

## JUDGMENT

CLAIM NO. C.L.C 578 OF 1995  
IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION

**BETWEEN**

**DENNIS P. CHONG**

**CLAIMANT**

**AND**

**THE JAMAICA OBSERVER LTD.**

**DEFENDANT**

Mr. Crafton Miller and Ms. S. Wolfe instructed by Crafton S. Miller and Co. for the Claimant.

Mr. Winston Spauldings Q.C. instructed by Charles Piper for the Defendant.

Heard: 12, 13, 14 and 15 February 2007 and 14, 15 and 16 May 2007 and 26 February 2008.

**Mangatal J:**

1. This Claim is a libel action. It involves the interplay between protection of reputation and freedom of expression and requires the Court to concern itself with balancing these two fundamental rights.
2. The evidence was completed in May 2007 but the time fixed for trial was insufficient for hearing oral submissions. The parties agreed that written submissions would suffice and so I ordered the Claimant's submissions to be delivered by the 13<sup>th</sup> June, the Defendant's submission by the 2<sup>nd</sup> July, and the Claimant's response to authorities by 9<sup>th</sup> July 2007. I take the opportunity to express my gratitude to Counsel on both sides for the timely manner in which they responded with those submissions, as well as to my recent invitation to comment, should they wish to do so, upon the decision of the Judicial Committee of

the Privy Council in Privy Council Appeal No. 90 of 2006, **Edward Seaga v. Leslie Harper**, delivered 30<sup>th</sup> January 2008.

3. The Claimant “Mr. Chong” is a Civil and Structural Engineer. In 1995 he was employed to the Ministry of Local Government and Works as the Director of Major Projects and Planning.

4. The Defendant “the Observer” is a limited liability company and at the material time carried, and currently carries on, the business of printing and publishing daily and other newspapers for circulation among the public in Jamaica. The Observer in particular prints, publishes and edits the Jamaica Daily Observer newspaper.

5. On the 1<sup>st</sup> of November 1995 the Observer published on its front page with continuation on page 4 an article under the headline on the front page “Government Official Suspended for buying Bad Asphalt” and continuing under the headline on page 4 “Bad asphalt creates dilemma for government, construction firm”. The journalist who wrote the article was Rohan Powell, Observer staff writer. The article reads as follows (the paragraphs have been numbered for ease of reference):

- [1] Dennis Chung, a senior official in the local government ministry, has been suspended from his job for his part in unauthorized importation of S3 million worth of unsuitable asphalt from Trinidad and Tobago.
- [2] The asphalt was to have been used by the construction firm Surrey Paving and Aggregate for road repair on behalf of the government, but when it arrived it was found that it could not be used.
- [3] Government sources say that Chung, a director in the ministry's projects department, overstepped his bounds in “trying to get something (asphalt) cheaper and at a more competitive price”.
- [4] Tests showed that the asphalt settled too easily, making it inappropriate for the road repair programme. The problem was compounded by the fact that, local

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facilities are ill-equipped to process asphalt with the characteristic of the one imported from Trinidad and Tobago.

- [5] The Observer learned that the company, from which the asphalt was bought, Lake Asphalt, has been demanding payment, but that the local government ministry and officials of Surrey were attempting to find ways to dispose of the product without cost to Jamaica.
  - [6] Lake Asphalt was said to have suggested to the Jamaican authorities that the company would be willing to finance modification to a local plant to handle its asphalt, drawn from Trinidad's famed Pitch Lake. That would cost an estimated \$10-million, which would be repaid later. Lake Asphalt would presumably then have a market in Jamaica.
  - [7] Both the Government and Surrey have apparently declined the proposal. "The discussion is now on whether we use it (the asphalt) to fix roof tops," said a ministry source. "However, the easier option is to get rid of it", he said.
6. Mr. Chong acted promptly and had his lawyers write to the Observer by letter dated November 9 1995 claiming that the article was defamatory of him and demanding, amongst other matters, an immediate apology and retraction. I note in passing that the Claimant's name is Dennis Chong, and not Dennis Chung as printed in the Observer article. However, nothing turns on this as it is not in dispute that the article refers to the Claimant.
7. When no apology or retraction was forthcoming, Mr. Chong's Attorneys issued a Writ commencing this Law Suit in December 1995 against the Observer. Mr. Chong has asserted that the article has the following defamatory meanings:
- (a) That the Claimant is or was suspended from his job at the Ministry of Local Government and Works.

- (b) That the Claimant was involved in unauthorized importation of unsuitable asphalt from Trinidad and Tobago, therefore imputing that he was acting ultra vires his job and in an incompetent manner, thus leading the public in general and the Government of Jamaica in particular to think that the Claimant is incapable of making purchases of material in the best interest of his country.
- (c) That the Claimant had engaged in improper, unprofessional and/or negligent conduct.
- (d) That the Claimant was incompetent in performing his job and his profession.

8. The pleadings raise issues on meaning, fair or, (more accurately), honest comment, qualified privilege and malice.

### **Mr. Chong's Case**

9. Mr. Chong in his Witness Statement states that at no time did he order or authorize the importation of three million dollars worth of unsuitable asphalt from Trinidad and Tobago as alleged in the Observer article or any asphalt whatsoever. At all material times he acted in accordance with his duty as Director of Major Projects and Planning to coordinate all activities to ensure the effective administration of loan agreements and the disbursements and accounting system relative to projects funded by international agencies. No contractual documents committing the Ministry of Local Government and Works were ever signed by him or at his behest and nor would he have so committed the Ministry as he was fully aware that the Ministry did not have the facilities or capability to undertake asphalt concrete mix for roadways.

10. Mr. Chong denies that he overstepped his bounds "in trying to get something (asphalt) cheaper and at a more competitive price" as alleged in the article. He acted as a medium for negotiations, facilitating discussions between the contractor and the potential supplier as he was

obliged to do in order to ensure the effective administration and disbursements of funds received from international agencies.

11. Mr. Chong also denies that when the asphalt arrived "it was found that it could not be used" and further that "the problem was compounded by the fact that local facilities are ill-equipped to process asphalt with the characteristic of the one imported from Trinidad and Tobago". He denies that "tests showed that the asphalt settled too easily making it inappropriate for the road repair programme" as research and usage over the past years has shown that the use of Trinidad Lake Asphalt in asphalt mixes delivers improved durability to pavements. It has proven to be strong material which can be easily adapted to local procedures.

12. Mr. Chong states that at the time of publication of the Observer article he was not suspended as alleged. He was on departmental leave which had commenced October 18, 1995 and was to end November 6, 1995. Thereafter his vacation leave was approved for ninety-four (94) days from the 9<sup>th</sup> November, 1995 until the 23<sup>rd</sup> March 1996. Mr. Chong makes reference to a letter dated October 19 1995 from the Director of Personnel confirming this. The then Permanent Secretary Joseph Shako recommended by letter dated October 20 1995 that disciplinary action be taken against Mr. Chong. Mr. Chong states that consequent upon that recommendation he was interdicted but this did not take place until the 25<sup>th</sup> March 1996.

13. Disciplinary proceedings were instituted against Mr. Chong pursuant to which six charges were preferred against him. A full enquiry was conducted into these charges at the Offices of the Services Commission. At the end of the enquiry Mr. Chong was acquitted of all the charges and reinstated with effect from the 25<sup>th</sup> March 1996.

14. Mr. Chong states that the Observer article was entirely false, baseless and an attempt at sensationalism so as to drum up sales of its newspaper. He verily believes that the Observer's publication was done

out of malevolence, maliciousness or spite particularly since the statements were false.

15. Mr. Chong claims damages for libel and is also asking for aggravated and exemplary damages.

**The Observer's Case.**

16. Rohan Powell in his Witness Statement states that he is presently employed as a journalist to Nationwide News Network. In November 1995 he was employed as a reporter to the Jamaica Observer. He prepared the article relating to Mr. Chong which appeared in the Observer on November 1, 1995. Before preparing the article he did not know Mr. Chong, had never met him formally, and up to the time of writing the article he had no recollection of ever having spoken to Mr. Chong previously.

17. Mr. Powell was carrying out investigations into the circumstances surrounding the importation of Trinidadian asphalt for use locally in road construction. He ascertained that Surrey Paving and Asphaltting, one of the authorized contractors for the Ministry of Local Government, had been one of the contractors retained by the Ministry to do the road works. That company was dissatisfied with the material which had been imported.

18. Mr. Powell says he obtained additional information and, on the basis of his investigations he prepared the article which was submitted for publication and was in fact published. In cross-examination Mr. Powell said that he did not interview Mr. Chong before he wrote the article and that he did not consider it necessary or appropriate to have words with Mr. Chong before publishing the article. Mr. Powell was not saying that it was not important to hear Mr. Chong's side of the story but based on the information that he had at the time, Mr. Chong had been sent on leave and was in fact on leave and persons within the same Government agency confirmed that this was the case. Mr. Powell

indicated that he did not consider the words "suspended from the job" different from the words "sent on leave."

19. Mr. Paget DeFreitas also gave evidence on behalf of the Defendant. He is a journalist and has been a journalist for over thirty years.

20. Mr. DeFreitas started with the Observer as Editor-in- Chief in 1993 and was in that position at the time when the article was published.

21. Mr. De Freitas states that at the end of October 1995, Mr. Rohan Powell, who was a reporter with the Observer came into the Observer's offices with a story. The story was brought to Mr. De Freitas' attention at the Observer's regular evening editors' conference where discussions were held with other senior editors. It also was Mr. De Freitas' task to edit the story.

22. Mr. De Freitas was of the opinion that the story brought by Mr. Powell was an important story and he made the decision to publish it having regard to two primary factors:

- (a) He thought that it dealt with an issue of sufficient public import to report on; and
- (b) Because of the source, he thought it had substantial credibility.

23. Mr. De Freitas thought it was a story to which the public should be privy for two reasons:

- (a) The story suggested that the Government was attempting to hold a public officer accountable for his actions in the performance of his duties in a context where the society was at the time beginning to demand greater levels of transparency and openness in the management of public affairs; and
- (b) Mr. Chong appeared to have been attempting to do something for the public good to wit, save taxpayers' money, had made a mistake and was being called to account, with the possibility of facing penalties.

Mr. De Freitas thought that the juxtaposition of these two issues was worthy of public discussion and debate.

24. The story was edited by Mr. De Freitas in such a fashion which he says was to make it clear that there was no malice and to take account of the fact that he did not think that Mr. Chong was being in any way dishonest or underhanded. Mr. De Freitas did not know Mr. Chong before the story was published and as far as he knows, has not met him since. What Mr. De Freitas thought was that Mr. Chong had made an honest mistake in judgment in an attempt to save the public purse. The fact that he was either suspended and/or sent on leave was a matter of sufficient consequence for the public to be privy to it. Even in retrospect, Mr. De Freitas thinks that the story represented a fair honest and balanced account of the events and was accurate in most of its essential elements. In his Witness Statement Mr. De Freitas said that his understanding is that the only element of the story that was inaccurate was whether Mr. Chong had been sent or asked to go on leave or had been suspended, which Mr. De Freitas believed in the circumstances, was of very little material difference.

25. I allowed Mr. De Freitas to amplify this aspect of his Witness Statement and in oral evidence he explained that it is not that he is saying that it was inaccurate to say that Mr. Chong was suspended, but that if he Mr. De Freitas were to make a concession, based on the claims being made, this would be the point on which, if pushed to the extreme, he would be prepared to say there was any inaccuracy at all. However Mr. De Freitas' position is not that this statement was inaccurate.

26. The Observer had information from Mr. Powell's source, which source had proved to be a reliable source in the past. Mr. De Freitas did not know the name of the specific source but he was aware of the broad realm from which the source came. Also, knowing Mr. Powell's professionalism and reputation, and his high quality work as a journalist, knowing that Mr. Powell had interviewed his source and been



told by his source that Mr. Chong had been sent on leave or suspended, the Observer had no reason to doubt that a constructive type of suspension had taken place. Mr. De Freitas expanded on his comments about constructive suspension in cross-examination, and said that he had in the past been involved in situations where an employee is being suspended, but the arrangements or correspondence do not say precisely or spell out that the employee is on suspension. When asked in cross-examination "Would you then, as Editor, in making your headlines factual, wouldn't it be fair if you, then, weren't so certain, to say, "sent on leave or suspended?" Mr. De Freitas' responded:

"Well, the term we used was *suspended* and we had absolute faith in our source and the things that were apparently in train".

27. Mr. De Freitas indicated that if it were possible to reach Mr. Chong before the article was published it would have been useful to have a comment from him but he indicated that Mr. Chong was not at work, not on the job, and was not available to be spoken to on the job.

28. Mr. De Freitas was cross-examined about the article's headlines. He indicated that the front page headline is changed on the turn page for freshness and style. However, one maintains the essential elements of the front page headline to make the connection clear, and establish the nexus between the headline on page one and the other headline on the turn page. He said that to an extent the front page of the newspaper is a window onto the newspaper. In relation to the article in question Mr. De Freitas indicated that the headline summarises the substance and essential elements of the story in this case, that is that a Government Official was suspended for Buying Bad Asphalt.

29. As discussed above, the issues raised on the pleadings in this case are:

- (a) Meaning; (b) Fair or Honest Comment; (c) Qualified Privilege;
- (d) Malice.

I shall first consider the issue of meaning.

### **Meaning**

30. With regard to meaning, I find I cannot improve upon the formulation set out by Lord Nicholls of Birkenhead in the decision of the Judicial Committee of the Privy Council on Appeal from a decision of the Court of Appeal of Jamaica in **Bonnick v. Morris and the Gleaner** [2002] UKPC 31. At paragraph 9 Lord Nicholls in turn referred to **Skuse v. Granada Television Ltd.** [1996] E.M.L.R. 278 and stated:

“As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarized by Sir Thomas Bingham M.R. in **Skuse v. Granada Television Ltd.** [1996] E.M.L.R. 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.”

31. The primary subject of the article is, in my judgment, as is mentioned in paragraph 1 of the article, that Mr. Chong, a senior official in the local government ministry was suspended from his job for his part in the unauthorized importation of three million dollars (\$3 M) worth of unsuitable asphalt from Trinidad and Tobago. The article would in my view be understood by the ordinary reader reading the article once to mean that Mr. Chong was suspended from his job because of the part he played in the unauthorized importation of unsuitable asphalt from Trinidad and Tobago which was not in the best interests of the

Government or the nation as a whole. The ordinary reader would have understood the article to mean that Mr. Chong was suspended because the Ministry of Local Government and Works was dissatisfied with the role Mr. Chong had played in this unauthorized importation.

32. In my judgment the imputation from the meaning of the words is defamatory because it would tend to lower Mr. Chong in the estimation of right-thinking members of society generally. However, it is well-established that the bane and the antidote must be taken together- **Chalmers v. Payne** (1835) 2 Cr M& R 156 at 159. In that regard, I find that to some extent the words "Government sources say that Chung, a director in the ministry's projects department, overstepped his bounds in trying to get something (asphalt) cheaper and at a more competitive price", water down any potential imputation of misconduct or disreputable, dishonest or irregular conduct, to an imputation of incompetency, or even of a lack of judgment, or error of judgment or lack of efficiency in the conduct of his professional activity. The article suggests that Mr. Chong, although acting outside of his authority, was attempting to do something beneficial for the country in that he was attempting to get a cheaper product at a more competitive price. However as it turned out the country was now being saddled with the problem or dilemma of what to do with this three million dollars worth of asphalt which was unsuitable for the purpose for which it was intended, i.e. use for road repair in Jamaica. To obtain something cheaper which is not fit for the purpose would still be inefficient or undesirable and at the very least displays lack of judgment.

33. It may well be arguable that it is not necessarily defamatory to say that someone has committed a mistake or an error of judgment. I note for example in Gatley on Libel and Slander, 10<sup>th</sup> edition, paragraph 2.27, footnote 92- the learned authors make reference to the approach in some American Courts as follows:

“Some American cases take the line that it is not defamatory to accuse another of a single mistake even if negligent, because that does not necessarily imply unfitness (though it may do so). See 50 Am Jur 2d, Libel and Slander, para. 213 & 51 A.L.R. 3d 1300.”

Further, the meaning of the offending words here are not completely dissimilar from the offending meaning arrived at by implication in **Bonnick v. Morris and the Gleaner**. In that case the Judicial Committee of the Privy Council saw no reason to disagree with the finding of the learned trial Judge Langrin J., as he then was, that the article would carry the imputation and would be understood by the ordinary reader to mean that the Claimant had been dismissed from his job as Managing Director because the Jamaica Commodity Trading Company was dissatisfied with his handling of certain contracts in one or more of the respects identified by an anonymous source. Lord Nicholls commented on that meaning as follows at paragraph 27 of the Judgment:

“....The defamatory imputation, while a matter of importance, cannot be regarded as approaching anywhere the top end of a scale of gravity. The public is well aware that from time to time senior managers are made scapegoats.”

34. To my mind, weighing the whole article, there is a defamatory imputation in this case but it is also not of the highest order of gravity.

35. The Defendant has not sought to prove that Mr. Chong was guilty of incompetence or an error of judgment or of inefficiency in his professional capacity. In other words, the Defendant has not pleaded truth or justification.

36. **Fair or Honest Comment**

The Defendant raises in its Statement of Case the Defence of Fair or Honest Comment. However, as the Judicial Committee of the Privy

Council found in **Bonnick v. Morris and the Gleaner** (paragraph 14), I hold that the defamatory statements set out in the article are not comments, they are statements of fact. In my judgment the Defence of Fair or Honest Comment would not therefore be sustainable.

37. **Qualified Privilege**

The main issue in this case is therefore Qualified Privilege. It is to be noted that in this case the pleadings were settled long before the House of Lords decision in **Reynolds v. Times Newspapers Ltd.** [2001] 2 A.C. 127 where the common law on the issue of qualified privilege underwent substantial development. Nor has there been any attempt to amend the pleadings to accord with the more modern approach, for example specifically to deal with the concept of responsible journalism. Paragraph 6 of the Defence pleads:

“6. The Defendant further states that its report was an honest report published without malice on an occasion of public privilege. The Defendant had a duty to publish and the public to receive the information which was a matter of public interest.”

**Malice**

38. In like fashion, the Amended Statement of Claim makes allegations of express malice which are repeated and adopted in the Reply. However, as Lord Nicholls indicated at paragraph 14 of the Judgment in **Bonnick v. Morris and the Gleaner:**

“...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 A.C. 127. ”

38A. However, both parties have sought to argue the issue of qualified privilege along the lines of *Reynolds* privilege and the Observer in its Counsels' submissions has expressly indicated that no reliance is being placed on traditional privilege in this case.

39. In **Jameel and others v. Wall Street Journal Europe Sprl** [2005] E.W.C.A. Civ. 74. Lord Hoffman stated:

"43. The newspaper's principal defence was based on **Reynolds v. Times Newspapers Ltd.** [ 2001] 2 A.C. 127. It is called in the trade "Reynolds privilege" but the use of the term privilege, although historically accurate, may be misleading. A defence of privilege in the usual sense is available when the defamatory statement was published on a privileged occasion and can be defeated only by showing that the privilege was abused.....

44. Misuse of the privileged occasion is technically known as "malice" and the burden is upon the claimant to prove it. In **Reynolds**, counsel for the newspaper invited the House to declare a similar privilege for the publication of political information. But the House refused to do so. Lord Nicholls of Birkenhead said that to allow publication of any defamatory statements of a political character, subject only to proof of malice, would provide inadequate protection for the reputation of defamed individuals.

45. Instead, Lord Nicholls said (at page 202) that-

"the common law solution is for the court to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public. Its value to the public depends upon its quality as well as its subject matter. This solution has the merit of elasticity. As observed by the Court of Appeal, this principle can be

applied appropriately to the particular circumstances of individual cases in their infinite variety. It can be applied appropriately to all information published by a newspaper, whatever its source or origin.”

46. Although Lord Nicholls uses the word “privilege”, it is clearly not being used in the old sense. It is the material which is privileged, not the occasion on which it is published. There is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged. The burden is upon the defendant to prove that these conditions are satisfied. I therefore agree with the opinion of the Court of Appeal in **Loutchansky v. Times Newspapers Ltd.** (Nos. 2-5) [2002] Q.B. 783, 806, that “Reynolds privilege” is “a different jurisprudential creature from the traditional form of privilege from which it sprang. It might more appropriately be called the Reynolds public interest defence rather than privilege.” (my emphasis).

40. Lord Hoffman went on to suggest that it is not helpful to apply the old classic law on qualified privilege and criticized Eady J.’s so doing in **Jameel** at first instance. Lord Hoffman had this to say in paragraphs 50 and 57 of **Jameel**:

“50. In answering the question of public interest, I do not think it helpful to apply the classic test for the existence of a privileged occasion and ask whether there was a duty to communicate the information and an interest in receiving it. The Reynolds defence was developed from the traditional form of privilege by a generalization that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House having made this

generalization, it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and the interest are taken to exist.....[ my emphasis).

57..... In my opinion it is unnecessary and positively misleading to go back to the old law on classic privilege. It is the principle stated in Reynolds and encapsulated by Lord Nicholls in Bonnick which should be applied.”

41. In the recent decision of the Judicial Committee of the Privy Council in Privy Council Appeal No. 90 of 2006, **Edward Seaga v. Leslie Harper**, delivered 30<sup>th</sup> January 2008, on Appeal from a decision of the Court of Appeal of Jamaica, Lord Carswell in delivering the judgment pointed out that whereas Lord Hoffman in **Jameel** took the view that the privilege is attached in such cases to the publication itself rather than, as in traditional privilege cases, to the occasion on which it is privileged, others such as Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Scott of Foscote in **Jameel** take the view that the **Reynolds** privilege is built upon the foundation of the duty-interest privilege. Lord Carswell said at paragraph 10 of the **Seaga** judgment:

“For the purposes of the present appeal the precise jurisprudential status of the *Reynolds* privilege is immaterial. What is significant is that it is plain in their Lordships’ opinion that the *Reynolds* decision was based, as Lord Bingham of Cornhill said in *Jameel* at paragraph 35, on a “liberalizing intention”. It was intended to give, and in their Lordships’ view has given, a wider ambit of qualified privilege to certain types of communication to the public in general than would have been afforded by the traditional rules of law.”

42. In my judgment, despite the fact that the case has been pleaded along traditional lines of classic qualified privilege, the issues should be



analyzed based on the principles of the common law as developed in **Reynolds** and as discussed by Lord Nicholls in our own local case of **Bonnick v. Morris and the Gleaner**. It is clear that in Jamaica we have accepted the developments in the area of libel law, specifically in the arena of qualified privilege as delineated in **Reynolds**, and therefore it is those common law principles which should be applied, irrespective of how the case has been pleaded. It is also to be noted that in **Bonnick v. Morris and the Gleaner** at paragraph 15, Lord Nicholls indicated that the **Reynolds** decision was handed down after the conclusion of the trial before Langrin J. and therefore his Lordship could not have been expected to approach the issue of qualified privilege in accordance with the common law as developed in the **Reynolds** decision. The pleadings in **Bonnick v. Morris and the Gleaner** could also not be expected to have been drafted on any but the pre-**Reynolds** traditional lines of qualified privilege. The Judicial Committee of the Privy Council went on to apply the common law as developed in **Reynolds** notwithstanding.

43. In **Bonnick v. Morris and the Gleaner**, Lord Nicholls discussed the interplay of protection of reputation and the constitutional right to freedom of expression. At paragraph 16 Lord Nicholls stated:

“16... 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."

44. In paragraph 23 of **Bonnick** Lord Nicholls succinctly describes the balance between freedom of expression and protection of the reputations of individuals and the significance of the **Reynolds** decision and the concept of responsible journalism in striking that balance. He stated:

"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 for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care."

45. The following are some of the basic principles and guidelines to be extracted from the cases:

- (a) The conditions and circumstances to be explored and examined are as follows:
  - (i) The public interest in the material.
  - (ii) Whether the inclusion of the defamatory statement was justifiable.

- (iii) Responsible journalism - If the publication, including the defamatory statement passes the public interest test, the inquiry then shifts to whether the steps taken to gather and publish the information were responsible and fair.
- (b) The standard and conduct required of a newspaper must be applied in a practical and flexible manner. The Court must have regard to practical realities-per Lord Nicholls in **Bonnick** (paragraph 24).
- (c) In **Reynolds** Lord Nicholls provided a non-exhaustive list of ten matters for consideration in appropriate circumstances. The weight to be given to relevant factors will vary from case to case. However, those matters are not to be treated as hurdles which the publication has to clear-per Lord Hoffman in **Jameel** at paragraph 56 and Lord Carswell in **Seaga** at paragraph 12.
- (d) The matters to be considered in appropriate circumstances include the following:
  - (i) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed if the allegation is not true.
  - (ii) The nature of the information, and the extent to which the subject matter is a matter of public concern.
  - (iii) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
  - (iv) The steps taken to verify the information.
  - (v) The status of the information. The allegation may have already been the subject of an investigation which commands respect.
  - (vi) The urgency of the matter. News is often a perishable commodity.

- (vii) Whether comment was sought from the Plaintiff. He may have information others do not possess or have not disclosed. An approach to the Plaintiff will not always be necessary.
  - (viii) Whether the article contained the gist of the plaintiff's side of the story.
  - (ix) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
  - (x) The circumstances of the publication, including the timing.
- (e) There is no question of the privilege being defeated by malice because the propriety of the conduct of the Defendant is already built into the conditions under which the material is privileged. There is no burden on the Claimant to prove malice in order to defeat the defence.
- (f) The burden is on the Defendant to prove that the conditions under which the material is privileged are satisfied.
46. In **Reynolds** the publication under consideration failed to meet the new test for the defence by a large margin. However, in **Jameel** it was held that the publication before the House did fulfill the test. The House was thus able to offer in **Jameel** a more detailed elaboration as to the circumstances in which the Reynolds defence is applicable.
47. Lord Hoffman in **Jameel** provides guidance as to how the principles in **Reynolds** should be applied.
48. "(a) The public interest of the material.
48. The first question is whether the subject matter of the article was a matter of public interest. In answering this question, I think that one should consider the article as a whole and not isolate the defamatory statement...
49. "The question of whether the material concerned a matter of public interest is decided by the judge. As

has often been said, the public tends to be interested in many things which are not of the slightest public interest and the newspapers are not often the best judges of where the line should be drawn. It is for the judge to apply the test of public interest.

(b) Inclusion of the defamatory statement."

50. "If the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.

"But whereas the question of whether the story as a whole was a matter of public interest must be decided by the judge without regard to what the editor's view may have been, the question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. And on that question allowance must be made for editorial judgment."

If the article as a whole is in the public interest, opinions may reasonably differ over which details are needed to convey the general message. The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky

and would discourage investigative reporting.” (my emphasis).

(c) Responsible Journalism

51. “If the publication, including the defamatory statement, passes the public interest test, the inquiry then shifts to whether the steps taken to gather and publish the information were responsible and fair.”

52. In **Jameel** Lord Hoffman stated that the question of whether the newspaper satisfied the conditions of responsible journalism could be divided into three topics, two of which were the steps taken to verify the story and the opportunity given to the Jameel group to comment.

53. Under the head of verification of the story, it would be perfectly proper to examine the question whether the journalist has been informed by a particular source of the matters which have been reported on. However, at paragraph 62 Lord Hoffman stated:

“...62....The fact that the defamatory statement is not established at the trial to have been true is not relevant to the Reynolds defence. It is a neutral circumstance. The elements of that defence are the public interest of the material and the conduct of the journalists at the time. In most cases the Reynolds defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true but there are cases (“reportage”) in which the public interest lies simply in the fact that the statement was made, when it may be clear that the publisher does not subscribe to any belief in its truth. In either case, the defence is not affected by the newspaper’s inability to prove the truth of the statement at the trial.”

54. In **Jameel** one of the staff reporters gave evidence that he had known his source at the Treasury for some years and had frequent

dealings with this person. Her information had been consistently reliable and she had access to the senior intelligence officer who was involved in developing lists of names which were of interest to the U.S. Government in financing terrorism.

55. As regards the opportunity to comment, Lord Hoffman stated:

“80... Failure to report the plaintiff's explanation is a factor to be taken into account. Depending on the circumstances it may be a weighty factor. But it should not be elevated into a rigid rule of law.”

56. On the facts in **Jameel**, Lord Hoffman stated:

“83 ...While it is true - and Mr. Dorsey admitted- that the story would have been no better or worse 24 hours later, this is only significant if the delay would have made a difference. In my opinion it would not...”

85. It might have been better if the newspaper had delayed publication to give Mr. Jameel an opportunity to comment in person. But I do not think that their failure to do so is enough to deprive them of the defence that they were reporting on a matter of public interest.”

57. In **Jameel** it was felt that it was not the case that the Claimant would have had information that others do not possess or had not disclosed because in the nature of things the Claimant would not have had any knowledge whether there was covert surveillance of his bank account. He could only have said that he knew of no reason why anyone should want to monitor his accounts. This the reporter would have reported if he had been allowed to do so. By contrast in **Reynolds** it was held that the publication was not protected by qualified privilege, because the serious allegations in the newspaper were presented as statements of fact, and the Claimant's considered explanation was nowhere mentioned or set out.

58. **Applying the law**

I now turn to apply the law to the instant case.

**[a] The public interest in the material.** The question here is what is the value of the material to the public? The subject matter of the article as a whole is to be considered and not just the defamatory statement in isolation. In my opinion the thrust of the article as a whole was to inform the public that unauthorized importation of three million dollars worth of asphalt which was unsuitable for use for road repair in Jamaica had taken place at the expense of the public purse and that Mr. Chong, a senior official in the Ministry of Local Government had been suspended from his job for the part he had played in this importation. The subject matter of this article was at the time of publishing undoubtedly of public concern in Jamaica. The question of the proper functioning of public officials in government departments and questions of transparency, efficiency, competence, financial prudence and accountability in relation to expenditure of public funds are in my view clearly matters with which the public would have legitimate and justifiable concern. In my judgment, as Lord Hoffman opined with regard to the article before him in **Jameel**, the article which appeared in the Observer was a serious contribution to a subject of considerable importance. I therefore find that the subject matter of the article was a matter of public concern.

**[b] Inclusion of the Defamatory Statement.**

59. Having determined that the article as a whole concerned a matter of public interest, the next question is whether the inclusion of the defamatory statement was justifiable. The defamatory statement must be a part of the story and make a real contribution to the public interest element in the article. In this article the inclusion of the name of Mr. Chong as a Senior Official in the Ministry of Local Government who had been suspended from his job as a result of the part he played in the unauthorized importation of the unsuitable asphalt was an important part of the story. It showed that this importation had been done on



behalf of the public, there were problems associated with it, and that a senior official in the Department was being held accountable, or facing penalties for the role he had played, albeit he may have ill-advisedly thought that he could get the asphalt into Jamaica for the purpose because it was cheaper and at a more competitive price. To convey this message the inclusion of Mr. Chong's name and of the suspension from his job was necessary. In that regard I cannot find any fault and have to make due allowance for Mr. De Freitas' editorial decision as to what was included in the article, specifically the defamatory statement. Again, I find some support for my views in the Judgment of Lord Nicholls in **Bonnick** where, (at paragraph 27), he stated that the fact that the Claimant was no longer the Managing Director of a government -owned company, whose management was appointed by the government, was itself a matter of legitimate public interest.

**[c] Responsible Journalism**

60. I now turn to examine the question of whether the Observer satisfied the conditions of responsible journalism. In that regard, I find it useful to look at the non-exhaustive list provided in **Reynolds**, though I appreciate that I must examine the standard and conduct required of the newspaper in a practical and flexible manner, encapsulating the tenets of responsible journalism.

61. **(1) The seriousness of the allegation.** As I have stated when I examined the question of meaning, whilst the allegation is serious, I do not consider that it falls on the higher end of the scale.

**(2) The nature of the information and the extent to which the matter is of public concern.** The information had to do with matters of concern to the public and concerned the operations and functioning of officials and the Ministry of Local Government.

**(3) The source of the information** As Lord Nicholls stated in Reynolds, (page 626f), in general, a newspaper's unwillingness to disclose the identity of its source should not weigh against it. In this case Mr. Powell gave evidence that he got his information from government sources which, in accordance with journalistic practice, he did not wish to reveal by name. He said that as a journalist, before publishing an article he would want to make sure that all the facts published are true. As far as he was concerned all the facts in the article which he wrote were true and that the information which he received from his sources was that Mr. Chong was suspended. He had not seen anything in writing but other persons within the same government establishment or agency that he contacted confirmed that Mr. Chong had been sent on leave and was in fact on leave.

Mr. DeFreitas indicated in his evidence that the Observer had absolute faith in Mr. Powell's source who had proved to be a credible reliable source in the past.

I find as a fact and accept that Mr. Powell's sources in the Ministry did tell him that Mr. Chong had been sent on leave and informed him that Mr. Chong was in fact on leave. I accept that Mr. Powell's sources were authoritative sources in the sense that they did have knowledge of what had taken place in terms of steps taken in relation to Mr. Chong's job and of what the Ministry of Local Government's stance was in relation to Mr. Chong's role regarding the asphalt. Mr. Powell has stated that there was to his mind no difference between printing that Mr. Chong had been suspended and saying that Mr. Chong had been sent on leave. Mr. DeFreitas said that based on what Mr. Powell recounted that his sources had relayed to him, the Observer had no reason to doubt the constructive element of suspension as having taken place. Mr. De Freitas indicated that he debriefed Mr. Powell and also asked other

editors to do certain things which allowed him to come to the conclusion that things were in train at the Ministry of Local Government and to conclude that Mr. Chong had been suspended. Mr. De Freitas said that at the time of publishing the article and still up to the time of giving evidence, he held and holds the view that constructively Mr. Chong was suspended. I find that Mr. Powell honestly and reasonably believed that Mr. Chong had been in effect suspended. A lot of time was spent during the trial on the question of whether Mr. Chong was in fact suspended. However, even if there is a distinction to be drawn between being suspended and being sent on leave, and therefore the fact of suspension has not been established to be true, that is a neutral circumstance when considering the Reynolds defence. I note that although Mr. Chong's Attorney sought to draw a distinction between being sent on leave and suspension, there is no evidence that Mr. Chong applied to go on leave, and the tenor of the memorandum dated October 19 1995 clearly suggests that Mr. Chong was being sent on leave. In the factual context of this case there is in my view really no material difference between being suspended and being sent on leave. By memorandum dated October 20 1995 the Permanent Secretary in the Ministry of Local Government and Works Mr. Joseph Shako wrote to the Chief Personnel Officer referring to their previous conversation on October 13 1995 advising that Mr. Chong had exceeded his authority by ordering material on behalf of the Ministry without the required approvals, and also recommending that disciplinary action be taken against Mr. Chong. Mr. Shako also referred to the fact that Mr. Chong "had proceeded on leave with effect from October 18,1995." I therefore find it quite reasonable to conclude that what was conveyed to Mr. Powell by his source was that Mr. Chong had been suspended or sent on leave, and that Mr. Powell honestly and reasonably

believed that to be the case. In addition, it seems to me that separate and apart from the question whether Mr. Powell believed that Mr. Chong was suspended, the public interest lay simply in the fact that a statement to that effect had been made by the source, in other words, simply reportage.

**(4) The steps taken to verify the information.** Mr. Powell stated that he spoke to several sources who were all connected to the same government agency and they confirmed the information. He did not have any written documentation available to him in relation to the information he had received. Mr. Powell also said in cross-examination that he did not contact the contractors who were to carry out the tests or use the asphalt. In cross-examination Mr. Powell indicated that he would not expect a reader reading the article to make a judgment that Mr. Chong had done something improper in his job by doing something unauthorized as he was just providing the public with information.

There is an aspect of this case that has concerned me from the outset and it is this. Both Mr. Powell and Mr. DeFreitas seem to have concentrated their efforts at verifying the information on the question of whether Mr. Chong was or was not suspended or being held accountable. The difficulty I am having is that very few steps, if any, seem to have been taken to verify whether Mr. Chong had played a part in any unauthorized importation, and if so, what kind of part, or whether the asphalt was indeed unsuitable. It seems to me that in the context of an article which says that Mr. Chong has been suspended for the part he played, not may have played, responsible journalism would have demanded that further enquiries be made about that aspect of the information, whether from the government sources, from the contractors, and of course, from Mr. Chong himself. This is not a case where the meaning of the article is that Mr. Chong had been suspended for the part he

allegedly played, or where the meaning is that there are reasonable grounds to suspect that he played a part. This is not a case as in **Bonnick** where the defamatory imputation is by implication. The express meaning of this article is that Mr. Chong was suspended for the part he played in something which was not good. The headline on the front page of the Observer proclaimed "Government Official Suspended for Buying Bad Asphalt". It could not be read as a neutral statement of historical fact that he had been suspended. The express meaning of this article is that he was suspended for the part he played in the unauthorized importation of unsuitable asphalt. I reject the averment in paragraph 7 of the Defence that the Observer did no more than bring to the public's attention a set of facts setting out the official status of the issues, and identifying the issues raised by the Ministry.

62. Though not directly on point, I found it useful to look at the analysis of Justice Gray in the English decision **Lance Armstrong v. Times Newspapers Limited** [2006] EWHC 1614. This was a libel action brought by Lance Armstrong, an internationally renowned cyclist against the well-known and prominent Times Newspaper. In that case Mr. Armstrong contended that the words of the article concerned carried the defamatory meaning that, contrary to his denials, he had taken drugs in order to enhance his performance in cycling competition and by so doing and denying that he had done so, he was a fraud, a cheat and a liar.

The Defendants on the other hand specified a defamatory meaning which they would seek to justify, which was that in so far as the words complained of bore the meaning that there were reasonable grounds to suspect that Mr. Armstrong had taken performance enhancing substances in order to compete in professional cycling, they were true in substance and in fact. The primary submission of the Defendant's Counsel was that the words convey no more than the existence of reasonable grounds to suspect. Alternatively, that even if the words go

further and suggest the existence of strong grounds of suspicion, they do not come close to a meaning of outright guilt.

63. Justice Gray went on to discuss the spectrum of meanings between an imputation of actual guilt, to the existence of reasonable grounds for believing in guilt.

64. Justice Gray at paragraph 27 commended the approach of looking at the article as a whole and, after taking everything into account, asking the question, whether one's impression is that the impact the article would have had on the hypothetical ordinary reasonable reader is that the person concerned was guilty or that there existed reasonable grounds for suspecting guilt.

65. In the case before me, the meaning of the defamatory words is not that there were reasonable grounds to suspect that Mr. Chong had acted incompetently or committed an error of judgment, but rather that he had been suspended for in fact acting incompetently or committing an error of judgment. It therefore seems to me that responsible journalism would have demanded further steps be taken to verify the story as regards the unsuitability of the asphalt and the question of whether Mr. Chong had played a part in unauthorized importation of it.

66. In addition, again I find the analysis of Lord Nicholls in **Bonnick** instructive. In **Bonnick** it was considered that although near the borderline, overall the article was a piece of responsible journalism to which the defence of qualified privilege was available. In **Bonnick** the defamatory imputation arose by implication. Had there been an express statement, the case would from all accounts have been decided differently. At paragraph 18 Lord Nicholls stated:

“....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.”

67. In my judgment the Defendant failed to take reasonable steps to verify aspects of the information which I have discussed above. As Lord Nicholls stated in **Bonnick**, matters relating to malice do not arise as an independent issue and are to be considered in the context of whether the publication attracted qualified privilege. To my mind this failure to take sufficient care to verify, or check the reliability of these aspects of the information are crucial in the context of the instant case.

68. I find the commentary of the authors Mark Lunney and Ken Oliphant, **Tort Law Text and Materials**, Second Edition, in a Chapter dealing with Defamation and Privacy, commenting on **Reynolds** at page 698-699 instructive:

“Of the two members of the minority, only Lord Hope can be said to have dissented from the majority’s approach to the basic question of principle... The basis for Lord Hope’s dissent was that questions such as whether the defendants had printed the plaintiff’s side of the story were relevant only to the question of malice, and not to the question whether the occasion was privileged in the first place. Addressing this point, Lord Cooke admitted that there was indeed support for such a proposition in certain earlier authorities where the publication was to a very limited class; in such cases, it might not be necessary to advert specifically to the wider circumstances of the publication (e.g. The steps taken by the defendant to ensure the information was accurate). But his Lordship ruled that the defence’s extension to publications made to the world at large meant 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’. The increase

in the scope of the defence had to be balanced by the introduction of a mechanism for preventing abuse. His Lordship noted:

'Although investigative reporting can be of public benefit, the commercial motivation of the press and other sections of the media can create a temptation, not always resisted, to exaggerate, distort or otherwise unfairly represent alleged facts in order to excite the interest of readers, viewers or listeners'."

69. The fact that the privilege has been extended in scope and that there has been a liberalization of the traditional rules, is offset by the checks and balances embraced within the concept of responsible journalism. An important element in what the Defendant is required to demonstrate as a responsible journalist is the question of the steps taken to verify the information.

70. **(5) The status of the information.**

In this case the information really was coming solely from government or ministry of local government sources. This information was coming at a relatively early stage, and was not supported by any documentation, whilst documentation dealing with the subject matter actually did exist. As it turns out, the allegations had not yet, but were to become, the subject of an enquiry by the Public Service Commission. The status of the information on certain aspects of the matter could not therefore be said to have gone through the rigours of testing. On the other hand, the information from these government sources certainly rises above rumour. Further, as regards the question of the posture which the Ministry was taking with regard to the relevant circumstances and events then the information would have a fairly authoritative basis. The real problem with this information was its limited range and that its subject matter was neither comprehensive nor all-embracing.



**71. (6) The urgency of the matter.**

In this case it does not seem as if there was any urgency or compelling need for the story to be reported when it was. Mr. Powell stated that he had been researching the story for a number of days, less than a week (page 68 of the notes of evidence on 15-5-07). There would have been no harm in delaying the story for a day or two. A delay in publishing the article could have made a difference. It was not as if it was news in respect of which readers would lose all interest if the article had been deferred for a time period during which proper inquiries could have been made.

**72. (7) Whether comment was sought from the Claimant.**

In this case Mr. Chong would have had information which others did not have or alternatively may not have disclosed. He would have said that he had not at any time ordered the asphalt, albeit Lake Asphalt of Trinidad and Tobago, the suppliers, considered that he had ordered it. Whilst Mr. Chong could not have denied that he had played some part in relation to the transaction to do with the asphalt, he would have said that his role as facilitator had been misunderstood. He would have said that what he had set up was a payment schedule, and not an order, that the letter of July 24 1995 which he wrote to Lake Asphalt was to establish a unit cost for the asphalt which would have been within the contractor's contractual arrangement with the Ministry of Local Government and Works. That unit cost would have been comparable to that which the contractor would pay to a local supplier thereby creating, according to Mr. Chong, "a level playing field" in terms of pricing and contractual arrangements between the contractor and the supplier. Mr. Chong would have said that details of payment and delivery for processing to the contractor were to be worked out in dialogue by telephone and confirmed by an agreement. Mr. Chong would have indicated that he acted only as a medium for negotiations, facilitating discussions between the contractor and the potential supplier as he was

obliged to do in order to ensure the effective administration and disbursements of funds received from International agencies.

Mr. Chong would also have denied that the asphalt was unsuitable as research over the past years, according to Mr. Chong, has shown that use of Trinidad Lake Asphalt in asphalt mixes delivers improved durability to pavements and has proven to be strong material which can be easily adapted to local procedures.

73. In short, some of Mr. Chong's communications may have been ambiguous. The terms of the letter dated August 3<sup>rd</sup> 1995, which he signed with the address of the contractor, not on behalf of the Ministry or the Contractor but on his own behalf as facilitator, are somewhat unclear and imprecise. Nevertheless, if approached by the journalist Mr. Chong would have had a different side of the story to tell. This is so even if some of the differences in Mr. Chong's account are of a subtle nature. So whereas Mr. Chong could not reasonably have denied being sent on leave, or playing some part in the transaction, he would have said that his role, actions and correspondence had been misconstrued and misinterpreted and also that it was incorrect to characterize the asphalt as bad. Indeed, at the subsequent Enquiry where Mr. Chong was afforded a chance to say his piece, it was concluded that whilst there had been mishandling of the situation, nowhere was there any evidence that any of it was as a result of any act or omission of Mr. Chong's.

I therefore find that it was not just unfortunate that no comment was sought from Mr. Chong, or that it would simply have been useful to have his comment, but rather the journalist and newspaper failed to exercise due care and to act responsibly when they failed to ascertain what Mr. Chong's version of the events was. I do not think that in this era of communication and technology the fact that Mr. Chong was on leave would be a sufficient reason for not attempting to get some contact phone numbers or address for him, e-mail or otherwise. It would not have been impractical for some effort to be made to interview or

communicate with Mr. Chong. Indeed, Mr. Powell's evidence makes it clear that he did not even attempt to ask his sources for contact information for Mr. Chong since he thought it unnecessary given that it was confirmed that Mr. Chong was on leave.

74. **(8) Whether the article contained the gist of the Claimant's side of the story.** Separate and apart from not publishing any comment by Mr. Chong, this article in no manner expressed or even hinted at the gist of Mr. Chong's side of the story. In this case I think that is a fairly serious flaw which detracts from the fairness of the publication.

75. **(9) The tone of the article.**

It is fair to say that the publication was written in measured tones. I do not find the language or the style to be sensational or dramatic. However, although the publication could have been used to raise queries, it did not. Instead the article appears to have adopted allegations as statements of fact.

76. **(10) The circumstances of the publication, including the timing.** There was nothing much that turned on the timing of this article, save that it was written at a time when Mr. Chong was on leave and matters were still at an exploratory stage in the Ministry.

### **CONCLUSION ON LIABILITY.**

77. Overall when I look at the article and the circumstances of publication, I find that the public interest in the material is clearly satisfied and the inclusion of the defamatory statement is justifiable. However, the Defendant did not behave fairly and responsibly in gathering and publishing the information. In all the circumstances this publication did not contain allegations which the public had a right to know, and was not a publication protected by qualified privilege. The Defence of Qualified Privilege therefore fails and Mr. Chong is entitled to Judgment on Liability.

### **Damages**

78. As Lord Hoffman said, at paragraph 91 of Jameel, "In the case of an individual, his reputation is a part of his personality, the "immortal part" of himself and it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss." In this case the Claimant Mr. Chong has attempted to prove actual financial loss and has claimed special damages and particularized certain heads of damage.

79. In paragraph 5 of the Amended Statement of Claim Mr. Chong states that "as a result of the said publication:

- (a) the Plaintiff's employers commenced an investigation against him and thereafter instituted disciplinary charges against him in respect of the said allegations which led to him being interdicted from duty on the 25-3-96, but the Plaintiff was subsequently acquitted of all charges and reinstated in his post;
- (b) The Plaintiff's suspension from work has ruined his chances of promotion to Permanent Secretary in his Ministry, his next logical and expected promotion, as, during the period of his interdiction from duties, a new Permanent Secretary was appointed.

### **Particulars of Special Damage**

Loss of Contract for Design and Construction of Office Complex at 9 Cargill Avenue, Kingston 10-----\$4,308,000.00."

80. As regards Mr. Chong's claim for loss of the contract for design and construction of the office complex at Cargill Avenue, Mr. Chong on the 14<sup>th</sup> of February 2007 (page 122 of the notes of evidence), stated that up to when the article was written in the Observer he did not have any permission to enter into the contract for the development of premises at

Cargill Avenue. He says that he had requested permission from the Ministry but had not yet received it.

81. In relation to the question of Mr. Chong having disciplinary charges brought against him, and his interdiction and suspension from work ruining his chances to be promoted to Permanent Secretary, Mr. Chong on the 14<sup>th</sup> February 2007 (pages 57 to 58 of the notes of evidence), whilst amplifying the evidence in his witness statement, stated that his position as Director of Major Projects and Planning would make him Second in Command to the Permanent Secretary and that the next logical promotion step for him was the position of Permanent Secretary. He said that this was the next logical step based on the hierarchy of the government service level. His level of Management was two levels below the Permanent Secretary Group and there is no other level in comparison for movement towards the position of Permanent Secretary within the organization. I do note however that at page 27 of the Bundle containing witness statements there is an organizational chart exhibited which shows the position of Director of Major Projects and Planning below that of the Permanent Secretary along with, and in the same lateral lineup as other Directors in the Ministry of Local Government and Works.

82. However, at paragraph 41 of his witness statement Mr. Chong states that by letter dated October 20 1995 the Permanent Secretary Joseph Shako had recommended to the Chief Personnel Officer, in the Offices of the Services Commission that disciplinary action be taken against Mr. Chong. This letter or memorandum clearly was dated prior to, or preceded the Observer article of November 1.

Further, in cross-examination on the 15<sup>th</sup> February 2007 (page 89 of the notes), Mr. Chong admitted that from as early as October 20 1995, well before the Observer article, a request had been made for disciplinary action to be taken against him (albeit at the time of filing this Law Suit he had not been aware of this letter). At page 95 Mr. Chong conceded that given the date of the letter, in all fairness he would have to conclude

that disciplinary proceedings had been recommended against him before the Observer's article and not as a result of the article.

83. In the circumstances, I can find no causal connection between the Observer article and (a) disciplinary charges being brought against Mr. Chong; (b) his being interdicted or suspended or not being promoted to the position of Permanent Secretary, assuming he was next in line for that position, which I am not satisfied of on the evidence on a balance of probabilities; and (c) the loss of the Cargill Avenue Contract.

84. In cases of libel, the Claimant may, but need not prove actual damage because the law presumes damage or injury to reputation resulting from defamation. I shall therefore proceed to assess Mr. Chong's entitlement to general damages. The main purpose of general damages in this area of the law is to compensate the Claimant for the distress he suffers from the publication, to repair the harm to his reputation, and also to serve as a vindication of his reputation.

85. Rowe J. as he then was, indicated in Caven v. Munroe 16 J.L.R. 286 at 293F and Forte P. indicated in S.C.C.A. No. 21/98 Margaret Morris and the Gleaner et al v. Hugh Bonnick, and S.C.C.A. No. 70/96 The Gleaner Co. Ltd. & Dudley Stokes v. Eric Anthony Abrahams, that previous decisions as to quantum in libel cases are not necessarily helpful, even when updated to the money of the day. This is because, as Sir Thomas Bingham M.R. stated in Elton John v. M.G.N. Ltd. [1996] 2 All E.R. 35 at page 51,... "comparison with other awards is very difficult because the circumstances of each libel are almost bound to be unique." The English Court of Appeal in John v. M.G.N. approved the practice of reliance upon awards which the Court of Appeal has had an opportunity to affirm or vary. In my view, the decisions of judges in other libel cases, particularly those considered by our Court of Appeal, can be a useful point of reference as a check or balance, once one bears in mind that the circumstances in each case are almost bound to be unique. What is important is that as Rowe J. stated in Caven v. Munroe page 293 F, "I

must however take fully into consideration all the factors which have traditionally exercised the minds of judges and jurors in arriving at a proper award".

86. In paragraphs 32.46-32.52 of **Gatley on Libel and Slander**, 10<sup>th</sup> Edition, some of the relevant considerations are set out. Some of these are the extent of the publication, the nature of the libel, the effect of the defamation on the claimant's reputation, and the claimant's position and standing, injury to feelings, any distress, loss of trust and humiliation the defamatory publication has caused to the claimant. The whole conduct of the defendant, from the time of the defamatory publication to the time of the judgment may also be taken into account.

In this case Mr. Chong is also seeking aggravated and exemplary damages and I will therefore have to consider additionally whether these heads of damages arise.

87. The evidence of Mr. Paget De Freitas, who was the Editor-in-Chief of the Observer at the relevant time, given on the 16<sup>th</sup> May 2007, pages 81-86 of the notes, is that on the date of the article the Observer was a new and vibrant newspaper with daily publication. Circulation took place in Jamaica and at the time there was no formal circulation to the United States or the United Kingdom or anywhere outside of Jamaica. Mr. Chong's evidence was, paragraphs 48-50 inclusive of his witness statement, that the publication caused him tremendous embarrassment and mental distress. He lost the respect of his co-workers and staff at the Ministry made adverse comments about him and manifested a loss of respect for him as their Senior Director. Mr. Chong was at the time of publication of the article, occupying a Senior position in the Ministry of Local Government and Works. He was at the date of the article a fully qualified Civil Engineer, with a Master of Science Degree in Construction Engineering and Management (pages 37-40 of the notes of evidence for 14-2-07). At page 87 of the notes of evidence on 15-2-07 Mr. Chong stated that he started working in the Ministry of Transport and Works in

1978 so at the time when he left the service in 2002, he had had about 24 years in the service. At the time of the publication he had therefore had about 17 years in the service.

88. In the **Bonnick** case allegations were made of incompetence and inefficiency in the Claimant's professional capacity. Although the judgment of the learned judge at first instance was overturned, and the defence of qualified privilege succeeded, the majority in the Court of Appeal did not appear to find the award of \$750,000.00 excessive. Forte P. in his dissenting judgment indicated that he would have reduced the award to \$650,000.00 but this was because he was not satisfied that the case was an appropriate one for the award of aggravated damages. That case was decided in January 1998. Updated, an award of \$650,000.00 would be in the region of \$1,684,976.00 today, using the latest Consumer Price Index for All Jamaica, published by the Statistical Institute for Jamaica, for January 2008(119.4 January 2008, 46.06 January 1998).

89. In Suit No. C.L.H138 of 1996, **Leslie Harper v. Edward Seaga**, judgment delivered 11<sup>th</sup> December 2003, Brooks J. found that the Leader of the Opposition at the relevant time, Mr. Edward Seaga, had defamed the Claimant Mr. Leslie Harper in his public office of Deputy Commissioner of Police by asserting that Mr. Harper was politically biased. The learned trial judge took the view that the allegation of political bias was an extremely serious one to make against a senior police officer, striking at the very root of the vital requirements for police officers not only to be impartial in the conduct of their duties, but also to be perceived by the public as impartial. Brooks J. made an award of \$3,500,000.00 inclusive of aggravated damages. In S.C.C.A. 29/2004, judgment delivered 20<sup>th</sup> December 2005, the Court of Appeal reduced the award of damages to \$ 1,500,000.00, and also indicated that the learned trial judge had erred in awarding aggravated damages. The Judicial Committee of the Privy Council in its judgment delivered on the



30<sup>th</sup> January 2008 dismissed the appeal and affirmed the award as reduced by the Court of Appeal to \$1,500,000.00. The award would operate as an award of \$1,500,000.00 in December 2003(Consumer Price Index 73.95). Updated, that award would be in the region of \$2,421,906.00.

90. I am aware that the circumstances in each case are very unique. However, I consider that the Harper case should attract a higher award than in the instant case whilst the libel in Bonnick is in the same general range as in Mr. Chong's case.

91. In my judgment this is not an appropriate case for the award of aggravated or exemplary damages. I do not consider the Observer's failure to apologize, which failure I find did take place, aggravated the damages nor do I find that the conduct of the Defendant or the state of mind of Mr. Powell or Mr. DeFreitas was such as to attract an award of aggravated damages. Their conduct demonstrates a failure to take due professional skill and care and to my mind does not rise to the level of willful or outrageous. I also do not find that the requisite mental element for an award of exemplary damages exists. Though it is clear that the newspaper was, amongst other goals, engaged in an activity aimed at securing profits, and the article did commence and feature prominently on the front page with continuation on page 4, the more calculated behaviour required to attract an award of exemplary damages is lacking in this case.

92. There will therefore be judgment for Mr. Chong, with general damages assessed at \$1,700,000.00.

Costs are awarded to Mr. Chong to be taxed if not agreed or otherwise ascertained.