COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2018/LE/GEN/01211

BETWEEN

SONIA BENITA HARAJCHI

Plaintiff

AND

NEIL HARTNELL

First Defendant

AND

THE TRIBUNE LIMITED

Second Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mr. Jairam Mangra for the Plaintiff**
	Mr. N. Leroy Smith, Ms. Theominique Nottage and Jonathan Deal for the Defendants
Hearing Dates:	**20th November, 2018 and 10th April 2019**
Ruling Date:	**4th December, 2020**

RULING

Civil – Interlocutory Injunction – Defamation – Right to freedom of expression – Right to freedom of press - Article published in newspaper – Rule in Bonnard v Perryman applied – Rule in Coulson v Coulson applied – Arguable defence – Application for interlocutory injunction dismissed

1. By an Ex-Parte Summons filed on 30th October, 2018, the Plaintiff, Mrs. Sonia Benita Harajchi **(the "Plaintiff")** sought against the First Defendant, Mr. Neil Hartnell **(the "First Defendant")** and the Second Defendant **(the "Second Defendant") ("collectively referred to as the Defendants")** the following interlocutory relief pursuant to Order 29 Rule 1 of the Rules of the Supreme Court **("RSC")**:

1.1 An injunction restraining the Defendants, and each of them whether by themselves their servants, or agents or otherwise from publishing or further

causing to be published in the Business Section of the Tribune Newspaper **(the "Newspaper")** and on the website www.tribune242.com **(the "Tribune Website")** the article entitled **"Insolvent bank's chief accused of sham deal"** which was published on 5th April, 2018 **(the "First Article")**,

1.2 Alternatively, an Order restraining the Defendants from publishing or further causing to be published the First Article in whole or in part or any similar article which contained defamatory words about the Plaintiff until the Writ of Summons filed 16th October, 2019 was determined,

1.3 An Order mandating the Defendants to remove or cause the Article 'Harajchi Resurfaces To Claim Mortgage on $20m Property" to be removed from the Tribune's Website and the internet **(the "Second Article")**, and

1.4 An Order that the Defendants do correct the false, incorrect and libelous information published in the First Article and the Second Article.

The Plaintiff relied on the Affidavit of Sonia Benita Harajchi filed 30th October, 2018 **(the "First Affidavit")** and the Supplemental Affidavit of Sonia Benita Harajchi filed 17th December, 2015 **(the "Supplemental Affidavit")**

(the "Plaintiff's Injunction Application")

2. The Defendants relied on the Affidavit of Jade Fowler filed 19th November, 2018 in support of its objection to the Plaintiff's Injunction Application.

3. At the commencement of the hearing of the Plaintiff's Injunction Application, the Court ordered that the First Defendant be dismissed from the action.

EVIDENCE

4. By the Plaintiff's First Affidavit, she averred that she was seventy four, married to Mohammed Harajchi **("Mr. Harajchi")** and resided as a Permanent Resident in The Bahamas for thirty years although her husband had left The Bahamas since 2006. She further stated that she was a businesswoman who owned real property on Paradise Island and lived with her son who assisted her in the conduct of her business ventures, financial and personal affairs.

5. The Plaintiff further averred that she believed that the Second Defendant published or caused to be published in the First Article, libelous and slanderous words without verifying the information about her and certain mortgages referred to in the First Article, which had damaged her reputation with persons with whom

she had formed relationships and a good reputation over the years. The words that she claimed were libelous and slanderous are set out para. 6, sub paras. a – k of the First Affidavit as follows,

(a) "The principal of a defunct Bahamian bank….has been accused of using a sham mortgage" to defeat legitimate creditors",
(b) "…Mohammad Harachji has "contrived a paper transaction" with his wife in a bid to sell his $20 million plus Paradise Island mansion and exit the country without returning depositors' funds.",
(c) "Mr. Winder, the Court appointed Liquidator for Mr. Harajchi's Suisse Security Bank & Trust, said he has made strong and detailed representations" to the Government's Investment Board in an effort to block the Harajchis alleged scheme.",
(d) "However…..Mr. Harachji's wife has made progress towards obtaining a Certificate of Validation for two Mortgage loans – allegedly made to her husband – which are secured on the Paradise Island properties.",
(e)"Detailing his suspicions…the Paradise Island properties were supposedly mortgaged "without proper regulatory permission being granted" under either the Immovable Property (Acquisition by Foreign) Act 1993 or its successor, The International Persons Landholding Act.",
(f) "….Mrs. Harajchi did not apply at the time of the alleged Mortgage, but she has now applied for a Certificate to validate the purported mortgages.",
g) "Referencing the Liquidators source of information the Article further states, "….The outcome of this battle is critical to Mr. Winder's efforts to recover $17.717 million in depositors funds that the Harajchis spirited out of the Bahamas in 2001, prior to the liquidator and his team taking control at Suisse Security.",
(h) "….Should that happen, there is every likelihood that Suisse Security depositors will never see their funds again, inflicting a further 'black eye' and reputational damage from a saga that has already hurt the Bahamas….Mr. Winder's latest Supreme Court report exposes how the 17-year Suisse Security saga continues to haunt this jurisdiction and overshadow the 'blue chip' image the Government and financial services sector are eager to present.",
(i) "……Clients had been directed to deposit funds with two International Business Companies (IBC's)….The two IBC's held $12.176 million and $5.54 million, respectively, when Suisse Security was placed into court-supervised liquidation, and the funds have remained under the Harajchi family's control to this very day.",
(j) ……."The move triggered a furious six-year onslaught by Mr Harajchi and his family, through the courts and using other means, in an ultimately futile attempt to regain their bank licence." (suspension and revocation),
(k) "Mr. Winder's Supreme Court meanwhile, reveals that Suisse Security's estate continues to suffer from a $21.547 million solvency deficiency, largely due to the depositor funds still in the Harajchi's possession."

6. The Plaintiff stated that the "sham mortgage" was a legal mortgage which was executed on 14th August 1989 between herself as mortgagee and her husband as mortgagor, granting her legal rights over the specified property. She added that it was executed in compliance with the governing Bahamian regulations at the time and that she had obtained the requisite permission from the Investment Board.

7. She further maintained that the mortgage was in existence long before Suisse Security Bank & Trust **("SSBT")** was established, as such, the mortgage could not be a scheme to sell property and exit the country to defraud the depositors or clients of **("SSBT")**. Additionally, the Plaintiff stated that she was dismissed from an action that was initiated by the Liquidators of SSBT against her, her husband and other defendants after she had applied to be struck out as a defendant. She noted that SSBT, was a company which had been owned by her husband and that it was not a family business. She said that she had personally never tried to have its licence restored.

8. The Plaintiff further averred that she had conducted her affairs lawfully in the selling of property legally owned by her and that she had invested and benefitted from the legitimately earned proceeds with financial institutions both in The Bahamas and internationally. She stated that Mr. Harajchi had defaulted on the mortgage which resulted in her obtaining an order for foreclosure or sale of the property.

9. The Plaintiff added that because of the publication of the First Article, several financial institutions had refused to accept her funds which had been obtained from the sale of the property, thus hindering her ability to invest their proceeds of sale of the property because it was considered that she could not satisfy the Know Your Client requirements in order to accept the funds.. The Plaintiff stated that one of the financial institutions had requested an explanation of the claim made by Mr. Harachji on the proceeds of sale, which she felt arose as a result of the publication.

10. In her Supplemental Affidavit, the Plaintiff further averred that the First Article referred to the legal mortgage as a sham mortgage executed without regulatory permission. The Plaintiff added that the Second Article also falsely and scandalously stated that the Court appointed Liquidator made strong and detailed representations to the Investment Board in an effort to block the Harajchis' alleged scheme and linked the liquidator's report.

11. The Plaintiff stated that the Second Article concluded that the SSBT depositors would likely never see their funds again if the Plaintiff was able to foreclose on

the mortgaged property, which again cast doubt on the legality of her mortgage and falsely connected the mortgage to SSBT.

12. In opposition n, the Second Defendant's Affidavit of Jade Fowler **("Ms. Fowler** exhibits, the Order of the late Honourable Mr. Justice Stephen Isaacs which ordered, *inter alia*, that SSBT be wound up and that an Official Liquidator was appointed to draft a report for the Court and all creditors, which stated the position of and progress made of the winding up process of SSBT **(the "Liquidation Order")**. They also exhibited the Affidavit of Raymond L. Winder which attached the Fourth Report of the Official Liquidator **(the "Fourth Report")**, filed in the Liquidation which included the Official Liquidator's Report on the mortgage action.

13. Ms. Fowler deposed that after a review of the SSBT's website on 19th November, 2018 **("SSBT Liquidation Homepage")** , it was confirmed that:

    (1) On 5th March 2001, by a Notice of Suspension issued by The Central Bank of The Bahamas, SSBT's banking and trust license was suspended,

    (2)Also on 5th March 2001, by Notice of Appointment issued by the Governor of The Central Bank of The Bahamas, Mr. Raymond L. Winder was appointed Receiver **("Mr. Winder"),**

    (3) On 2nd April, 2001, The Central Bank of The Bahamas, pursuant to the Bank and Trust Companies Regulations (Revocation of License) Order and pursuant to paragraph (i) of subsection (1) (a) of section 14 of the Banks and Trust Companies Regulation Act, 2000, revoked the Bank's banking and trust license and that Julian Francis, in his capacity as Governor of The Central Bank, pursuant to section 14(5) of the Banks and Trust Companies Regulation Act, 2000, filed a winding up petition with the Supreme Court for the winding up of the Bank and the appointment of Mr. Winder as Official Liquidator,

    (4) On 9th April, 2001, SSBT was placed into provisional liquidation by the Supreme Court and Mr. Winder appointed as Provisional Liquidator, and on the 13th November 2006, it was ordered by the Supreme Court that SSBT be wound up confirming Mr. Winder as the Official Liquidator.

SUBMISSIONS

14. Counsel for the Plaintiff, Mr. Mangra, relied on the locus classicus **American Cyanamid Co v. Ethicon Ltd [1975] AC 396**, which he submitted would assist the Court in its determination of whether an injunction sought should be granted:

    14.1 **"Whether the Plaintiff had a substantive cause of action,**

    14.2 **Whether there was a serious question to be tried,**

    14.3 **Whether damages would be an adequate remedy for the Plaintiff,**

    14.4 **Whether an undertaking in damages would be an adequate remedy for the Defendants,**

    14.5 **Whether the Balance of Convenience/status quo would be in favour the Plaintiff?**

    14.6 **What were the merits of the claim by the Plaintiff"**

15. Her Counsel submitted that:

    15.1 The Plaintiff had a substantive cause of action in libel and defamation as the Second Defendant's publication of the First Article and Second Article significantly interfered with and damaged her name, character and reputation in her personal/private and social life and adversely affected her livelihood and business/investment ventures.

    15.2 The Plaintiff had a very good prospect of success at trial.

    15.3 Her claim for damages for libel and defamation was a serious issue to be tried,

    15.4 Damages would not be an adequate remedy because of the nature and type of risk or harm faced by the Plaintiff as the First Article and Second Article posed a serious, present and continuing harm to the Plaintiff in her personal, social and business life,

    15.5 The Plaintiff was willing to give an undertaking in damages,

    15.6 The Order sought was appropriate because of the damage experienced to her name, character and reputation both socially and professionally, along with the future damage that could be experienced, and

15.7 The injunction sought was interim and not permanent, He added that the Application was only initiated after the Plaintiff had written to the Second Defendant without any resolution of her concerns.

16. Mr. Mangra further submitted that in the interest of justice the Court should consider the defamatory exposure of her private, personal and social life in the public domain and the significant damage to her name, character and reputation. She added that the significant and unjustified interference and continuing interference with her legitimate right to earn and maintain her livelihood through the lawful sale of her property should also be considered.

17. He additionally contended that any defence that the Second Defendant would advance would be bound to fail as it related to the defence of truth because nothing published in the First Article and Second Article about the Plaintiff was true in substance or fact. He added that fair comment and justification would also not be available defences as the words used in the First Article and the Second Article were not a fair and accurate report of the Fourth Report of the Official Liquidator.

18. It was submitted that the Second Defendant also could not rely on the defence of qualified privilege as the Fourth Report was submitted under privilege and that there was a clear distinction between the contents of the Fourth Report and the Article. She continued that such privilege did not transfer to the First Article and Second Article.

19. Mr. Mangra further submitted that as the First and Second Articles were not fair and accurate reports and not based in truth, there was clearly malicious intent by the Second Defendant designed to damage the name, reputation and character of the Plaintiff. The Plaintiff then submitted that the Second Defendant failed and or refused to correct the falsehood in the First Article and refused to remove the Second Article from the internet when requested to do so by the Plaintiff.

20. Counsel for the Second Defendant, Mr. Leroy Smith **("Mr. Smith")**, in turn submitted that American Cyanamid, was not applicable to the Injunction Application. Instead, he relied on **Bonnard v Perryman [1891] 2 Ch 269** where Coleridge C.J. with the approval of Lord Esher M.R., Lindley Bowen and Lopes L.JJ held:"

> **"The Court has jurisdiction to restrain by injunction, and even by an interlocutory injunction, the publication of a libel. But the exercise of the jurisdiction is discretionary, and an interlocutory injunction ought not to be granted except in the clearest cases – in cases in which, if a jury did not find the matter complained of to be libelous, the Court would set aside**

the verdict as unreasonable. An interlocutory injunction ought not to be granted when the Defendant swears that he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so."

Additionally, at pg. 284 of the judgment, they stated

".......We entirely approve of, and desire to adopt as our own, the language of Lord Esher M.R. in Coulson v. Coulson (1) - To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libelous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable."

21. He further submitted that as the Plaintiff had not yet pleaded her case, he could not proffer a Defence, however, he asserted that the First and Second Articles were published on an occasion of privilege based on the findings of a fair and disinterested Fourth Report prepared by Mr. Winder as the Official Liquidator of SSBT pursuant to the Liquidation Order, which ordered that the Fourth Report be filed and published on the SSBT Homepage. The Second Defendant made its publication based on the findings in the Fourth Report.

22. Mr. Smith also relied on **Isaacs v Curry [1986] BHS J. No. 63**, where Adams J rejected an application for an interlocutory injunction which would have restrained the future publication of allegedly defamatory statements as there was no material before him that would have suggested that the defendants did not hold an honest belief in the truth of what was published about the Plaintiff. In **Isaacs**, the Court referred to and relied on numerous English authorities which each discussed a different aspect with respect to personal libel and interlocutory injunctions all of which are instructive and which held that interlocutory injunctions for defamation cases should not be issued except in the most exceptional circumstances.

"23. The case of Herbage v Pressdram Ltd. (184) 2 ALL E.R. 769 seems to suggest, however, that in cases of personal libel an interlocutory injunction is granted only in the clearest cases; for example, if the jury at the trial found for the defendant, their verdict would be set aside as unreasonable.
24. In Quartz Hill Consolidated Gold Mining Company v. Beall (1882) 20 Ch. D. 501 Jessel M.R pointed out that it was very difficult to try questions of privilege and malice upon interlocutory application. He said:-

> **"In the present case the defendant says he is acting bona fide and there is no evidence against him. But if there were, I think a Judge should hesitate long before he decides so difficult a question as that of privilege upon an interlocutory application, the circular being on**

the face of it privileged, and the only answer being express malice. Those are questions which really cannot be tried upon affidavit, or in the mode in which an interlocutory application is disposed of."

25. In William Coulson and Sons v. James Coulson and Co. (1887) 3 T.L.R 846, Lord Esher M.R said that the jurisdiction to grant an interim injunction was of a delicate nature and that the Court could only "on the rarest occasions" exercise its jurisdiction. Lindley L.J. added his observations on the "gravity of granting injunctions upon affidavit evidence before the trial."

26.In Armstrong and others v Armit and others (1886) 2 T.L.R 887 Lord Coleridge L. C.J. emphasized that the right and privilege of comment should not be used as "any cloak whatever for private malice" but cautioned that it would be extremely difficult upon affidavits to try whether the privilege had been exceeded. He also thought that that was a case "which might be thoroughly and adequately compensated for in damages."

27. In Champion and Co. (Limited) v. the Birmingham Vinegar Brewery Company (Limited) (1893) 10 T.L.R. 164 Lord Coleridge again stressed that the jurisdiction to restrain the publication of libels pending the outcome of a libel action was "of a delicate nature and not to be exercised but in the clearest cases.

28 In the present application the defendants have pleaded that the publication was made with the plaintiff's leave, license and consent, either express or implied. This is an issue that is more properly decided by oral evidence that is subject of cross-examination, where the Judge observes the manner and demeanour of witnesses.

29. In Toogood v Spyring (1834) 1 Cr. M & R 181 at p 193 Parke B. stated:-

> "In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."

30. This brings me to an important point. The application for an injunction is to restrain future publication. There was nothing in the plaintiff's original affidavit to indicate that there was any intention on the part of the defendants to rebroadcast the words about which he complained. It was only in the final paragraph of his supplementary affidavit that he expressed a belief that the defendants would further publish and intended to continue publication of the allegations. But he stated no grounds for his belief. The defendants have, however, sworn that the do not intend to republish the words complained of "unless circumstances again arise give a good defence to any action" and they cite two possible instances of absolute privilege......In the words of Jessel M.R in the case of Quartz Hill Consolidated Gold Mining Company v. Beall:-

> "There is no ground, therefore, for interference. The act is past, the mischief has been done, if mischief there is, and there is no ground

for the intervention of the Court before the trial. It appears to me that this also is a fatal objection to the motion."

31. Support for this ratio is to be found in the London Motor-Cab Proprietors Association and the British Motor-Cab Company (Limited) v. The Twentieth Century Press (1912) (Limited) (1917) 34 T.L.R 68 where Younger J said:-

"The printers were the sole defendants; it was not said that they knew in any way of the libel; it was not said or proved that they would be called on to print more copies or that the union intended to do so. The printing was finished on October 20. An injunction against them would do no good as things were, so that its refusal would not cause such injury to the plaintiffs as to induce the Court to grant it."

32. If the Plaintiff succeeds at trial, he can be adequately compensated by an award of damages."

23. Mr. Smith additionally relied on **Martha Greene v Associated Newspapers Limited [2004] EWHC 2322 (QB)** in which the claimant, knowing that the defendant was planning to publish an article about her in its Sunday newspaper, applied for an injunction to restrain publication on the ground that the article was defamatory. The defendant maintained that the information contained in the article was true and that, if sued in defamation, it would plead justification. The judge dismissed the application, holding that the Human Rights Act 1998 had not affected the rule that a court should not grant an interlocutory injunction to restrain the publication of an allegedly defamatory statement unless it was clear that the alleged libel was untrue. The claimant then appealed this decision.

24. The appeal was dismissed and it was held by Brooke L.J., *inter alia*, that the rule in such a case where a defendant pleaded justification remained that a claimant would not be able to obtain an interim injunction unless it were plain that the plea of justification was bound to fail; and that, accordingly, the judge had been entitled to refuse to grant the injunction which the claimant sought.

25. The Second Defendant also relied on Brooke L.J.'s extensive discussion of the authorities and a review of the law of prior restraint in defamation actions as well as its modern position which is useful and I set the discussion out herein:-

"...Part III

8. The law of prior restraint in defamation actions: the beginnings

....46 The rule in *Bonnard v Perryman* was laid down by five judges, including the Lord Chief Justice and the Master of the Rolls, who constituted the majority of the full Court of Appeal in that case. The libel in issue was a very damaging one. North J at first instance said (<u>[1891] 2 Ch 269 at 274</u>) that unless it could be justified at the trial it was one in which a

jury would give the plaintiff 'very serious damages'. He went on to say ([1891] 2 Ch 269 at 277–278):

> '... I have this to bear in mind, that, if in such a case as this an interlocutory injunction is not granted, I cannot imagine any case in which an interlocutory injunction to restrain a libel could be granted, whereas it is clear on the authorities that there are cases in which it would be proper to grant it. Then there is this further matter to be considered with reference to the point made, that the matter ought to be tried before a jury. I am satisfied of this, that if the matter was before a jury now, upon the evidence which is before me—that is to say, the evidence of the Plaintiffs contradicted, not cross-examined to, and merely resting on the Defendant's evidence in answer to it—I am perfectly satisfied there is not any jury in *England* who would say there should be a verdict for the Defendant in such a case, and, what is more, if they did, I am quite satisfied it is a case in which a new trial would be directed. This, of course, does not touch what may be the case when the action comes to be tried. There may be evidence before the Court then which would satisfy a jury who tries it that the Defendant has made out a justification. I am merely referring to the materials before me, which are all I can look to now in considering what I am to do in the matter. In these circumstances I have come to the conclusion that an injunction must be granted in the terms which I have mentioned.'

[47] In overruling that decision Lord Coleridge CJ quoted with approval what Lord Esher MR had said four years earlier in *William Coulson & Sons v James Coulson & Co* (1887) 3 TLR 846:

> '... the question of libel or no libel was for the jury. It was for the jury and not for the Court to construe the document, and to say whether it was a libel or not. To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant. It followed from those three rules that the Court could only on the rarest occasions exercise their jurisdiction.'

[48] In the *William Coulson & Sons* case Lindley LJ (concurring, as he was later to concur in *Bonnard v Perryman*)—

> 'agreed with the rules laid down by the Master of the Rolls, and he was not prepared to say that the jury might not find that this was no libel, or that the alleged libel was true. The injunction, therefore, ought not to have been granted. Both the Judge at Chambers and the Divisional Court had suggested a form of

> circular; but it was no part of a Judge's duty to do so, except for the purpose of putting an end to litigation, and the Court ought not to settle a draft form of what might turn out to be a libel.'

[49] This dictum illustrates an unusual feature of this particular jurisdiction, which is that the judge does not know in advance exactly what the publisher is going to say. Since he cannot determine the question 'libel or no libel' at the trial, still less at the pre-trial stage, he must not get himself involved in the process of drafting what the defendant may or may not be permitted to say.

[50] In *Bonnard v Perryman* [1891] 2 Ch 269 at 285, [1891–4] All ER Rep 965 at 969 Lord Coleridge CJ resolved North J's dilemma by saying that although the courts undoubtedly possessed the requisite jurisdiction, 'in all but exceptional cases' they should not issue an interlocutory injunction to restrain the publication of a libel which the defence sought to justify except where it was clear that that defence would fail. He based his approach on the particular need not to restrict the right of free speech in libel cases by interfering before the final determination of the matter by a jury otherwise than in a clear case of an untrue libel. He said ([1891] 2 Ch 269 at 284, [1891–4] All ER Rep 965 at 968):

> '... the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions ... In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable.'

(9) The law of prior restraint in defamation actions: the modern law

[51] It is necessary to refer only to five modern cases in which the rule in *Bonnard v Perryman* was authoritatively restated. In *Fraser v Evans* [1969] 1 All ER 8 at 10, [1969] 1 QB 349 at 360–361 Lord Denning MR said:

> 'The court will not restrain the publication of an article, even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge; but a

better reason is the importance in the public interest that the truth should out ... There is no wrong done if it is true, or if [the alleged libel] is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication.'

[52] In *Herbage v Pressdram Ltd* [1984] 2 All ER 769 at 771, [1984] 1 WLR 1160 at 1162 Griffiths LJ restated the effect of the rule and then said:

'These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press, when balancing it against the reputation of a single individual who, if wrong, can be compensated in damages.'

[53] He refused to water the principles down. After summarising an argument by counsel which suggested that the combined effect of the Rehabilitation of Offenders Act 1974 and the decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396 justified a radical departure from the rule, he went on to say:

'If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would obtain an injunction, for on the *American Cyanamid* principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.'

[54] In *Khashoggi v IPC Magazines Ltd* [1986] 3 All ER 577 at 581, [1986] 1 WLR 1412 at 1417–1418 Donaldson MR applied the rule in a new context, where the defendants had asserted that they would justify what they said at trial by reference to a *Polly Peck* defence (see *Polly Peck (Holdings) plc v Trelford* [1986] 2 All ER 84, [1986] QB 1000). He said:

'I cannot see why [the *Bonnard v Perryman* principle] should not be applied. Quite apart from any question of public interest in the freedom of the press, there is a much wider principle which covers it, and that is this. The injunctive powers of the court can only be invoked in support of a right or in defence of an interest. If the *Polly Peck* defence were to succeed [the plaintiff] would have no right. She therefore cannot expect to have it defended. That does not of course answer the question which arises as to how likely she is to succeed. That is a problem which always arises in libel and elsewhere. The point is that *Bonnard v Perryman*, apart from its reference to freedom of speech, is based on the fact that courts should not step in to defend a cause of action in defamation if they think that this is a case in which the plea of justification might, not would, succeed.'

[55] By now it was firmly established by this court that the principles underlying the grant of interlocutory injunctions which Lord Diplock laid down in the *American Cyanamid* case did not apply to cases covered by the rule in *Bonnard v Perryman*. This was reaffirmed by Lord Denning MR in

Herbage v Times Newspapers (1981) Times, 30 April. In that case Sir Denys Buckley, who had a great understanding of practice and procedure in relation to equitable remedies, observed:

> 'the question what meaning the words complained of bore was primarily one for the jury. Suppose the words bore the second meaning alleged and an injunction were granted restraining further publication, if application were made to commit the defendants for contempt of court for breach of that injunction, the judge hearing the application would have to form a view as to whether there had been a breach of the injunction and decide whether the words used implied that Mr Herbage had been made bankrupt and discharged without paying his debts in full. It could not be right in a defamation action to grant an action of that kind. *There were special circumstances in defamation actions.*' (Our emphasis.)

[56] In *Holley v Smyth* [1998] 1 All ER 853 at 872, [1998] QB 726 at 749, where the potency of the rule was reaffirmed, Sir Christopher Slade, another experienced Chancery judge, said:

> 'I accept that the court may be left with a residual discretion to decline to apply the rule in *Bonnard v Perryman* in exceptional circumstances. One exception, recognised in that decision itself, is the case where the court is satisfied that the defamatory statement is clearly untrue. In my judgment, however, that is a discretion which must be exercised in accordance with established principles.'

(10) The law of prior restraint in defamation actions: the rationale of the rule

[57] This survey of the case law shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial. This is partly due to the importance the court attaches to freedom of speech. It is partly because a judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it. This is another way of putting the point made by Donaldson MR in *Khashoggi*'s case, to the effect that a court cannot know whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth lies. And if the defence fails, the defendants will have to pay damages (which in an appropriate case may include aggravated and/or exemplary damages as well)."

26. In concluding, Mr. Smith submitted that the Plaintiff's claim for defamation and any defences thereto were matters for trial but that in any event it had one or more highly arguable defences and as such this case was far from being an exceptional case as stated in Bonnard v Perryman. The Second Defendant finally submitted that any finding to the contrary could have a far reaching, 'chilling effect' on the constitutionally enshrined and protected rights of freedom of

speech and expression and subsequently, the ability of the Tribune and other news outlets to report on developments of the liquidation of SSBT.

DECISION

27. The issue for determination is whether or not an interlocutory injunction should be ordered against the Second Defendant, prohibiting the further publication of the First Article in the Newspaper and any related material from the First Article and mandating the removal of the Second Article from the Tribune's Website.

28. The principle known as the rule in Bonnard v Perryman is still the applicable law governing applications for interlocutory injunctions with defamation cases and not the test as set out in American Cyanamid. This rule was based upon the consideration of an individual's freedom of speech and more importantly freedom of the press, balanced against the reputation of a single individual who can be compensated in damages. This reasoning differs from that in American Cyanamid which holds that an injunction should be granted when damages would not be adequate compensation.

29. I accept, that at this stage of the action, I can only consider whether the Second Defendant intends to provide an arguable defence and only in the absence of such defence, would the Second Defendant then fall within the exception to the rule in Bonnard v Perryman, i.e. an interlocutory injunction should be granting pending final determination of the Plaintiff's case. The Plaintiff, at the time of the hearing had not filed her statement of claim to enable the Second Defendant to properly plead its Defence.

30. I do not accept that the Plaintiff's affidavit evidence is sufficient for the Court to disregard the fact that no Statement of Claim has been filed. In accordance with the rule in Bonnard v Perryman and the authorities reviewed therein which I accept. I cannot accept the Plaintiff's affidavit evidence as dispositive of the facts nor the Second Defendant's affidavit in response.

31. I am guided by **Isaacs v Curry (supra)** and adopt the same, in which Adams J refused to grant an interlocutory injunction after he considered of William Coulson and Sons v. James Coulson and Co., Herbage v Pressdram Ltd. and the other English authorities. Adams J went so far as to consider the affidavit evidence supplied by both parties but ultimately determined that the issue was more properly decided by oral evidence that would be subject to cross-examination, as the judge would be able to observe the manner and demeanour of witnesses. Moreover, in 2012, Tugendhat J in **Trimingham v Associated Newspapers Ltd - [2012] 4 All ER 717** stated that the rule in Bonnard v Perryman was still the applicable law where an interlocutory injunction was sought in a defamation action.

32. In 2020, the English Court of Appeal in **R (on the application of the Governing Body of X) v Office for Standards in Education, Children's Services and Skills and another [2020] EWCA Civ 594** agreed with Nicklin J's review and consideration of private law cases where interlocutory injunctions were sought, inclusive of Bonnard v Perryman in which he stated that the Court would usually prevent the grant of an order to restrain publication of defamatory statements where the respondent contends that the proposed publication was defensible.

33. The Second Defendant also referred to **Ewart F. Brown v. Bermuda Press (Holdings) Ltd. et al [2007] SC (Bda) 59 Civ**, in which Kawaley J held that the rule in Bonnard v Perryman was the applicable legal principle and also considered and applied Greene v Associated Newspapers Ltd.

34. In addition to the Bahamian and Bermudian courts' adhering to and applying the rule in Bonnard v. Perryman, the Barbadian Court of Appeal in **Thompson v Arthur - (1999) 57 WIR 40** also held that the rule n Bonnard v Perryman was still the applicable law with respect to an application for an interlocutory injunction in defamation proceedings. At para. 2 of pg. 43, Sir Denys Williams CJ stated,

> **"The principles on which a court acts in deciding whether to grant an interlocutory injunction in actions for defamation are long established and well known, and do not require repetition or discussion at any great length. The relevant portion of para 171 of 28 *Halsbury's Laws of England* (4th edn) pp 90 and 91 reads as follows:**
>
> > **'Because of the court's reluctance to fetter free speech before a trial, and because the questions that arise during the proceedings (such as what meaning or possible meanings the words bear, whether the meaning is defamatory, whether justification or fair comment are applicable and as to malice) are generally for the jury, interlocutory injunctions are granted less readily in defamation proceedings than in other proceedings and according to different principles. An injunction will be granted only if the plaintiff can satisfy the court that any jury would say that the matter complained of was libellous and where, if it did not so find, the court would set aside its verdict as unreasonable. It is for the plaintiff to show that the words are defamatory, false and, where relevant, published with actual malice.'"**

At pg. 44, para. 3 he further stated,

> **"In *Bonnard v Perryman* [1891-4] All ER Rep 965 at 968, in the course of delivering the decision of the Court of Appeal, Lord Coleridge CJ made the following statement:**
>
> > **'The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very**

> **wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions.'**
>
> **We heartily adopt that statement, especially in any case involving persons in public life; and we therefore, with the greatest respect to Payne J, fail to appreciate on what basis he could grant and then confirm an injunction to restrain the defendant from making statements of fact on a matter of undoubted public interest. In our view, therefore, the trial judge was wrong in law and erred in principle in extending the injunction to admitted facts."**

35. The Court of Appeal in Trinidad and Tobago recently departed from the rule in Bonnard v Perryman in **Southern Medical Limited et al v. Cherry Ann Rajkumar CA S-062/2019** based on the fact that defamation matters were no longer heard by a jury. The balance of justice test was introduced and sought to balance one's right of freedom of expression to one's right to privacy and their family. The Court ultimately decided that a judge could possibly reach the same conclusion as if the rule in Bonnard v Perryman were applied, once it determined where the greater risk of injustice would lie.

36. These courts, except for Trinidad & Tobago, still recognize and apply the rule in Bonnard v Perryman as does The Bahamas, as the applicable law for whether or not an injunction should be granted in defamatory actions. In the absence of a decision from the Bahamian appellate court determining otherwise, I cannot, until the case is properly pleaded, defended and determined at trial, properly make a decision to restrain the Second Defendant from republishing the First Article and Second Article.

37. As the authorities have stated, the First and Second Articles have already been published and the alleged mischief has already been done if there is found to be any at trial. Therefore it would be improper to stifle the Second Defendant's right to the freedom of expression and by extension the freedom of the press, which is a most important freedom.

38. Accordingly, I find that while the Plaintiff has submitted that the affidavit evidence was sufficient to make a decision at this stage, her matter has not been properly pleaded and she along with the Second Defendant must be given an opportunity to properly present their cases and have a trial of the issues. Should the trial judge determine that there was mischief or malice, the appropriate award of damages will follow.

39. I also find that I am constrained to only consider whether or not the Second Defendant has submitted that it has an arguable defence, which it submits it has

and I so accept. I therefore, dismiss the Plaintiff's Injunction Application and award the Second Defendant costs to be taxed if not agreed.

Dated this 4th day of December, 2020

G. Diane Stewart

Justice