, the learned trial judge found the words libellous, there must be cogent reasons for upsetting his findings of fact.

Turning to the Statement of Claim to ascertain Bonnick's case it reads:

"3. By the said words in their natural and ordinary meaning the Defendants meant and were understood to mean:

(a) The plaintiff's services as Managing Director of Jamaica Commodity Trading Company Limited (JCTC) were terminated because of his impropriety in the formation, conclusion and implementation of very unusual contracts with Prolacto SA for the supply of milk powder.

(b) The Plaintiff caused the contract to be entered into and implemented irregularly and in breach of normal procedures.

(c) The Plaintiff acted irregularly and improperly in having JCTC enter into these very unusual contracts without the normal participation of the Purchasing Department and with a company which was not on JCTC's list of approved suppliers.

(d) The Plaintiff is insane or stupid and would be so viewed by an authoritative source insofar as the plaintiff agrees that under the contracts interest should have gone to the suppliers.

(e) The Plaintiff is insane, stupid or incompetent in having JCTC enter into contracts in which the supplier could be entitled to interest on the deposits.

(f) The Plaintiff is guilty of impropriety and irregularity in bringing pressure to bear on JCTC officers to accede to requests from the supplier which were departures from the norm and irregular."

Here is how Langrin J. stated his findings on this aspect of the case:

"The plaintiff is a Management Consultant by calling and the words in the article and their imputations are capable of disparaging him in his calling and if true they would in fact tend to disparage the plaintiff in his calling and injure him."

In coming to this conclusion the learned judge expressly stated that he considered **Charleston v News Group Newspapers Ltd.** [1995] 2 All ER 313 and **Jones v Skelton** [1963] 3 All ER 952. In **Charleston,** Lord Bridge said:

> "The first formidable obstacle which Mr. Craig's argument encounters is a long and unbroken line of authority the effect of which is accurately summarised in **Duncan and Neil on Defamation** (2nd edn, 1983) p 13, para 4.11 as follows:
>
> > 'In order to determine the natural and ordinary meaning of the words of which the plaintiff complains it is necessary to take into account the context in which the words were used and the mode of publication. Thus a plaintiff cannot select an isolated passage in an article and complain of that alone if other parts of the article throw a different light on that passage.'
>
> The locus classicus is a passage from the judgment of Alderson B in **Chambers v Payne** (1835) 2 Cr M & R 156 at 159, 150 ER 67 at 68, where he said:
>
> > 'But the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together'."

As for **Jones v Skelton** [1963] 3 All ER 952 the learned judge specifically cites the following passage from the opinion of Lord Morris at 958:

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

> inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict rules of construction, would draw from the words."

It must be emphasised that the appellants stressed the context in which the alleged defamatory words were used, and at paragraph 6 the defence reads:

> "6. The Defendants will at the trial of this action, refer to and rely on the full text of the article published on the 19th day of April 1992 captioned 'JCTC sues Belgian Milk Company' for its true meaning and legal effect."

To my mind the ordinary reasonable reader in Jamaica would interpret the article as stating that there were allegations of irregularities in the commercial dealings between the Jamaica Commodity Trading Company and Prolacto S.A., a Belgian company, which gave rise to a lawsuit. Mr. Hugh Bonnick was the Managing Director during this period and there was a parting of ways between the Company and Bonnick as his contract of employment was terminated. The departure of high profile executives from their companies is not an uncommon feature of commercial life in Jamaica or elsewhere. Generally there are differences in policy or the Board of Directors favour a replacement for personal reasons. So on this basis I would decide in favour of the appellants. I do not think the ordinary reasonable reader would conclude that there was a termination of Bonnick's services because of his impropriety in the formation of the contracts, or that he (Bonnick) brought pressure to bear on the employees of J.C.T.C. to depart from the norm in administering the contract. On the contrary the ordinary reasonable man would conclude that the pressure was from Prolacto S.A. and that that pressure was resisted hence the lawsuit. So the first ground of appeal which reads:

> "1. The learned trial judge erred in arriving at the conclusion that the words complained of were defamatory in their natural and ordinary meaning,"

must succeed.

Did the appellants prove justification?

As three other grounds of appeal were argued they must be addressed as there might be a further appeal. In any event if the defence of justification failed, the other defences were alternatives, if it were to be found that the article was libellous as Bonnick contends. Ground 3 reads:

> "3. The learned trial judge misconstrued the nature of the plea of justification as it appears on the defence and rejected it upon an unsound assessment of the meaning of the words and of the evidence before him."

Here is how the learned judge found against the appellants on the issue of justification:

> "The words not proved to be true are grossly disparaging of the plaintiff's integrity since the inescapable inference must be that there was impropriety, irregularity and disregard for procedures in dealing with contracts.
>
> By endorsing her "authoritative" source the defendant was endorsing not only the facts alleged by the "authoritative" source which are proved to be true but also the facts alleged by the authoritative source which are not proved to be true and are grossly defamatory of the plaintiff.
>
> The plea of justification therefore fails."

The appellants' case on this issue was succinctly put in the Court below thus:

> "If the Plaintiff's pleaded meanings are rejected, there is an end of the case even if there are other unpleaded defamatory meanings that may be open on the words. The position our defence of justification takes is that the meanings the Plaintiff allege are not the natural and ordinary meaning and the natural and ordinary meaning (which we have not pleaded and are not bound to plead.

> See **Prager v Times** (1988) 1 All ER 300) are true in substance and in fact, even if they carry a defamatory connotation. Our defence simply means that the matters in this article are true in substance and cannot therefore form a foundation for an action in defamation. They are not pregnant with defamatory meaning." [Emphasis supplied]

Since there is reliance on **Prager's** case it is helpful if the basis of the ruling in that case on the use of justification is set out. Purchas L.J. at page 306 quoting from Mustill L.J, in **Lucas-Box v. Nunes Group Newspapers** [1986] 1 All E.R. 177, [1986] 1 W.L.R. 147 said:

> "The essence of the decision in the **Lucas-Box** case (and here it may have broken new ground) is that the justification must be pleaded so as to inform the plaintiff and the court precisely what meaning the defendant will seek to justify. This is, however, an altogether different matter from saying that the defendant is obliged to say, yea or nay, whether that meaning is the one which the writing really bears. Thus on the law as it stands at present I do not consider that the defence can be criticised for omitting any statement of the defendant's chosen interpretation of the article."

Then Nicholls L.J. said at 310-311:

> "...These conclusions are, however, not quite the end of the matter. When setting up a plea of justification a defendant must plead his case with sufficient particularity to enable the plaintiff to know clearly what is the case, what is the possible defamatory meaning of the words complained of, which the defendant is seeking to justify. As Ackner LJ said in delivering the judgment of this court in **Lucas-Box v News Group Newspaper Ltd** [1986] 1 All ER 177 at 183, [1986] 1 WLR 147 at 153:
>
> > '. . . whatever may have been the practice to date, in future a defendant who is relying on a plea of justification must make it clear to the plaintiff what is the case which he is seeking to set up. The particulars themselves may make this quite clear but if they are ambiguous then the situation must be made unequivocal.'

> Mustill LJ, who was a member of the court which decided the **Lucas-Box** case, commented on this in **Viscount De L'Isle v Times Newspapers Ltd** [1987] 3 All ER 499 at 507:
>
> > 'The essence of the decision in the **Lucas-Box** case (and here it may have broken new ground) is that the justification must be pleaded so as to inform the plaintiff and the court **precisely what meaning the defendant will seek to justify.** This is, however, an altogether different matter from saying that the defendant is obligedd to say, yea or nay, whether that meaning is the one which the writing really bears'."(My emphasis.)

It must be recognised that in the article the reference to Mr. Bonnick concerns his explanation as to the interest payments to Prolacto, and that the awards of the two contracts followed the established procedures. The article reported him as saying that he would sue anyone who suggested that the contracts were otherwise awarded. Then there is the reference to the termination of his contract of employment. All this of course is in the context of the operations of the JCTC and the issue which gave rise to the law suit between Prolacto and JCTC. That suit was instituted one year after his departure from office. For ease of reference I restate the two paragraphs referred to:

> "Mr. Hugh Bonnick, then managing director of the JCTC told the Sunday Gleaner that there had been a mistake in the implementation of payments on the first contract and interest should have gone to the suppliers, not to JCTC. He said that he had "opened up the restricted lists" of all suppliers when he assumed the position at JCTC.
>
> Mr. Bonnick also emphasised that the Prolacto contracts were both put out to tender, evaluated and awarded according to the rules and that the auditors were present on all occasions. He indicated that he will sue anybody who suggests otherwise. Mr. Bonnick's services as managing director were terminated shortly after the second contract was agreed."

As for the evidence on the termination of his contract here is Mr. Bonnick's own words in the court below:

> "She asked me why. I told her that based on the advice I received I would be paid for notice period. She asked me whether the termination was due to Prolacto contract and I said No."

Bonnick gave an expanded version, for the termination of his contract which will be cited later.

That the defence's submission that there is justification in this case is correct is implied in section 7 of the Defamation Act which reads:

> "7. In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

Paragraph 10 of the defence reads:

> "10. The Defendants will, if necessary, rely upon section 7 of the DEFAMATION ACT."

To appreciate the strength of the appellants' case on justification it is necessary to refer further to their pleaded case. Here is how it emerges in the defence:

> "9. Further or alternatively, the Defendants say that the words set out in paragraph two (2) of the Statement of Claim are in their natural and ordinary meaning (contrary to the meaning ascribed to them in paragraph three (3) of the Statement of Claim) true in substance and in fact."

So the appellants contended that evidence in the case established that the article was true in substance and form. Therefore, even if it carried a defamatory connotation the appellants would not be guilty of libel.

Then the appellants go into their particulars which it was prudent to plead in the light of **Prager** (supra)

> "PARTICULARS
>
> 9 (a) The defendants will rely on the facts stated in the words set out in paragraph two (2) of the Statement of Claim as well as in the full text of the article including the publication in the "Insight" newsletter referred to therein."

So it is appropriate to give the text of the Insight article. It reads:

> "Legal
>
> **JCTC SUES BELGIAN MILK CO.**
>
> EAGLE COMMERCIAL BANK NAMED SECOND DEFENDANT IN MILK POWDER DISPUTE
>
> A US$13 MILLION lawsuit being brought by Jamaica Commodity Trading Company (JCTC) against a Belgian company and a steep increase in the price of powdered milk are reported by sources close to JCTC.
>
> Prolacto SA, a Belgian company which contracted to supply JCTC with 3,000 tonnes of powdered milk at between US$1,264 and US$1,450 (two separate contracts) a metric tonne, is the company being sued by JCTC for among other things, breach of contract.
>
> According to INSIGHT sources, the Prolacto contract provided that JCTC pay for the milk in Jamaican dollars at the commercial bank rate at the time of payment. JCTC insisted after the contract had gone part way that it would pay the milk company at the weighted average exchange rate applicable to Bank of Jamaica transactions.
>
> As a result of the disagreement, Prolacto stopped shipment and JCTC started to buy powdered milk from a different source. This time JCTC paid something in the vicinity of US$1,750 or US$300 more a tonne than the higher of the two contracts it had with Prolacto and according to our sources, the bill had to be paid in US dollars.

> Sources close to JCTC say that even if the government company had accepted the devaluation risk and paid for the milk at the commercial bank rate for the dollars, the milk would be substantially cheaper and the price of condensed milk to the consumer, for example, would have been kept down.
>
> Joined in the suit against Prolacto as the second defendant is the Eagle Commercial Bank Limited which is described in the statement of claim as the agent of Prolacto. The bank received money under the term of the contract from JCTC to be paid to Prolacto in respect of shipments of powdered milk as authorised by JCTC from time to time.
>
> JCTC is now contending in the suit that Eagle Merchant Bank had paid out more to Prolacto than it should have and the suit is intended to recover money from the bank and damages from the Belgian company.
>
> At press time INSIGHT sources said that Prolacto is filing a counter suit against JCTC and is also taking action through diplomatic channels."

As to the truthfulness of the form of the article in issue, the particulars of justification continue thus:

> "9 (b) Writ of Summons in Suit No. C.L. of 1991/J-244 was filed in the Supreme Court of Jamaica in August 1991.
>
> (c) It was common knowledge that at the material times:
>
> i importers experienced difficulty in getting foreign exchange to pay overseas suppliers
>
> ii some overseas suppliers refused to extend credit
>
> iii some importers had difficulty in obtaining credit from overseas suppliers because of the uncertainty of the availability of foreign exchange to make payments in timely fashion

iv most overseas suppliers transacted their business in foreign currency and contracted for payment in foreign currency.

(d) The Defendants repeat the introducing/governing particular at paragraph 8 herein, beginning:

"The Jamaica Commodity Trading..." and ending "cost of living."

For ease of reference 9 (d) above reads in full:

> "8. The said words were published upon an occasion of qualified privilege.
>
> PARTICULARS
>
> The Jamaica Commodity Trading Company (JCTC) is a Corporation wholly owned by the Government of Jamaica. It is, or was at all material times, in particular, involved in the importation and distribution of goods which are necessary for the economic welfare/well-being of Jamaica. Included in such goods is milk powder or skimmed milk required for supply to the condensary and ice-cream manufacturers. Further, the purchase of goods from overseas suppliers where foreign exchange is involved is also of great concern to Jamaica as a whole and a contract involving the price of such goods in regard to a basic food is of importance in regard to the cost of living."

It should be noted that, quite apart from the Companies Act the JCTC would also be governed by the Crown Property (Vesting) Act. The Accountant-General, as a corporation sole, is therefore the shareholder. This would have some bearing on the issue of qualified privilege when it is addressed. Then paragraph 10 of the defence read:

> "10. The Defendants will, if necessary, rely upon section 7 of the DEFAMATION ACT."

Another point made by Mr. Vassell Q.C., in relation to justification was that the learned judge was wrong in his assessment of the evidence. In his skeleton argument he said:

> "Further, in dealing with the truth of the words about the participation of the purchasing department, the learned judge leaves out the very important part of Anton Thompson's evidence that the Respondent himself arranged to put Prolacta on the approved list and that the purchasing department was not at all involved in that process, as they would normally be."

Anton Thompson was a former Purchasing Manager of JCTC. He retired in 1982, but remained there until 1991. His evidence ought not to have been disregarded on this issue. Here is his account:

> "In August 90 contract entered into with Prolacto. They never supplied JCTC prior to this. There was a list of approved supplier.(s)
>
> The procedure – is that they would write Purchasing Department – write back requesting additional information then refer to Internal Auditor, also would arrange for credit check to be done. The credit check would go through the Managing Director who would approve then Company name would add to approve suppliers.
>
> My recollection is that Purchasing Department was not involved because approval was handed to him by Managing Director together with credit check and we handled it from there.
>
> I know that payment to be in Jamaican Dollar which is something we benefitted from because F/E was in short supply.
>
> I am aware that purchase price was paid to Eagle Commercial or Merchant Bank. Payment of interest on funds would have been delayed. In most commercial contracts payment is made when shipment is made. If money is in account then interest would be for purchasers."

There is another passage of importance from this witness. It reads thus:

> "There was an increase in freight rates in 1990. We resisted the request but it was an unusual one. They should honour the contract at it was.
>
> This letter requested an increase of 50%."

Then under cross-examination by Dr. Manderson Jones this evidence emerges:

> "I don't know if JCTC benefit from F/E in these contracts. It is for Finance Department.
>
> Because certain currences are used in international trade I would regard it as unusual. If I had opportunity to denominate a contract in Jamaican Dollar it would be common sense. The offer was unusual but acceptance was unusual."

In this context it is instructive to refer to Bonnick's assessment of Anton Thompson. Here it is:

> "Mr. Anton Thompson is purchasing manager. I would describe him as a competent, honest and reliable employee."

I can find no reference to the appellants' pleadings on justification, nor the above evidence in the judgment in the Court below; nor is there any detailed reference to the suit between **Jamaica Commodity Trading Co. v. Prolacto S.A.** Had the learned judge taken into account the evidence adduced by the appellants, he would have found on a balance of probabilities that they had established the truth contained in the article. The statement of claim of JCTC in the action against Prolacto in part reads:

> "6. By letter dated 19th April 1991 the Defendants gave to the Plaintiff an undertaking that if Prolacto S.A. failed to make any shipment in accordance with the contract and the Plaintiff should exercise its right to cancel all late shipments or all further shipments then the Defendants would pay to the Plaintiff the portion of the purchase price held by it referable to the cancelled shipments together with

interest agreed thereon whereupon the Plaintiff paid to the Defendants the sum of J$39,717,675.00.

7. The said undertaking amounted to a contractural promise by the Defendants and/or an agreement between the Plaintiff and the Defendants collateral to the agreement made between the Plaintiff and Prolacto S.A. that in consideration of the Plaintiff paying the full price of the goods to them in advance of the performance by Prolacto S.A. of their obligations, that the Defendants would refund to the Plaintiff the value of cancelled instalments of the said goods together with interest accruing thereon."

Turning to the Defence of Prolacto it reads:

"8 Paragraph 7 of the Statement of Claim is denied.

The First Defendant states that:

(a) Although the letter from the Second Defendant to the Plaintiff stated that the interest on the deposit would be for the account of the Plaintiff, this statement was included in error in that letter. This error was brought to the attention of the Plaintiff and was omitted from the letter of the 3rd of October,1990 from the Plaintiff to the Second Defendant, which replaced and/or modified the letter of the 3rd of September, 1990, referred to at paragraph 4 hereof.

(b) While the Agreement between the Plaintiff and the First Defendant stated that the entire purchase price should be deposited in Jamaican Dollars with the Second Defendant for the account of the First Defendant, the Plaintiff failed to make the deposit of the purchase price on a timely basis. In that circumstance, and in order to enable the First Defendant to arrange to commence supplying the goods purchased, the First Defendant urged the Plaintiff to deposit at least 50% of the purchase price in Jamaica Dollars with the Second Defendant. The plaintiff deposited a sum of $10,000.000 on the 5th of September, 1990

> and by letter dated 11th of December, 1990, deposited a further sum of $5,000,000 to make up the total deposit to $15,000.000."

Then there is this memorandum which is also part of the appellants' proof of justification:

> "JAMAICA COMMODITY TRADING COMPANY LIMITED
>
> 8 Ocean Boulevard
> Kingston
>
> INTEROFFICE MEMORANDUM
>
> TO: Mr. Hugh Bonnick
> Managing Director DATE: Sept. 10, 1990
>
> FR: Norman Mattis
>
> SUBJECT: PROLACTO S.A.
>
> Attached is a copy of a telefax from Prolacto which speaks for itself. The request made by this company is unusual to say the least and is totally contrary to the policy of the company. Payment wholly or partially is made upon presentation of documents after shipment of goods.
>
> I believe we should insist on our normal procedures, especially as this is a new supplier and their request does not form part of our agreement.
>
> c.c. Mr. Anton Thompson."
>
> [Emphasis supplied]

In this context the following passage from Anton Thompson's evidence is relevant:

> "I am an Assistant General Manager Investment – J.U. Trust. I was employed to JCTC. I started at JCTC in 1979 – 80. I went on secondment to 1981. Retired in 1982 and remained until 1991. I left as Purchasing Manager I believe in 1986 – Purchasing Manager.
>
> I was involved in basic foods – milk solids."

The telefax reference described as unusual is as follows:

"PROLACTO
S.A.
FOOD AND DAIRY PRODUCTS

MESSAGE TO: JAMAICA COMMODITY TRADING CO. DATE: 10/09/90

Mr. Norman Mattis OUR REF: J.F.W.

We have received your purchase confirmatio nr. PKG/90/09/118. Due to the approach of the winter and the negative effect of the gulf crisis on both manufacturing and transport costs, we ask you to immediately proceed with the deposit of at least 50% of the total value of the order, this in Jamaican dollars at the Eagle Commercial Bank like previously agreed.

This will enable us to start operations as first shipment is approaching fast.
Awaiting your news in this regard.

Sincerely,

J.F. WAUTERS."

The telefax was described as unusual because Prolacto was seeking payment before the goods were shipped.

Then there is the letter from Eagle Commercial Bank to the Jamaica Commodity Trading Co. Ltd.

"Eagle Commercial Bank Limited
24-26 Grenada Crescent, Kingston

September 3, 1990

Jamaica Commodity Trading
Company Limited
8 Ocean Boulevard
Kingston

Attention: Mr. Milton Daley

Dear Sirs,

Re: Importation of Medium Heat Skimmed Milk Powder

Reference is made to meetings held between your Messrs Daley, Bonnick and the writer, and we now confirm certain arrangements that were agreed on with regards to the establishment of a Letter of Credit to facilitate importation of the subject commodity.

1) The quantity of milk powder to be imported is 3000 metric tons, which is to be delivered over a period of six months at 500 metric tons monthly.
2) The price quoted by the supplier is US$1,260 per metric ton on a cash basis, however, if Letter of Credit is established on a 180 days basis the applicable price would be US1,325 per metric ton.

3) The devaluation risks will be carried by the Jamaica Commodity Trading Company during the tenure by the Letter of Credit.

4) The following L/C charges will be for the account of Jamaica Commodity Trading Company.

   i) Opening and closing commission of 3%

   ii) Foreign Bank Commission of 1%

   iii) Interest to be calculated on the foreign exposure at the rate of 3% above the U.S.A. prime rate.

   iv) Mobilization Charge of 2%

   v) Local Funds to be placed on deposit to meet drawdowns under the Letter of Credit Arrangement, however, interest that accrue against the deposits will be for the account of Jamaica Commodity Trading Company.

vi) An initial amount in the range of $10 to $12 Million to be placed on deposit in order to Mobilize the Letter of Credit.

In our initial discussions it was advised that the opening and closing commission would be 1 ½%, and the interest rate applicable on the Foreign Exposure would be 2 ½% above the U.S.A. Prime Rate, as will be noted the rates in both cases will be 3%
We trust that you will be in concurrence with the above and look forward to concluding the relevant matter at the earliest possible date.

Yours very truly,

MICHAEL SALMON
SENIOR BRANCH MANAGER

MS/cb"

Since the devaluation risks were to be borne by JCTC it was reasonable that the interest on the funds deposited would accrue to JCTC. It would not require commercial insight to say that a contrary arrangement would be imprudent. The payment of interest to Prolacto in such circumstances would be reflected in the price to consumers.

Then there is this strange letter from Prolacto:

"Prolacto
S.A.
FOOD AND DAIRY PRODUCTS

JAMAICA COMODITY TRADING CO. LTD.
8 Ocean Boulevard
KINGSTON MALL
JAMAICA

24th July 1991.

Dear Sirs,

I have just been advised by EAGLE COMMERCIAL BANK that three errors were made in their final calculation with respect to contract PKG 90/09/118.

These were as follows:

-The Foreign Bank Commission of 1% which was agreed with J.C.T.C. was not billed. This reflects an amount of THIRTY SEVEN THOUSAND EIGHT HUNDRED US DOLLARS (US$37,800.00) The forward rate is currently JA$15,40 to US$ 1.00. The total due is FIVE HUNDRED AND EIGHTY TWO THOUSAND ONE HUNDRED AND TWENTY DOLLARS ($J582,120.00)

- The Forward rate used in calculating the One Hundred and Eighty (180) day price adjustment should have been JA$ 15,40 instead of JA$ 12,80. This reflects a short billing of THREE HUNDRED AND SEVENTEEN THOUSAND SIX HUNDRED AND NINETY FOUR JA DOLLARS (J$ 317,694.00).

- The interest of TWO MILLION ONE HUNDRED AND TWENTY FOUR THOUSAND TWO HUNDRED AND SEVENTY SIX DOLLARS AND TWENTY EIGHT CENTS (JA$ 2,124,276.28) should have been for PROLACTO's account and should not have been paid to J.C.T.C.

I HAVE INSTRUCTED THE Bank to collect these amounts from J.C.T.C. as these were errors on their part.

Yours truly.

S. A. PROLACTO
J.F. WAUTERS."

[Emphasis supplied]

Further the averment of Jamaica Commodity Trading Co. Ltd. against Prolacto reads:

"7. It was also expressly agreed that local funds would be placed on deposit by the Plaintiff with the Second Defendant to meet drawdowns under the Letter of Credit Arrangement hereinbefore mentioned, and that interest which was earned on the deposits would be for the account of the Plaintiff. Amounts totaling $15 million were accordingly deposited by the Plaintiff with the Second Defendant on the 5th September, 1990 in the sum of $10 million, on the 11th September, 1990 in the sum of $5 million with interest rates on the said deposits agreed at 26%."

There is no indication here that there was an error as regards the interest payment as Bonnick now states.

Turning to the evidence of Bonnick as regards the appellants' case for justification the following extracts are instructive:

> "I was employed to JCT Corporation. I was first employed to JCTC from 1977 –78 as Department Managing Director and Managing Director from April 1, 1990 to December 24, 1990.
>
> I was advised by Chairman of Board that new minister wanted to have his own man as Managing Director. Hugh Small was new Minister. Minister of Industry and Commerce."

This is the expanded version given in chief in Court for the termination of his contract. Under cross-examination the following evidence emerged:

> "Minister Clarke was one when I was appointed. I came in April 1990.
>
> I was invited to resign. I had discussions with Minister but it did not include Prolacto.
>
> I don't recall whether I read in the Gleaner that I was fired because the Minister wanted his own man.
>
> Document handed to witness – I agree that is what in the Gleaner re Minister. But article precedes discussion with Chairman.
>
> My letter of termination was received by me in office on afternoon of 24th December, 1990. Chairman was in discussion with me 3 to 4 days prior to my receiving the letter.
>
> My contract of employment was in writing for 3 years with proviso that if JCTC was closed down before, certain decisions would be made.

> I declined the invitation to resign because Chairman made an offer and I renege on it. So I said they would have to fire me because they have no reason for doing so. I got my compensation which was worked out by Dunn, Cox & Orrett."

The inference is that compensation would be based on a three year contract which was terminated after nine months. If a notice was part of the contract that presumably was taken into account.

Then to reiterate an aspect of his evidence cited earlier.

> "Never mentioned to me about having any authoritative sources. She asked me whether I was fired from JCTC and I said Yes. She asked me why. I told her that based on the advice I received I would be paid for notice period. She asked me whether the termination was due to Prolacto contract and I said No."

As for the evidence of Margaret Morris, the appellant, on the termination of Bonnick's contract of employment, her account in Court was as follows:

> "I say Mr. Bonnick services was terminated. Not possible for services to be terminated without being dismissed.
>
> He said if his services were terminated that way I would get more money.
>
> He made known to me that he would get more 'notice pay'.
> He said there was no connection with my termination and Prolacta and the contract. No report on that.
>
> The reasons for Bonnnick's termination was not germane to the contract. I have adverted to it only for historical fact.
>
> Because Bonnick could not give me any information on the suit it was because his services was terminated.
>
> I don't think any of my readers could think his services were terminated because of matters related to Prolacto contracts.

> A reasonable person would interpret termination as a historical fact.
>
> I made no enquiries as to reason for his termination. I accept his reason that Prolacto had nothing to do."

The pleadings, the correspondence and the evidence are ample proof that the appellants had proved the truth in form and substance of the article in issue so that Langrin J. was wrong to reject the appellants' claim as regards justification.

Paragraph 2 of the ground of appeal pertaining to malice on the issue of qualified privilege and fair comment reads:

> "2. The learned trial judge failed to appreciate or apply the test of malice as expounded in at least three decisions of the Court of Appeal and further, failed to correctly assess the pleadings and the evidence before him and thereby came to the erroneous conclusion that the defence of qualified privilege and fair comment were defeated by express malice on the part of the Defendants."

It is convenient to turn firstly to the issue of qualified privilege.

Was the defence of qualified privilege established?

In examining the issue of whether the publication of the article in issue admitted of a defence of qualified privilege the starting point must be a recognition that freedom of expression is enshrined in the Constitution. Of equal importance is that one of the limits on freedom of expression is the protection of the reputation of the individual. How that balance is struck is dependent on legislative provisions and the evolving common law on defamation which must be in accordance with the constitutional provisions enshrined in Chapter III sec. 22 of the Constitution. The material part reads as follows:

> "22.-(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression,

> and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –
>
> (a) which is reasonably required –
>
> (i) in the interests of defence, public safety, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments."
> Emphasis supplied]

It is clear that freedom of expression is given primacy in section 22 of the Constitution and if there is a constitutional challenge the onus lies on the claimant to establish that a statutory provision, or a common law authority, is reasonably required to protect his reputation. The tort of defamation served this purpose before 1962 and continues to evolve in conformity to the Constitution.

In this regard, the common law has always recognised the importance of the press and media as fundamental institutions in a democratic society. The freedom of persons to publish, which includes publishing companies, enables the citizen to

participate in the conduct of government which is central to a parliamentary democracy. It is by the free flow of information and ideas that the Cabinet as 'the principal instrument of policy' and Parliament which is entrusted to make 'laws for peace, order and good government' can function in a responsible manner. Freedom of the press, is therefore, a necessary implication from section 22 of the Constitution and its strength is not diminished merely because it is an implication.

In **Reynolds v Times Newspapers Ltd.** [1999] 4 All E.R. 609 at 617 Lord Nicholls in demonstrating how qualified privilege recognises freedom of the press said:

> "But the common law has recognised there are occasions when the public interest requires that publication to the world at large should be privileged. In **Cox v Feeney** (1863) 4 F & F 13 at 19, 176 ER 445 at 448 Cockburn CJ approved an earlier statement by Lord Tenterden CJ that 'a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know'. Whether the public interest so requires depends upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice."

In stating the classic test for qualified privilege Lord Nicholls said at 619:

> "In its valuable and forward-looking analysis of the common law, the Court of Appeal in the present case highlighted that in deciding whether an occasion is privileged the court considers, among other matters, the nature status and source of the material published and the circumstances of the publication."

Then His Lordship continued thus:

> "These factors are to be taken into account in determining whether the duty-interest test is satisfied or, as I would prefer to say in a simpler and more direct way, whether the public was entitled to know the particular information. The duty-interest test, or the right to know test, cannot be carried out in isolation from these factors and without regard to them. A claim to privilege stands or falls according to whether the claim passes or fails this test. There is no further requirement."

That the common law responds to felt needs is evidenced by its acknowledgement that new areas of journalism are entitled to the constitutional guarantees of freedom of expression. It is stated thus by Lord Nicholls:

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

Then Lord Cooke dealing with the issue of publications to the world at large said at 645:

> "Hitherto the only publications to the world at large to which English courts have been willing to extend qualified privilege at common law have been fair and accurate reports of certain proceedings or findings of legitimate interest to the general public. In **Blackshaw v Lord** [1983] 2 All ER 311, [1984] QB 1, **Templeton v Jones** [1984] 1 NZLR 448 and now the present case, the law is being developed to meet the reasonable demands of freedom of

> speech in a modern democracy, by recognising that there may be a wider privilege dependent on the particular circumstances. For this purpose I think it reasonable that all the circumstances of the case at hand, including the precautions taken by the defendant to ensure accuracy of fact, should be open to scrutiny. Lord Nicholls has listed, non-exhaustively, matters to be taken into account. As the Court of Appeal suggested, this brings English law into a position probably not very different from that produced by the Australian reasonableness test, but perhaps rather more consonant with common law tradition. Onus becomes unimportant, except in the sense that evidence of the circumstances surrounding the publication is necessary. The contents of the publication in those circumstances become all-important."

On this aspect Lord Hobhouse said at page 657:

> "The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information, not misinformation, which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed, not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations."

Turning now to the necessity for privilege, Lord Hobhouse put it thus:

> "The law of civil defamation is directly concerned with the private law right not to be unjustly deprived of one's reputation and recognises the defence of privilege. The justification for this defence is at least in part based upon the needs of society. It can sensibly be asked why society or the law of defamation should tolerate any level of factual inaccuracy. The answer to this question is that any other approach would simply be impractical. Complete factual accuracy may not always be practically achievable; nor may it always be possible definitely to establish what is

> true and what is not. Truth is not in practice an absolute criterion. Nor are the distinctions between what is fact and innuendo and comment always capable of a delineation which leaves no room for disagreement or honest mistake. The free discussion of opinions and the freedom to comment are inevitably liable to overlap with factual assumptions and implications. Some degree of tolerance for factual inaccuracy has to be accepted; hence the need for a law of privilege."

As for the qualities necessary to attract the defence of privilege Lord Hobhouse said:

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

Lord Nicholls on this issue said at page 615:

> "There are occasions when the person to whom a statement is made has a special interest in learning the honestly held views of another person, even if those views are defamatory of someone else and cannot be proved to be true. When the interest is of sufficient importance to outweigh the need to protect reputation, the occasion is regarded as privileged."

It is now appropriate to consider whether Langrin J. was right to find that the publication of the article in question attracted the defence of qualified privilege. There was no challenge to the averment of the appellants that the occasion of publication of the article attracted the defence of qualified privilege. What Bonnick's pleading averred was that the privilege was defeated by express malice. This is how Langrin J. stated the position:

> "The plaintiff has agreed that if the Managing Director was dismissed for impropriety or irregularity that would be a matter of public interest. He agreed that the press had a duty to report matters of public interest. This moral duty of the defendant and its reporter to publish matters of public interest is implicitly recognised in the cases: **Trevor Munroe v. The Gleaner Company** S.C.C.A. 67/86 and **Smart v. Sibblies and the Gleaner Company** S.C.C.A. 32A and 32D of 1979. It follows in the instant case, that the fact that the JCTC is a public institution is sufficient to make the conduct of its management in their office a matter of public interest and the occasion is therefore privileged."

It is helpful to refer to the appellants' plea of qualified privilege and how it was met initially:

> "8 The said words were published upon an occasion of qualified privilege
>
> Particulars
>
> The Jamaica Commodity Trading Company (JCTC) is a Corporation wholly owned by Government of Jamaica. It is, or was at all material times, in particular, involved in the importation and distribution of goods which are necessary for the economic welfare/well-being of Jamaica. Included in such goods is milk powder or skimmed milk required for supply to the condensery and ice-cream manufacturers. Further the purchase of goods from overseas suppliers where foreign exchange is involved is also of great concern to Jamaica as a whole and a contract involving the price of such goods in regards to a basic food is of importance in regard to the cost of living.
>
> (a) The second Defendant is dedicated to informing the public on matters of public interest;
>
> (b) The first Defendant is a well known journalist and staff reporter of the Second Defendant;
>
> (c) The Business transactions of the Jamaica Commodity Trading Company (JCTC) in

circumstances where, inter alia, it quite often enjoys a monopoly or otherwise are matters in which the public as a whole has a legitimate interest;

(d) The First Defendant prior to publication afforded the plaintiff an opportunity to state his point of view by way of reply to the intended publication which was, as the publication complained of shows, incorporated in the said publication."

Then the averments continue thus:

"In the premises the Defendants say:-

(i) That the persons to whom the said words were published had a concern and corresponding interest in the subject matter and publication of the said words. The subject matter of the said words was of public concern and the publication thereof was in the public interest;

(ii) Further and/or in the alternative, that they were under a legal and/or moral and/or social duty so to publish the said words and the public in general had a like duty and/or interest to receive them;

(iii) Further and/or in the alternative, the subject matter of the said words was in the general public interest and they published the said words for public information or were under a duty to communicate the said words to the general public;

(iv) Further or in the alternative, the said publication constituted formed fair information on a matter of public interest and said publication possessing both appropriate status and appropriate subject matter in that the public had a legitimate and proper interest therein and/or the Defendants were under a duty to communicate same to the public;

(v) Further and/or in the alternative, that they published the said words in the reasonable and/or necessary protection of their own interest and that of the public as a whole."

In the Court below there was implicit acknowledgement that the defence of qualified privilege availed the defendants but that the privilege was lost by express malice. Here is the Reply to the Defence:

"1. Save in so far as the same consists of admissions the Plaintiff joins issue with the Defence. In particular, the plaintiff denies paragraph 7 of the Defence.

2. The defendants wrote and published the words set out in paragraph 2 of the Statement of Claim with actual malice.

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1. The Defendants and each of them published the words in a newspaper out of sensationalism and with a view to profit, knowing that they were untrue, alternatively reckless as to whether they were true or false.

2. The Defendants did not honestly believe in the truth of the words complained of

3. The Defendants used excessive language, including inter alia that the contracts "were 'very unusual'" and that " 'nobody at JCTC could be so mad as to agree to that'"

4. The defendants intended to injure the Plaintiff."

However, on appeal Mr. Goffe Q.C., for the respondent Bonnick reopened the issue by filing a Respondent's Notice which reads as follows:

"TAKE NOTICE THAT when the hearing of the above Appeal resumes the Respondent herein intends to contend that the decision of the Court below dated the 16th day of January 1998 should be varied as follows:

> 'That part of the decision whereby the learned judge held that the occasion on which the words complained of were published was privileged should be replaced by a decision that the occasion was not privileged.'
>
> AND TAKE NOTICE that the grounds on which the Respondent intends to rely are as follows:-
>
> 'That the learned judge erred in considering only one aspect of the issue of qualified privilege, namely, that the Jamaica Commodity Trading Company was a public institution, hence the conduct of its management was a matter of public interest, hence the occasion was privileged. He ought to have considered, as well, the nature, status and source of the 1st Defendant/Appellant's information, and all the circumstances of the publication. Had he done so he would not have held that the occasion was privileged'."

This Court granted permission to file the Respondent's notice in the exceptional circumstances where **Reynolds** [1988] 3 All ER 961 in the Court of Appeal was relied on. Mr. Goffe argued that a reconsideration of the issue of qualified privilege might be necessary in the light of that decision. However, generally, be it noted that the usual course ought to be followed and a party ought not to be permitted to fight a case on a different basis from that below. The following passage from **Jones v Skelton** (supra) at 960 is useful in that regard:

> "Their lordships have recounted the course of the interlocutory proceedings in the action. It was inevitable that SUGERMAN, J., should follow what had been said in **Goldsbrough's** case **(1934), 34 S.R. (N.S.W.) 524.** After the decision of SUGERMAN, J., it was however open to the defendant to appeal. He then had the opportunity to seek to challenge the decision in **Goldsbrough's** case **(1934), 34 S.R. (N.S.W.) 524.** The course which would be followed at the trial was then being settled. The whole purpose of pleadings is to define, to clarify and to limit the issues which are to be the subject of the pending contest

> (see **Esso Petroleum Co. Ltd. v. Southport Corpn. [1955] 3 All E.R. 864).** The defendant wished to put forward the defence of fair comment. That was to be his defence if, contrary to his contention, the words which he published had a defamatory content. It was for him to plead his case in the way that he wished to fight it and to put it forward. When SUGERMAN, J., held that he was not entitled to plead as he first wished to do he could either have appealed against the decision of SUGERMAN, J. (and so challenge the ruling in **Goldsbrough's** case **(1934), 34 S.R. (N.S.W.) 524)** or he could have accepted it. What he did was to accept it. He availed himself of the liberty to amend which was given to him. He thereby put on the record the defences on which he then chose to rely and which would direct the course of the trial. Having failed in the action their lordships consider that he cannot now repudiate the pleading which he put forward and on the basis of which the issues in the case were fought."

It is now appropriate to consider whether the occasion in the instant case warranted the defence of qualified privilege. The J.C.T.C. is in substance the commercial arm of Government. In addition to the control exercised by the Accountant-General as the shareholder, that officer is responsible to the Minister of Finance through the Financial Administration and Audit Act. Bonnick in his evidence sets out the role of the J.C.T.C. thus:

> "The Board appointed by the Minister, Managing Director must have approval of Cabinet. Accounts are received by Committee of Parliament. I attended Committee re importation of zinc Public Inquiry by (Green E.G.) Sole importer and distributor to trade of motor cars. The policy of JCTC has received much attention over years and received much public interest. The Managing Director Chief Ex. Officer and he is a member of the Board. He would help to formulate policy and would be responsible for their administration.
>
> The conduct of Managing Director would have effect on JCTC."

As for its commercial operation, Bonnick said:

> "JCTC is a limited liability Company. Shares owned by Government. There were State Trading Corporation, Janace Pharmaceutical Jamaica Building Materials, Jamaica Nutrition Holdings. They had exclusive right to import and distribute.
>
> They merged into Nutrition Products – and had a name change to JCTC. It is now Tax Exempt Company.
>
> It is sole exclusive importers of all basic foods, rice, wheat, salt fish, milk products and few other basic commodities. They were exclusive importers of pharmaceutical drugs ( ) lumber."

Regarding Prolacto's application for a change in price above the contract, here is his response:

> "The application of price hike for transportation was done with my approval. Nobody else could approve it."

Turning to the interview with the appellant Margaret Morris, Bonnick said:

> "Mrs. Morris called. Basically she was researching an article on JCTC and had information re irregularities re Prolacto contract. She did not go into extensive details as to what irregularities were, I told her that there were no irregularities and contracts put out to tender according to laid down procedures and that they were evaluated and awarded according to the criteria laid and that the auditors were present on all occasions. I further indicated to her that I would sue anybody who says otherwise. I don't recall she said anything."

The legal status of J.C.T.C., and its function as being sole importer for a large number of items, made it obligatory to present its accounts to Parliament. The investigation and reporting to the public on the Prolacto contract therefore attracted the defence of qualified privilege. It is the judiciary which defines the scope and limit of this defence and Lord Nicholls in **Reynolds** put it thus at p. 624:

> "The court has the advantage of being impartial, independent of government, and accustomed to deciding disputed issues of fact and whether an occasion is privileged."

How is the scope and limit defined?

Lord Nicholls at pg. 616 of **Reynolds** said:

> "The underlying principle is conventionally 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. Lord Atkinson's dictum, in **Adam v Ward** [1917] AC 309 at 334, [1916-17] All ER Rep 157 at 170, is much quoted:
>
> > ' ... a privileged occasion ... 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.'
>
> The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. 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. That is the end the law is concerned to attain. 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."

A necessary ingredient in reporting on the issue was the naming of the officer under whose watch the contract was negotiated . Of importance also was that his contract of employment was terminated. If the naming of Bonnick had a defamatory

connotation, qualified privilege would still be a defence provided it was not lost by express malice.

Was express malice to be attributed to the appellants as Langrin J. found?

Here is how the learned judge approached his task:

> "In the present case there are two separate sources of information providing conflicting information. Although the defendant says she believed her anonymous source to be reliable and found him so on two previous occasions she nevertheless made subsequent enquiries from the plaintiff, who gave her a different account from that of her anonymous source with important conflicting allegations of fact. The defendant in her evidence stated that she believed the plaintiff's statement at the time it was made to her to be true."

Then the learned judge continued thus:

> "The position taken by Mrs. Morris is clearly untenable both in law and practice. Just imagine a situation in which a so called authoritative anonymous source who had been disgruntled over a decision given by a Judge telephoned her and made a defamatory remark about a Judge. If she called up the Judge and requested an explanation from him in which he contradicted the 'source', would it be permissible for her without further enquiry to publish both accounts for her readership to decide which of the two accounts was true?"

The appropriate answer to the learned judge's finding is to be found in the following passage of Lord Nicholls' speech in **Reynolds**. It ran thus at pages 615-616:

> "The classic exposition of malice in this context is that of Lord Diplock in **Horrocks v Lowe** [1974] 1 All ER 662 at 669, [1975] AC 135 At 149. If the defendant used the occasion for some reason other than the reason for which the occasion was privileged he loses the privilege. Thus, the motive with which the statement was made is crucial. If desire to injure was the dominant motive the privilege is lost. Similarly, if the maker of the statement did not believe the statement to be true, or if he made the statement recklessly, without considering or caring whether it was

> true or not. Lord Diplock emphasised that indifference to truth is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true.
>
> > 'In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", i.e, a positive belief that the conclusions they have reached are true. The law demands no more.' (See [1974] 1 All ER 662 at 669, [1975] AC 135 at 150)'."

This is how Lord Diplock defines express malice in **Horrocks v. Lowe** [1975] A.C. 133 at 149:

> "So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. "Express malice" is the term of art descriptive of such a motive. Broadly speaking it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests."

Then the learned judge continued thus:

> "The motive with which a person published defamatory matter can only be inferred from what he did or said or

> knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person."

How is the judge to determine express malice? Lord Diplock gives valuable guidance as follows at p. 152:

> "So the judge was left with no other material on which to found an inference of malice except the contents of the speech itself, the circumstances in which it was made and, of course, the defendant's own evidence in the witness box. Where such is the case the test of malice is very simple. It was laid down by Lord Esher himself, as Brett L.J. in **Clark v Molyneux,** 3 Q.B.D. 237. It is: has it been proved that the defendant did not honestly believe that what he said was true, that is, was he either aware that it was not true or indifferent to its truth or falsity? In **Royal Aquarium and Summer and Winter Garden Society Ltd. v Parkinson** [1892] 1 Q.B. 41 Lord Esher M.R. applied the self-same test. In the passage cited by Stirling J. he was doing no more than disposing of a suggestion made in the course of the argument that reckless disregard of whether what was stated was true or false did not constitute malice unless it were due to personal spite directed against the individual defamed. All Lord Esher M.R. was saying was that such indifference to the truth or falsity of what was stated constituted malice even though it resulted from prejudice with regard to the subject matter of the statement rather than with regard to the particular person defamed. But however gross, however unreasoning the prejudice it does not destroy the privilege unless it has this result. If what it does is to cause the defendant honestly to believe what a more rational or impartial person would reject or doubt he does not thereby lose the protection of the privilege."

An earlier case from the Privy Council laid down the same principles. Sir Montague Smith delivering the opinion of the Board in **Hart v Gumpach [1871-73 L.R. Vol 1V]**, 439 said at pages 458-459:

> "The Judge ought, therefore , to have explained to the jury the relation and position of the parties, and (assuming for the present the existence of a limited privilege only) he should have told them that the action would not lie if the statements were made honestly, and in a belief of their truth, and that the burden was on the Plaintiff to prove they were not so made.
>
> No such explanation, however, was given. The Judge only asked the jury, whether the Appellant had made false statements, and whether the representations were warranted by facts. The last question is clearly misleading. In cases of this kind, the question is not as upon a plea of the truth of the libel, whether the representations are true, or warranted by facts; but whether, although they may not be true, the Defendant might have honestly believed them to be so, and made them, without malice, in the discharge of his duty."

After a careful re-examination of the article in issue, an examination of the evidence of Margaret Morris and the circumstance in which she investigated the article and published it, I can find no fact from which to infer express malice. On this issue I differ with respect from Langrin J.

Did the defence of honest comment fail as Langrin J. found?

The learned judge below found against the appellants on this issue, so it is necessary to examine his approach to ascertain if his findings were correct. Here is how he made his findings:

> "An examination of the comment that 'nobody at JCTC could be so mad as to agree to that' referring to Prolacto's demand for interest, reveals the uncontradicted evidence of the plaintiff that JCTC agreed to interest going to Prolacto.
>
> The matters referred to as 'other departures from the norm' such as:
>
> (i) The contracts were arranged without the normal participation of the purchasing Department

(ii) Prolacto was not on JCTC list of approved suppliers

(iii) Much pressure was brought to bear on JCTC officers to accede to the request from Prolacto for a price hike

did not occur.

Accordingly the facts on which the comments were based are not true and I so find."

As regards the facts, that issue was addressed under the caption of justification. So we must now turn to the matter of comments.

It is useful to re-examine how the Constitution deals with the issue of communication of opinion and ideas. Section 22 specifically states in part:

> "no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference ."

This is an instance where the role of the press and other agencies of communication is given express recognition in the Constitution. It is a classic instance of Lord Devlin's statement in **DPP v. Nasralla** 10 JLR 1 at page 5 that freedoms enshrined in Chapter III of the Constitution were already enjoyed by persons in Jamaica and the Constitution was meant to protect them from any future legislative or executive interference. Here is the relevant section of Lord Devlin's opinion:

> "Whereas the general rule, as is to be expected in a Constitution and as is here embodied in s. 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Cap. III. This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in

> order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

Against this background an examination of how the common law treats the defence of "honest comment on a matter of public interest" is necessary. Once again it is necessary to turn to **Reynolds** [1999] 4 All ER 609 at 614-615. The first passage states:

> "The common law has long recognised the 'chilling' effect of this rigorous, reputation-protective principle. There must be exceptions. At times people must be able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed. In the wider public interest, protection of reputation must then give way to a higher priority."

Then Lord Nicholls recognising the special role of the media said at 614-615:

> "**Honest comment on a matter of public interest**
>
> One established exception is the defence of comment on a matter of public interest. This defence is available to everyone, and is of particular importance to the media. The freedom of expression protected by this defence has long been regarded by the common law as a basic right long before the emergence of human rights conventions. In 1863 Crompton J observed in **Campbell v Spottiswoode** 3 B & S 769 at 779, 122 ER 288 at 291: 'It is the right of all the Queen's subjects to discuss public matters ...' The defence is wide in its scope. Public interest has never been defined, but in **London Artists Ltd v Littler** [1969] 2 All ER 193 at 198, [1969] 2 QB 375 at 391 Lord Denning MR rightly said that it is not to be confined within narrow limits. He continued:
>
> 'Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to

> them or others; then it is a matter of public interest on which everyone is entitled to make a fair comment'."

Further His Lordship demonstrated how common law countries have a heritage which the poet stated thus:

> "Where Freedom slowly broadens down
> From precedent to precedent."

Then Lord Nicholls put it this way:

> "Traditionally one of the ingredients of this defence is that the comment must be fair, fairness being judged by the objective standard of whether any fair-minded person could honestly express the opinion in question. Judges have emphasised the latitude to be applied in interpreting this standard. So much so, that the time has come to recognise that in this context the epithet 'fair' is now meaningless and misleading. Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it: see Diplock J in **Silkin v Beaverbrook Newspapers Ltd.**[1958] 2 All ER 516 at 518, [1958] 1 WLR 743 at 747."

Then turning to the limitation on honest comment to protect the reputation of others His Lordship states:

> "One constraint does exist upon this defence. The comment must represent the honest belief of its author. If the plaintiff proves he was actuated by malice, this ground of defence will fall."

Langrin J grasped the principle by stating:

> "The point was admirably expressed in **Slim v. Daily Telegraph** (1968) 2 QB 157 at 170 by Lord Denning M.R. in terms that would favour the writer in a deserving case."

So it is instructive to turn to the words of Lord Denning at page 169-170:

> "The complaints which Mr. Hirst made were about the comments. In particular, he complained about the

> comments "Double Think" and "cynical" in the letter of March 30, 1964: and the comments "Protestations of injured innocence" and "How can Mr. Graves pretend to associate himself?" in the letter of April 23, 1964."

Then Lord Denning continues thus:

> "These comments are capable of various meanings. They may strike some readers in one way and others in another way. One person may read into them imputations of dishonesty, insincerity and hypocrisy (as the judge did). Another person may only read into them imputations of inconsistency and want of candour (as I would). But in considering a plea of fair comment, it is not correct to canvas all the various imputations which different readers may put upon the words. The important thing is to determine whether or not the writer was actuated by malice."

The following part of Lord Denning's statement is of utmost importance:

> "If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it, see per Lord Porter in **Turner v. M.G.M. Pictures Ltd. (1950) 66 T.L.R. (Pt. 1) 342, 354; [1950] 1 All E.R. 449, H.L.** and per Diplock J. in **Silkin v. Beaverbrook Newspapers Ltd. [1958] 1 W.L.R. 743, 745; [1958] 2 All E.R. 516.** I stress this because the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to "write to the newspaper": and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear

> of any liability. They should not be deterred by fear of libel actions."

It is now pertinent to turn to the pleadings to see how the issue emerged in the Court below. The pleaded Defence reads:

> "11. Further and/or alternatively, the Defendants, and each of them say that the said words are fair comment made in good faith and without malice on matters of public interest namely, role of the Jamaica Commodity Trading Company Limited (JCTC) in the importation and/or sale of products for/to the people of Jamaica."

Further, the pleadings were particularised thus:

> "PARTICULARS
>
> The Defendants repeat the particulars to paragraph 9 herein."

Paragraph 9 (supra) pleaded the defence of justification. The important point to grasp is that this defence was traversed in the reply, by alleging actual malice, and Langrin J. found in Bonnick's favour. Justification has already been dealt with. As for the honest comments, Margaret Morris and The Gleaner Company Ltd. and its Editor have a constitutional right to "receive and impart ideas and information without interference" as explained by the common law defence of "honest comment on a matter of public interest."

I find that to hold the opinion that it was madness for a company owned by the government to permit Prolacto to claim the interest on JCTC deposits in the Bank after an undertaking to bear the risk of devaluation, warranted strong comment. It would warrant such a comment in a rich country, let alone a poor one. If it were to be allowed it would result in the transfer of wealth from the poor to the rich. Nor is it to be said that to publish the opinion that the contract was unusual was actuated by malice. There was

no proof that The Gleaner Company Ltd. published the article out of sensationalism or with a view to profit, nor was there an intention to injure Bonnick. Equally, to describe the contract as a departure from the norm was legitimate comment on a matter of public interest. So this defence also succeeds.

It is important to stress that the issue of freedom of expression is not an issue confined to the tort of defamation. It is given primacy of place even against legislative restriction which purports to abridge freedom of expression. One notable example was cited by Lord Keith in **Derbyshire C C v Times Newspapers** [1993] 1 All ER 1011. At 1018-1019 His Lordship said:

> "Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public. In **Hector v A-G of Antigua and Barbuda** ([1990] 2 All ER 103, [1990] 2 AC 312 the Judicial Committee of the Privy Council held that a statutory provision which made the printing or distribution of any false statement likely to undermine confidence in the conduct of public affairs a criminal offence contravened the provisions of the constitution protecting freedom of speech. Lord Bridge of Harwich said ([1990] 2 All ER 103 at 106, [1990] 2 AC 312, at 318):
>
> > 'In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations

> their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion'."

Conclusion

The expansive term freedom of expression includes freedom of the press. It is an important aspect of the fundamental rights and freedoms guaranteed by Chapter III of the Constitution. The contest between that freedom and the need to protect individual reputation also enshrined in the Constitution and spelled out in the law of Defamation will always be a crucial constitutional issue. The judiciary is aware of the importance of the contest and will adjudicate fairly in interpreting the Constitution and the tort of Defamation on a case by case basis. In this case the balance was distinctly in favour of press freedom so the appeal is allowed and the order of the Court below set aside. The costs both here and below must go to the appellants.

BINGHAM, J.A.:

On 19th April, 1992, an article given some prominence appeared on the front page of the ***Sunday Gleaner***, a newspaper with a wide circulation in Jamaica and published by the second-named defendant/appellant. It bore the caption, "JCTC Sues Belgian Milk Company". The article reads as follows:

> "**By Margaret Morris**
> Sunday Gleaner Staff Reporter
>
> The Jamaica Commodity Trading Company (JCTC) has confirmed that they have filed suit against a Belgian company in respect of a breached contract to supply milk powder.
>
> The faxed response to the *Sunday Gleaner* from JCTC's Legal Officer, Karen Ford-Warner said: 'We do not feel ourselves able to answer your questions at this stage as the matter is in the hands of our attorneys who have already filed a court action.'
>
> The newsletter *Insight* reported that the suit is for US$13 million and that the Belgian Company Prolacto SA has filed a counter suit. Eagle Commercial Bank, named as a co-defendant with Prolacto in the *Insight* report, told the *Sunday Gleaner* that JCTC has withdrawn the suit against them.
>
> The *Sunday Gleaner* has learned that Mr. Alfred Rattray of Rattray Patterson Rattray is representing Prolacto.
>
> A source close to JCTC confirmed that the dispute centres on two supply contracts - the first for 3,000 tonnes at US$1.264 per tonne awarded in August 1990 and the second for the same amount at US$1325 per tonne agreed in December 1990.
>
> The attractive feature of both was that payment could be made in Jamaican dollars but the contracts were

'very unusual'. Both were cash contracts and as such, prices were lower than average in a recovering and volatile world market.

In respect of the first contract, JCTC was required to lodge the full amount (over J$30.2 million) in Eagle Commercial Bank and appropriate disbursements from the deposit were to be credited to Prolacto's account at the time of each shipment leaving Europe. At the same time, interest on the deposit was paid to JCTC.

In the second deal, Prolacto demanded that the interest on the deposit of approximately J$31.8 million should accrue to their account.

According to one authoritative source, 'nobody at JCTC could be so mad as to agree to that.' He also contended that the contracts were arranged without the normal participation of the Purchasing Department and that Prolacto was not on JCTC'S list of approved suppliers.

Mr. Hugh Bonnick, then managing director of the JCTC told the *Sunday Gleaner* that there had been a mistake in the implementation of payments on the first contract and interest should have gone to the suppliers, not to JCTC. He said that he had 'opened up the restricted lists' of all suppliers when he assumed the position at JCTC.

Mr. Bonnick also emphasised that the Prolacto contracts were both put out to tender, evaluated and awarded according to the rules and that the auditors were present on all occasions. He indicated that he will sue anybody who suggests otherwise. Mr. Bonnick's services as managing director were terminated shortly after the second contract was agreed.

An authoritative source pointed out other departures from the norm in respect of these contracts: the fact that Prolacto was late in starting delivery - and then requested a price hike to cover increased transportation costs because of the Gulf War. Much pressure was brought to bear on JCTC officers to accede to this

> request but the *Sunday Gleaner* was unable to find out the actual outcome.
>
> The second contract was agreed just weeks after the delivery on the first contract had started. In the absence of any official release, it is assumed that Prolacto terminated supplies when JCTC refused to agree to release their financial conditions - for example agreeing to Prolacto getting the bank interest.
>
> Skim milk under these contracts is supplied to the condensery and ice-cream manufacturers and the import price impacts heavily on the cost of living."

The article had as its basis an earlier article published in a newsletter known as ***Insight***.

Enquiries made by the first defendant/appellant from certain reliable and anonymous sources at JCTC led to the appellant Margaret Morris seeking an interview with the respondent Hugh Bonnick who was the managing director at the time that the contracts with the foreign company Prolacto SA were negotiated. It was shortly after this interview that the article appeared in the ***Sunday Gleaner***. Within three days of the article appearing, the respondent filed his writ. The statement of claim was filed on April 29, 1992.

The action named the writer of the article, Margaret Morris, the Gleaner Company Limited and Ken Allen, the Editor of the newspaper, as defendants.

In the statement of claim the plaintiff having set out the article save and except for a few paragraphs, it was then averred as to the sting and gist of the libel that:

"**3.** By the said words in their natural and ordinary meaning the Defendants meant and were understood to mean:

(a) The Plaintiff's services as Managing Director of Jamaica Commodity Trading Company Limited (JCTC) were terminated because of his impropriety in the formation, conclusion and implementation of very unusual contracts with Prolacta SA for the supply of milk powder.

(b) The Plaintiff caused the contracts to be entered into and implemented irregularly and in breach of normal procedures.

(c) The Plaintiff acted irregularly and improperly in having JCTC enter into these very unusual contracts without the normal participation of the Purchasing Department and with a company which was not on JCTC's list of approved suppliers.

(d) The Plaintiff is insane or stupid and would be so viewed by an authoritative source insofar as the Plaintiff agrees that under the contracts interest should have gone to the suppliers.

(e) The Plaintiff is insane, stupid or incompetent in having JCTC enter into contracts in which the supplier could be entitled to interest on the deposits.

(f) The Plaintiff is guilty of impropriety and irregularity in bringing pressure to bear on JCTC officers to accede to requests from the supplier which were departures from the norm and irregular.

4. By the publication of the said words the Plaintiff has been much injured in his credit and reputation and

> has been brought into public scandal, odium and contempt."

The claim ended with the usual prayer for damages and costs.

Langrin, J. (as he then was) found in favour of the respondent Bonnick and awarded him damages in the amount of $750,000.

The appellants now seeks to challenge that award. In coming to his decision, the learned trial judge, while of the view that the article attracted some measure of protection by being published on a privileged occasion, he found that the privilege was defeated by proof of express malice on the part of the appellants. He also by that same token found that malice being proven also defeated any claim to the defence of fair comment.

As to the defence of justification, he found that this defence did not avail the appellants as the first defendant/appellant had caused the article, in so far as it referred to the respondent, to be published well knowing that it was false, to use the words of the pleader in the statement of claim, out of sensationalism and with a view to profit due to an increase in the circulation in sale of the newspaper.

In cases of this nature, it is the meaning of the words in the article that call for our examination and in this regard it is the meaning of the words when taken as a whole and how these words appear to the ordinary and fair-minded reader. It is also equally important as to the meaning attributed to the words by the ordinary reader. Diplock, L.J. (as he then was) in ***Slim and others v. Daily***

Telegraph, Ltd. and another [1968] 1 All E.R. 497 at page 504 puts the matter this way:

> "The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey; but the notion that the same words should bear different meanings to different men, and that more than one meaning should be 'right', conflicts with the whole training of a lawyer. Words are the tools of his trade. He uses them to define legal rights and duties. They do not achieve that purpose unless there can be attributed to them a single meaning as the 'right' meaning. And so the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning, which is not necessarily the same as that intended by him who published them or understood by any of those who read them, but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it."

In this appeal, the appellant has sought to rely on four grounds. These read as follows:

> "1. The learned trial judge erred in arriving at the conclusion that the words complained of were defamatory in their natural and ordinary meaning.
>
> 2. The learned trial judge failed to appreciate or apply the test of malice as expounded in at least three decisions of the Court of Appeal and further, failed to correctly assess the pleadings and the evidence before him and thereby came to the erroneous conclusion that the defences of qualified privilege and fair comment were defeated by express malice on the part of the Defendants.

3. The learned trial judge misconstrued the nature of the plea of justification as it appears on the defence and rejected it upon an unsound assessment of the meaning of the words and of the evidence before him.

4. The award of $750,000.00 for general damages was inordinately excessive and arbitrary and out of line with comparable local and regional awards which were drawn to the learned trial judge's attention. Further, having regard to the nature of the plea of justification in this case, the learned trial judge erred in determining that the damages were aggravated by reason of said plea."

Qualified Privilege

The learned trial judge found that the article was published on an occasion which he found was privileged. This finding has been challenged by the respondents who filed a respondent's notice. Although filed out of time, the court exercised its discretion by granting the respondent leave to argue it. The issue of qualified privilege was accordingly reopened for argument.

In his judgment, before proceeding to consider this plea, the learned judge said:

> "The defendant's plea is that the said words were published upon an occasion of qualified privilege and he stated the particulars as under:
>
> **Particulars**
>
> 'The Jamaica Commodity Trading Company (JCTC) is a Corporation wholly owned by the Government of Jamaica. It is, or was at all material times, in particular, involved in the importation and distribution of goods which are necessary for the economic welfare/well-being of Jamaica. Included in such goods is milk

> powder or skimmed milk required for supply to the condensery and ice-cream manufacturers. Further the purchase of goods from overseas suppliers where foreign exchange is involved is also of great concern to Jamaica as a whole and a contract involving the price of such goods in regards to a basic food is of importance in regard to the cost of living:
>
> **(a)** The second Defendant is dedicated to informing the public on matters of public interest;
>
> **(b)** The first Defendant is a well known journalist and staff reporter of the Second Defendant;
>
> **(c)** The Business transactions of the Jamaica Commodity Trading Company (JCTC) in circumstances where, inter alia, it quite often enjoys a monopoly or otherwise are matters in which the public as a whole has a legitimate interest;
>
> **(d)** The First Defendant prior to publication afforded the plaintiff an opportunity to state his point of view by way of reply to the intended publication which was, as the publication complained of shows, incorporated in the said publication;'..."

In coming to his finding that the words in the article were published on a privileged occasion, the learned judge said:

> "The plaintiff has agreed that if the Managing Director was dismissed for impropriety or irregularity that would be a matter of public interest. He agreed that the press had a duty to report matters of public interest. This moral duty of the defendant and its reporter to publish matters of public interest is implicitly recognised in the cases: ***Trevor Munroe v. The Gleaner Company*** S.C.C.A. 67/88 and ***Smart v. Sibbles and the Gleaner Company*** S.C.C.A. 32A and 32D of 1979. It follows in the instant case, that the fact that the JCTC is

> a public institution is sufficient to make the conduct of its management in their office a matter of public interest and the occasion is therefore privileged."

In ***Reynolds v. Times Newspapers Ltd. and others*** [1999] 4 All E.R. 609, the House of Lords sought to review the law of defamation and the defence of qualified privilege. In his speech, Lord Nicholls, at pages 614-616 in dealing with the defence of honest (fair) comment on a matter of public interest, had this to say:

> *"Honest comment on a matter of public interest*
>
> One established exception is the defence of comment on a matter of public interest. This defence is available to everyone, and is of particular importance to the media. The freedom of expression protected by this defence has long been regarded by the commonlaw as a basic right, long before the emergence of human rights conventions. In 1863 Crompton J observed in ***Campbell v. Spottiswoode*** 3 B & S 769 at 779, 122 ER 288 at 291: 'It is the right of all the Queen's subjects to discuss public matters...' The defence is wide in its scope. Public interest has never been defined, but in ***London Artists Ltd v. Littler*** [1969] 2 All ER 193 at 198, [1969] 2 QB 375 at 391 Lord Denning MR rightly said that it is not to be confined within narrow limits. He continued:
>
> > 'Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment'."

In dealing with privilege under the heading "Privilege: factual inaccuracies", the Law Lord went on to state that:

> "Sometimes the need for uninhibited expression is of such a high order that the occasion attracts absolute privilege, as with statements made by judges or

advocates or witnesses in the course of judicial proceedings. More usually, the privilege is qualified in that it can be defeated if the plaintiff proves the defendant was actuated by malice.

The classic exposition of malice in this context is that of Lord Diplock in ***Horrocks v Lowe*** [1974] 1 All ER 662 at 669, [1975] AC 135 at 149. If the defendant used the occasion for some reason other than the reason for which the occasion was privileged he loses the privilege. Thus, the motive with which the statement was made is crucial. If desire to injure was the dominant motive the privilege is lost. Similarly, if the maker of the statement did not believe the statement to be true, or if he made the statement recklessly, without considering or caring whether it was true or not. Lord Diplock emphasised that indifference to truth is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true:

> 'In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', ie, a positive belief that the conclusions they have reached are true. The law demands no more.' (See [1974] 1 All ER 662 at 669, [1975] AC 135 at 150.)

Over the years the courts have held that many common form situations are privileged. Classic instances are employment references, and complaints made or information given to the police or appropriate authorities regarding suspected crimes. The courts

> have always emphasised that the categories established by the authorities are not exhaustive. This list is not closed. The established categories are no more than applications, in particular circumstances, of the underlying principle of public policy. The underlying principle is conventionally 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. Lord Atkinson's dictum, in ***Adam v Ward*** [1917] AC 309 at 334, [1916-17] All ER Rep 157 at 170, is much quoted:
>
> > '...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'."

Given the above observations of the noble Law Lord and as one has to bear in mind that the learned trial judge found that there was proof of express malice which defeated the plea of qualified privilege raised by the appellants, given the evidence in this case, it is open to question as to whether the evidence went far enough to lead to a correct finding by the learned judge. As this issue is of importance, both to the defence of qualified privilege and fair comment, it will be more fully explored when I come to deal with that defence later on in this judgment.

The learned trial judge then adverted to the existence of two conflicting sources providing information, that of the respondent and the first appellant. Having examined the evidence of the first appellant under cross-examination, he focussed on the first appellant's answer that she believed the respondent's

account. He then proceeded to use this as a basis for concluding that as both sources could not be correct, the appellant's conduct in publishing the article was actuated by malice, thus defeating the privilege.

In coming to this conclusion I, with the utmost respect, differ from the finding of malice arrived at by the learned judge. Granted that these were two conflicting sources of information, one came from an authoritative and reliable source inside the Jamaica Commodity Trading Company whose reliance had been tried and successfully tested and proven to be reliable in the past. The first appellant, Mrs. Morris, had testified that both sources believed that their perception of the facts relating to the contracts were correct. She, therefore, included both accounts and left it to the readers to make up their minds. Most important, however, was the following evidence from the first appellant's testimony which would have gone a far way to establishing whether she acted in bad faith or was actuated by malice in presenting the article for publication. She said:

> "I quoted my source. It was their perception and I quoted Mr. Bonnick's. I don't know who is right. I attempted to balance Mr. Bonnick's. Whatever I wrote I firmly believe it to be true. I disagree that I did not honestly believe in the truth of the words."

The first appellant omitted from the article Bonnick's account of the reason he gave for his dismissal. His handling of the Prolacto contracts may well have had some connection with his dismissal. At the time of the publication of the article in April 1992, the respondent had long since departed from the corridors of

the JCTC. The appellant treated the termination of his services as an historical fact. The learned judge expressed the view that the first appellant Morris, having received two conflicting accounts, including one from the respondent, she was obliged to make further enquiries to verify what her source had told her. For her to go ahead to submit the article for publication was in reckless disregard as to its truth, amounting to malice on her part defeated the plea of qualified privilege.

Justification

In examining this question, the learned judge proceeded to set out the following statements which the respondent relied on as being untrue in seeking to defeat the plea of justification. These were:

> **(a) " '...nobody at JCTC could be so mad as to agree to that', referring to interest being paid to Prolacto (the suppliers) on the second contract."**

It is important to note that although the article was concerned with mentioning the comment from the first appellant's source in relation to interest on the second contract, the respondent testified that interest should also have been paid to Prolacto on the first contract, where a mistake had resulted in JCTC receiving the interest. In this regard, the learned judge then said that:

> The plaintiff's unchallenged evidence is that it was agreed that as cash contracts interests would go to the suppliers, Prolacto and not to JCTC."

The respondent's evidence, however, was not unchallenged. Mr. Anton Thompson, the purchasing manager at the time of the award of both contracts was someone described by the respondent, Mr. Bonnick, in the following words:

> "Mr. Anton Thompson is purchasing manager. I would describe him as a competent, honest and reliable employee."

He had this to say about Prolacto and the contracts awarded to them. He said:

> "In August '90 contracts entered into with Prolacto. Never supplied JCTC prior to this. There was a list of approved suppliers."

Having described the procedure followed in a supplier being approved to get on the restricted list and so to be able to tender, Mr. Thompson then had this to say:

> "The credit check would go through the Managing Director who would approve then Company name would add to approve suppliers.
>
> My recollection is that Purchasing Department was not involved because approval was handed to him by Managing Director together with credit check and we handled it from there.
>
> I know that payment to be in Jamaican Dollars which is something we benefitted from because F/E was in short supply.
>
> I am aware that purchase price was paid to Eagle Commercial or Merchant Bank. Payment of interest on funds would have been delayed. In most commercial contracts payment is made when shipment is made. If money is in account then interest would be for purchasers." [Emphasis supplied]

These contracts also sought to protect the suppliers in the event of devaluations of the Jamaican dollar. It was this decision on the part of the managing director to agree to a contract with this term as to the interest rate on advance payments in a deposit account payable before shipment of goods that

resulted in the lawsuits with Prolacto. This condition was resisted by the authorities resulting in Prolacto cutting off supplies, resulting in the suit.

The learned judge failed to assess the evidence of Anton Thompson in his determination as to where the truth lay. Had he taken it in his consideration in evaluating the evidence it would clearly have affected his assessment of the testimony of the respondent as to his creditworthiness and the conclusion to which he came.

Also considered by the learned judge under this head was the following matter:

(b) **"contracts were arranged without the normal participation of the purchasing department."**

Here again, the learned judge, in referring to the evidence of Anton Thompson, overlooked his testimony to which I have already referred that the procedures normally followed in getting suppliers on the restricted list was not followed in the case of Prolacto. The role played by the purchasing department related to the manner in which the contracts were implemented. Moreover, there could be no complaint in relation to the manner in which the contracts were awarded as the account given by Mr. Bonnick (the respondent) was published in the article.

In the court below, it could not form part of any claim to the suit for libel.

(c) "Prolacto was not on the list of approved suppliers."

Again, this was in substance not a misrepresentation of the truth. The purchasing department was by-passed in getting Prolacto on the list of approved suppliers. The statement, therefore, has to be examined against the background of the evidence of Anton Thompson, previously referred to.

(d) "There were other departures from the norm."

This clearly was reference to the unusual nature of the contracts resulting in payment being made to the credit of Prolacto in a deposit account before shipment was made and Prolacto being granted an increase in transportation costs after the terms of the contract were finalised. In this regard the memorandum addressed to the respondent as Managing Director from Norman Mattis is worthy of mention:

"JAMAICA COMMODITY TRADING COMPANY
LIMITED
8 Ocean Boulevard
Kingston

INTEROFFICE MEMORANDUM

TO: Mr. Hugh Bonnick DATE: Sept. 10, 1990
Managing Director

FR: Norman Mattis

SUBJECT: PROLACTO S.A.

Attached is a copy of a telefax from Prolacto which speaks for itself. The request made by this company is unusual to say the least and is totally contrary to the policy of the company. Payment wholly or partially is made upon presentation of documents after shipment of goods.

> I believe we should insist on our normal procedures, especially as this is a new supplier and their request does not form part of our agreement.
>
> cc. Mr. Anton Thompson."

Mr. Anton Thompson also had something to say about the price hike for transportation costs due to the Gulf War. This was a post-contract situation. Although not a commercial law expert, anyone who had anything to do with contracts for the sale of goods is aware that the risk passes to the seller upon the agreement being finalised. Mr. Thompson, as purchasing manager at the time of the award of the first contract, had this to say on the matter:

> "There was an increase in freight rates in 1990. We resisted the request but it was an unusual one. They should honour the contract as it was." [Emphasis supplied]

The "they" referred to here is obviously the suppliers Prolacto. The proper course for the respondent to have adopted when the request by the suppliers for a price hike was made was to seek legal advice either from the Attorney General or from the company's attorneys-at-law. He nevertheless acted on his own initiative. Under cross-examination, here was his response:

> "Prolacta did not terminate supply during my tenure.
>
> The application of price hike for transportation was done with my approval. Nobody else could approve it." [Emphasis supplied]

(e) "Much pressure was brought to bear on JCTC officers to accede to the request from Prolacto for a price hike."

This clearly is a *non sequitur* as this can properly be interpreted to mean that this pressure was being applied by the suppliers. It needs to be borne in mind that the problems with Prolacto leading to a dispute which resulted in supplies being terminated came after the respondent had left the company, on 24th December 1990.

Given the allegations by the respondent and recited in paragraph 3 of the statement of claim, when the evidence is reviewed and looked at separately and as a whole the weight of the evidence is clearly in favour of the plea of justification being upheld.

Accordingly, I also would differ from the learned judge as to the conclusion reached on this ground.

Fair Comment

The learned judge also found against the plea of fair (honest) comment succeeding. One will, therefore, have to examine how he came to this conclusion.

The article attracted the same comments that were considered under the head of justification. The plea of both these defences has to be seen as the plea of justification as a rolled-up plea, viz.:

> "In so far as the plea of justification is concerned, the words are true in substance and in fact. In so far as they are not then they are fair (honest) comment on a matter of public interest."

In this regard, I rely on the extracts from the testimony of Anton Thompson and Norman Mattis. I would accordingly hold that the contention of the authoritative source that his perception in substance was right has much to commend it. As the appellants, therefore, in effect, in publishing the article, were merely doing no more than passing on information to the public without endorsing it, in the circumstances the article would not attract proof of malice (vide ***Horrocks v. Lowe*** (supra) per dictum of Lord Diplock at page 150A).

One also needs to bear in mind that the common law has always sought to permit freedom of communication and expression.

In so far as the press and the media is concerned, based on the duty/interest test, it is recognised that the press has a duty to publish matters of public interest and the persons to whom it is published must have an equally corresponding interest in receiving it. Both, however, must co-exist.

Lord Denning in ***Slim and others v. Daily Telegraph, Ltd. and another*** (supra), in dealing with this defence, had this to say at page 503 (B-E):

> "In considering a plea of fair comment, it is not correct to canvas all the various imputations which different readers may put on the words. The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations: no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view. So long as he does this, he has

> nothing to fear, even though other people may read more into it, see ***Turner (otherwise Robertson) v. Metro-Goldwyn-Mayer Pictures, Ltd.*** [1950] 1 All E.R. 449 at pp. 460, 461, per LORD PORTER and ***Silkin v. Beaverbrook Newspapers, Ltd.*** [1958] 2 All E.R. 516, per DIPLOCK, J. I stress this because the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to 'write to the newspaper': and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions."

Given the evidence which I have referred to and the statements relied on by the respondent in proof of express malice, and having reviewed the article with the necessary care, I can find nothing going towards proof of malice as defined by the authorities. I must, for emphasis, again refer to the classical exposition of the law in relation to malice by Lord Diplock who sets out the test to be applied in ***Horrocks v. Lowe*** (supra) at page 151:

> "There may be evidence of the defendant's conduct upon occasions other than that protected by the privilege which justify the inference that upon the privileged occasion too his dominant motive in publishing what he did was personal spite or some other improper motive, even although he believed it to be true. But where, as in the instant case, conduct extraneous to the privileged occasion itself is not relied on, and the only evidence of improper motive is the content of the defamatory matter itself or the steps taken by the defendant to verify its accuracy, there is

only one exception to the rule that in order to succeed the plaintiff must show affirmatively that the defendant did not believe it to be true or was indifferent to its truth or falsity. Juries should be instructed and judges should remind themselves that this burden of affirmative proof is not one that is lightly satisfied.

The exception is where what is published incorporates defamatory matter that is not really necessary to the fulfilment of the particular duty or the protection of the particular interest upon which the privilege is founded. Logically it might be said that such irrelevant matter falls outside the privilege altogether. But if this were so it would involve the application by the court of an objective test of relevance to every part of the defamatory matter published on the privileged occasion; whereas, as everyone knows, ordinary human beings vary in their ability to distinguish that which is logically relevant from that which is not and few, apart from lawyers, have had any training which qualifies them to do so. So the protection afforded by the privilege would be illusory if it were lost in respect of any defamatory matter which upon logical analysis could be shown to be irrelevant to the fulfilment of the duty or the protection of the right upon which the privilege was founded. As Lord Dunedin pointed out in ***Adam v. Ward*** [1917] A.C. 309, 326-327 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here, too, judges and juries should be slow to draw this inference."

Conclusion

In publishing the article, there can be no doubt as the learned judge correctly found that the nature of the subject-matter and the naming of the individual who was the responsible officer at the JCTC at the time the contracts were awarded, made the publication of the article an occasion which, given the circumstances relating to it, was protected by privilege. It clearly satisfied the duty/interest test laid down in ***Adam v. Ward*** (supra). This privilege could only be defeated by affirmative evidence going towards proof of express malice not in the ordinary sense that this term is used but in the sense of spite, ill-will or evil motive. Probe as I might I can find nothing in the article and in the circumstances in which the first appellant came to research and have it published which leads me to conclude that malice has been established, thus defeating the claim to qualified privilege or to negative the appellants' claim to having published the article in the honest belief that the information obtained was true. The first appellant said she believed in the truth of what she published. There were two conflicting perceptions, both of whom sought to justify what they said. She published both accounts and left it to her readers to make up their own minds. Can one reasonably come to a finding of malice on this basis? I respectfully think not.

I would accordingly allow the appeal, set aside the judgment of the learned judge and award costs to the appellants both here and in the court below.

FORTE, P.:

By a majority, the appeal is allowed, and the order of the court below set aside.

Costs to the appellants both here and below to be taxed if not agreed.