

Hugh Bonnick

Appellant

v.

(1) **Margaret Morris**
(2) **The Gleaner Company Ltd. and**
(3) **Ken Alen**

Respondents

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 17th June 2002

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
The Rt. Hon. Justice Tipping

[Delivered by Lord Nicholls of Birkenhead]

1. Jamaica Commodity Trading Co. Ltd, or JCTC for short, is a government-owned company with a monopoly over the import of basic foods into Jamaica. In 1990 JCTC entered into two contracts with a Belgian company, Prolacto SA, for the supply of milk powder. The first contract was made in September 1990, the other in December 1990. Throughout this period JCTC's managing director was Mr Hugh Bonnick. He left the company at Christmas 1990, shortly before the formal signing of the second contract.

2. Some time after the first contract was made a dispute arose regarding the amounts payable by JCTC. In August 1991 JCTC started proceedings against Prolacto, claiming damages for breach of contract. The claim was defended. In April 1992 Prolacto served a defence and counterclaim. On Sunday 19 April 1992 the *Sunday Gleaner*, a leading newspaper on the island, published on its front page an article spread across three columns under the

headline "JCTC sues Belgian milk company". The article read as follows (the paragraphs have been numbered for ease of reference):

"[1] 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.

[2] 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.'

[3] 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Commercial Bank, named as a co-defendant with Prolacto in the *Insight* report, told the *Sunday Gleaner* that JCTC has withdrawn the suit against them.

[4] The *Sunday Gleaner* has learned that Mr Alfred Rattray of Rattray Patterson Rattray is representing Prolacto.

[5] 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\$1,325 per tonne agreed in December 1990.

[6] 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.

[7] 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.

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

[9] 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.

[10] 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.

[11] 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.

[12] 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.

[13] 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.

[14] 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."

3. Mr Bonnick's response was immediate. Three days later he issued the writ in these defamation proceedings against the

journalist who wrote the article, Margaret Morris, the publisher of the newspaper and its editor. He asserted that the article bore several defamatory meanings: that his services as managing director of JCTC were terminated because of his impropriety in the formation, conclusion and implementation of very unusual contracts with Prolacto; that, irregularly and in breach of normal procedures, he had caused JCTC to enter into these contracts without the participation of the purchasing department and with an unapproved supplier; and that he was insane, stupid or incompetent. The pleadings raised issues on meaning, justification, qualified privilege, honest comment and malice.

The trial

4. At the trial Mr Bonnick gave evidence that there was nothing irregular about the making of the contracts. Nor did his dismissal have anything to do with the Prolacto contracts. He was told by the chairman that the incoming minister wanted to appoint his own man as managing director. Mr Bonnick refused to resign, but insisted on being dismissed so he would be paid compensation.

5. Mrs Morris gave evidence that her *Sunday Gleaner* article was prompted by the *Insight* report mentioned in paragraph 3. She approached JCTC, but the company was unwilling to answer questions on the record. Her sources comprised one anonymous source, knowledgeable about JCTC, and Mr Bonnick himself. The anonymous source gave her information to the effect stated in the article. She made no enquiries about the reasons for Mr Bonnick's dismissal. Over the telephone Mrs Morris sought information from Mr Bonnick for a proposed article on JCTC. She told him she had information of irregularities concerning the Prolacto contracts.

Mr Bonnick responded as summarised in paragraphs 10 and 11 of the article. She asked him whether he had been "fired" from JCTC. He said he had made them fire him because, based on the advice he had received, this would enable him to obtain more compensation. He said there was no connection between the termination of his employment and the Prolacto contracts. She considered both sources honestly believed their versions of the disputed events. She did not know whose account was correct. She left it to the readers to make up their minds.

6. Langrin J found in favour of the plaintiff, Mr Bonnick. He held that the crucial words at the end of paragraph 11 of the article meant, and would be understood by the ordinary reader to mean, that Mr Bonnick was dismissed as a result of the irregularities mentioned by the "authoritative source". The judge rejected the

defences of justification and honest comment. He held that the occasion was privileged but malice was proved: given her belief in Mr Bonnick's honesty, Mrs Morris ought not to have printed the anonymous source's conflicting version. Moreover, she failed to mention Mr Bonnick's statement that his dismissal had nothing to do with the Prolacto contracts. Persistence in the plea of justification attracted aggravated damages, which he assessed at J\$750,000.

The Court of Appeal

7. The Court of Appeal allowed an appeal by the defendants. Downer JA held that the article was not defamatory. The ordinary reader would not have concluded that Mr Bonnick's services were terminated because of impropriety in the making of the Prolacto contracts. Downer JA considered that, additionally, the defences of justification, qualified privilege and honest comment were all well founded. Bingham JA was also in favour of allowing the appeal. He too differed from the judge's conclusions on justification, qualified privilege and honest comment. He did not expressly set out his own view on the meaning of the article.

8. Forte P dissented. He agreed with the judge on the defamatory meaning of the article. He considered the article did not attract qualified privilege. Further investigation should have been undertaken, and the article failed to report Mr Bonnick's denial of any connection between his dismissal and the Prolacto contracts. He rejected the defence of justification, but would have reduced the damages to J\$650,000.

The defamatory meaning

9. Before their Lordships' Board the issues were reduced to two: meaning and qualified privilege. As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in *Skuse v Granada Television Ltd* [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the *Sunday Gleaner*, reading the article once. The ordinary, reasonable reader is not naïve; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant. An appellate court

should not disturb the trial judge's conclusion unless satisfied he was wrong.

10. Mr Tomlinson QC took his stand essentially on one defamatory meaning. Read in context, the last sentence in paragraph 11 would be understood as conveying the defamatory imputation that Mr Bonnick had been dismissed by JCTC because of impropriety in relation to the Prolacto contracts discussed in the article. Their Lordships substantially agree.

11. The primary subject of the article is, as mentioned in the headline, JCTC's court action against Prolacto. This concerned disputes arising out of two contracts. Paragraphs 1 to 8 set the scene by referring to the court proceedings and the terms of the contracts. Paragraph 9 introduced some highly critical comments made by an "authoritative source". Paragraph 10 introduced Mr Bonnick, then managing director, and reported his statement that a mistake had been made over payment of interest in carrying out the first contract and also his comments on the procedures leading up to the two contracts. There followed the crucial words, at the end of paragraph 11:

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

The article continued in paragraph 12 by reporting further "departures from the norm" in respect of the contracts, as pointed out by the "authoritative source".

12. In its context, "termination" of Mr Bonnick's services is to be read as meaning that Mr Bonnick was dismissed by JCTC (which he was). But this statement would not be read as merely a neutral statement of historical fact. Mr Bonnick is said to have been dismissed "shortly after the second contract was agreed". This links the timing of his dismissal to the matters discussed earlier, and later, in the article. It suggests to the reader there was a connection between his dismissal and those events. It would be understood by the ordinary reader to mean that Mr Bonnick had been dismissed because JCTC was dissatisfied with Mr Bonnick's handling of the Prolacto contracts in one or more of the respects identified by the anonymous source.

13. On the issue of meaning, therefore, their Lordships see no reason to depart from the conclusion of Langrin J.

14. This leaves qualified privilege as the only other issue arising on the appeal. The defence of justification is not sustainable. In the courts below the defendants did not plead, or seek to prove, that Mr Bonnick was dismissed because of dissatisfaction with his handling of the Prolacto contracts. Nor is the defence of honest comment available in this case. The defamatory statement set out above is not comment. It is a statement of fact. Further, Mr Tomlinson rightly accepted that malice does not arise as an independent issue. Matters relating to malice are to be considered in the context of deciding whether the publication attracted qualified privilege in accordance with the common law as developed by the decision of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

Qualified privilege

15. Two preliminary points can be noted regarding the defence of qualified privilege in the present case. First, the decision of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 was given after the conclusion of the trial. So Langrin J could not be expected to approach the issue of qualified privilege in accordance with the common law as developed in the *Reynolds* decision.

16. Second, section 22(1) of the Constitution of Jamaica guarantees freedom of expression. This is subject to the limitations set out in section 22(2). Nothing contained in any law, or done under the authority of any law, shall be held to be inconsistent with or a contravention of section 22 to the extent that the law makes provision on certain specified matters. One of these matters is a provision “which is reasonably required ... for the purpose of protecting the reputations, rights and freedoms of other persons”. In the *Reynolds* case the House of Lords held that the law relating to qualified privilege as declared in that case was consistent with article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). Although the wording of article 10 is not identical with the wording of section 22 of the Constitution of Jamaica, their Lordships are of the view that the law relating to qualified privilege as declared in *Reynolds* is, likewise, consistent with section 22 of the Constitution. The wording of section 22 is different from article 10, but in this context its effect is the same.

17. In the present case, as already noted, the defamatory imputation arises as a matter of implication. This raises a short point of law on the application of *Reynolds* privilege. It is this.

The defamatory imputation in the *Sunday Gleaner* article concerned the reason for Mr Bonnick's dismissal. Responsible journalism demanded that, if the newspaper was proposing to publish this defamatory imputation, it should have some factual basis. As it was, the anonymous source provided no information on this point. Further, the article should at least include Mr Bonnick's own explanation, which he had given to Mrs Morris, of why he was dismissed.

18. So much is clear. Accordingly, as Mr Caldecott QC accepted, had the article *expressly* stated that JCTC had dismissed Mr Bonnick because of dissatisfaction with his handling of the Prolacto contracts, a defence of qualified privilege could not have succeeded. By not making further enquiries and omitting Mr Bonnick's own explanation the article would have fallen short of the standards to be expected of a responsible journalist.

19. But the article contained no such express statement. The defamatory imputation was a matter of *implication*. Plainly, there is room for different views on whether the article contained such an implication. Mrs Morris seems to have thought she was not making a statement to this effect in her article. Rather more relevantly and importantly, one of the members of the Court of Appeal was of the same view. Downer JA, on his reading of the article, considered the article carried no such implication.

20. This divergence of view is neither surprising nor unusual. Language is inherently imprecise. Words and phrases and sentences take their colour from their context. The context often permits a range of meanings, varying from the obvious to the implausible. Different readers may well form different views on the meaning to be given to the language under consideration. Should the law take this into account when applying the objective standard of responsible journalism? Or should the law simply apply the objective standard of responsible journalism to the single meaning the law attributes to the offending words, regardless of how reasonable it would be for a journalist or editor to read the words in a different, non-defamatory sense?

21. At first sight there might seem to be some legal logic in applying the latter approach. The "single meaning" rule adopted in the law of defamation is in one sense highly artificial, given the range of meanings the impugned words sometimes bear: see the familiar exposition by Diplock LJ in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 171-172. The law attributes to the words only one meaning, although different readers are likely to read the

words in different senses. In that respect the rule is artificial. Nevertheless, given the ambiguity of language, the rule does represent a fair and workable method for deciding whether the words under consideration should be treated as defamatory. To determine liability by reference to the meaning an ordinary reasonable reader would give the words is unexceptionable.

22. At first sight it might seem appropriate to apply the same principle when considering whether *Reynolds* privilege affords a defence. This might appear to have the merit of consistency. But that would be to apply the “single meaning” principle for a purpose for which it was not designed and for which it is not suitable. It is one matter to apply this principle when deciding whether an article should be regarded as defamatory. Then the question being considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly. Then the question being considered is one of conduct.

23. Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care.

24. To be meaningful this standard of conduct must be applied in a practical and flexible manner. The court must have regard to practical realities. Their Lordships consider it would be to introduce unnecessary and undesirable legalism and rigidity if this objective standard, of responsible journalism, had to be applied in all cases exclusively by reference to the “single meaning” of the words. Rather, a journalist should not be penalised for making a wrong decision on a question of meaning on which different people might reasonably take different views. Their Lordships note that in the present case the selfsame question has resulted in a division of view between members of the Court of Appeal. If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether *Reynolds* privilege is available as a defence.

In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances.

25. This should not be pressed too far. Where questions of defamation may arise ambiguity is best avoided as much as possible. It should not be a screen behind which a journalist is “willing to wound, and yet afraid to strike”. In the normal course a responsible journalist can be expected to perceive the meaning an ordinary, reasonable reader is likely to give to his article. Moreover, even if the words are highly susceptible of another meaning, a responsible journalist will not disregard a defamatory meaning which is obviously one possible meaning of the article in question. Questions of degree arise here. The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances.

26. Their Lordships turn to the facts of the present case. JCTC was a government-owned company, whose management was appointed by the government. Its import business affected the cost of living of everyone. The activities of this company, and the competence of its management, were matters of considerable public concern. Members of the public were entitled to be informed of the Prolacto court proceedings. If the newspaper had seemingly reliable information of incompetent or irregular conduct by the management of JCTC, that also was a matter of legitimate public interest, provided the information was reported in a balanced and responsible fashion. Here, the general tone of the article was restrained. Mr Bonnick was approached, and his comments were printed even-handedly beside those of the anonymous source. The article did not associate itself with one or other of the two divergent versions of the events.

27. The fact that Mr Bonnick was no longer the managing director was itself a matter of legitimate public interest. The defamatory imputation, while a matter of importance, cannot be regarded as approaching anywhere near the top end of a scale of gravity. The public is well aware that from time to time senior managers are made scapegoats. Downer JA noted that the departure of high profile executives from their companies is not an uncommon feature of commercial life in Jamaica. The defamatory meaning of the words used was not so glaringly obvious that any responsible journalist would be bound to realise this was how the words would be understood by ordinary, reasonable readers. The failure to make further enquiry, and the omission of Mr Bonnick’s explanation of his dismissal, although unfortunate, have to be

evaluated, and their compatibility with responsible journalism considered, against this background.

28. Taking all these matters into account their Lordships consider that, although near the borderline, overall this article was a piece of responsible journalism to which the defence of qualified privilege is available. Accordingly, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondents' costs before their Lordships' Board.