BARBADOS

IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION

Suit No. 324 of 1989

BETWEEN:

MACDONALD FARMS LTD.	**FIRST PLAINTIFF**
ASHA MIRCHANDANI	**SECOND PLAINTIFF**

AND

NATION PUBLISHING CO. LTD	**FIRST DEFENDANT**
HAROLD HOYTE	**SECOND DEFENDANT**

Appearances:
Mr. Clement E. Lashley, QC, Mr. Leslie F. Haynes, QC and Ms. Honor Chase for the Plaintiffs
Sir Henry De B Forde, QC, Mr. C. Anthony Audain with him for the Defendants

Suit No. 861 of 1990

BETWEEN:

ASHA MIRCHANDANI	**FIRST PLAINTIFF**
RAM MIRCHANDANI	**SECOND PLAINTIFF**
MACDONALD FARMS LTD.	**THIRD PLAINTIFF**

AND

CARIBBEAN BROADCASTING CORPORATION	**DEFENDANT**

Appearances:
Mr. Clement E. Lashley, QC, Mr. Leslie F. Haynes, QC and Ms. Honor Chase for the Plaintiffs
Sir Henry De B Forde, QC and Mr. John A. Connell, QC for the Defendants

Suit No. 1702 of 1990

BETWEEN:

ASHA MIRCHANDANI	**FIRST PLAINTIFF**
RAM MIRCHANDANI	**SECOND PLAINTIFF**
MACDONALD FARMS LTD.	**THIRD PLAINTIFF**

AND

BARBADOS REDIFFUSION SERVICE LTD (NOW STARCOM NETWORK INC.)	**DEFENDANT**

Appearances:
Mr. Clement E. Lashley, QC, Mr. Leslie F. Haynes, QC and Ms. Honor Chase for the Plaintiffs
Sir Henry De B Forde, QC. Mr. C. Anthony Audain with him for the Defendants

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court.

Date of Decision: 2014 November 21

[1] This Decision is rendered pursuant to written submissions filed on behalf of the parties as follows:

1. Plaintiffs' submissions in respect of leave to amend writ of summon filed 7th February 2014;
2. Defendants' submissions filed 7th February 2014;
3. Plaintiffs reply to Defendants' submissions filed 18th February 2014;
4. Defendants' submissions in response filed 14th February 2014; and
5. Plaintiff's submissions in reply filed 13th March 2014.

DECISION

PROCEDURAL BACKGROUND

[2] Mrs. Asha Mirchandi and the company, Macdonald Farms Ltd appear as Plaintiffs in each of the above-captioned actions, together in two of the actions (Suits No. 861 of 1990 and No. 1702 of 1990) with her husband, Ram Mirchandani. The actions, however, are instituted against entirely different persons, although all the Defendants are media organizations operating in Barbados or, in the case of Harold Hoyte, the editor/publisher of one.

[3] The first action (Suit No. 324 of 1989) is instituted against the Nation Publishing Co. Ltd (the Nation) and its publisher Harold Hoyte while the second action (Suit No. 861 of 1990) is against the Caribbean Broadcasting Corporation (CBC) and the third action (Suit No. 1702 of 1990) is against Barbados Rediffusion Service Ltd (now Starcom Network Inc). (Barbados Rediffusion).

[4] Not only are the Defendants all media entities and personalities, but also the actions instituted against each of them by the Plaintiffs are all actions in defamation.

[5] Furthermore, all three actions arise as a result of certain allegations made in relation to the business operations of McDonald Farms Ltd reported by the Barbadian Media in 1989 which allegations inspired the calypso songs, "the Madd Chicken Song" by the Madd Group, "Pluck It" by Red Plastic Bag and "Tit for Tat" by Classic, all produced during Crop Over Festival 1989. The Plaintiffs allege that the media reports and these calypso songs contained words defamatory of them. It is because of the alleged defamation contained in these songs and

newspaper reports of the allegations that the Plaintiffs have instituted their claims against the Defendants.

[6] They have instituted an action against CBC and Barbados Rediffusion for their publication of the songs during June, July and August 1989 while they have sued the Nation and its editor for the publication of several articles covering the allegations, investigations carried out in relation to the allegations and the controversy caused by it, including the popular calypso songs listed above. An action had also been instituted against the Barbados Advocate, but this action has been long settled.

[7] The claims filed by the Plaintiffs in these three separate actions may very well hold the dubious distinction of being the longest running action in the High Court of Justice, having now been instituted more than twenty-five years ago. The matters have been vigorously contested at every stage, with many interlocutory applications and appeals from the same passing through the hands of many judges, most now retired, until the appeal against the order of **Husbands J** striking out an amended defence in the action against Barbados Rediffusion finally reached the Caribbean Court of Justice (CCJ) as the first action to be heard before it in any jurisdiction, at which point it was ordered to be returned to the High Court for trial and disposal.

[8] The matters are all now at the case management stage. At this point, two issues have been raised by Counsel for the Defendants, relating to consolidation of the separate matters and trial by jury in Suit No. 861 of 1990.

[9] The parties have also agreed that a Summons for Leave to Amend a Statement of Claim filed by the Plaintiffs on the 4 August 2006 should be determined by the Court at this stage.

ISSUES

[10] The following issues arise for the Court's consideration:

1) Whether the three actions filed separately against each Defendant by the Plaintiffs should be consolidated;
2) Whether Suit No. 861 of 1990 (whether or not consolidated with the other actions) should be heard by a jury pursuant to **section 44** of the **Juries Act Cap. 115B (Cap. 115B)**; and
3) Whether the amendments sought by the Plaintiffs in the Statement of Claim filed in Suit No. 1702 of 1990 should be permitted.

[11] In keeping with their previous conduct, each of the issues raised above has been robustly argued and the parties have all filed written submissions on each point.

[12] The issues will now be considered and disposed of in turn.

CONSOLIDATION OF THE MATTERS

[13] Counsel for the Defendants have all joined forces seeking to have the three actions consolidated by the Court under its case management powers while Counsel for the Plaintiffs have firmly resisted this application.

The Case for the Defendants

[14] Sir Henry Forde, QC now representing all the Defendants together with their other Counsel, urged the Court to consolidate all three actions and dispose of them together, arguing that it had the power to do so under **Part 26(1)(2)** of the **Supreme Court (Civil Procedure) Rules 2008 ("CPR")**.

[15] Counsel pointed out that the purpose of consolidation was to avoid wasting time and resources in a situation where two or more claims raise identical or similar issues that can be properly brought together. On the authority of the text, **Civil Procedure: Principles of Practice by Adrian Zukerman**, he submitted that consolidation had the effect of ensuring that claims containing considerable overlapping issues did not give rise to irreconcilable decisions.

[16] Sir Henry further submitted that the overriding objective of **CPR Rule 1.1** demanded consolidation of the actions as doing so would not only save time and resources, but also erase the need to empanel three different juries thereby reducing the risk of contradictory verdicts.

[17] Counsel further contended that consolidation was justified as there was substantial overlap in the three actions although separately filed as (i) the Plaintiffs in each action were (largely) the same; (ii) the causes of action all related to the same or largely similar defamatory publications and complaints; (iii) the defences (and hence the issues before the Court) were also similar; (iv) the remedies sought were identical; and (v) there were common issues of law and fact.

[18] According to Sir Henry, the Court, in considering whether to consolidate the matters, had to carefully compare the pleadings in each of the actions. Sir Henry argued that an examination of the pleadings showed similarity not only in wording but also on the facts pleaded, the causes of action raised, the relief claimed and the issues of law arising. He pointed out that the complaints and particulars of damage in each action were quite similar, as was the relief claimed.

The Case for the Plaintiffs

[19] In their Reply to the Defendants' written submissions filed 18 February 2014, the Plaintiffs argued that consolidation should not be ordered, pointing out that **Greenidge J.** did not order the consolidation of the actions against the Nation and the Advocate Limited and instead ordered that the cases be tried one after the other.

[20] It is noted that reference to the decision of **Greenidge J.** does little to support the Plaintiffs' opposition to the application for consolidation. The judgment of Greenidge J. to which the Plaintiffs referred was not provided to the Court and the Court has also been unable to otherwise obtain a copy of this judgment. The Plaintiff was unable to advert to the reasons given by **Greenidge J.** for refusing the application to consolidate those two matters and, given the absence of

evidence in relation to the context of this prior application for consolidation, the Court cannot speculate on the same. His decision to decline consolidation of the suits against the Barbados Advocate with that against the Nation is not binding on this Court and, without the reasons for that decision, is of no value to the determination of this matter.

[21] Counsel for the Plaintiffs submitted that consolidation was not appropriate where each matter was complex in nature. They also drew particular attention to the fact that the form by which defamation occurred in each case was different. The Defendants, however, have correctly pointed out that there were similar modes of publication in the action against CBC and the action against Barbados Rediffusion. While they have agreed that the medium by which the alleged defamation was published in the case against the Nation was quite different, they have argued that the factual background and issues of law arising in this action remain similar to those arising in the other two.

[22] Counsel for the Plaintiffs further argued that one of the reasons why the Court should decline to consolidate the matters was because of the volume of documents filed in each matter. Given the large number of documents filed in each action, it was argued that consolidation would cause confusion, make it difficult for the Court to efficiently and effectively manage the case and would not only increase the length of the trial, but also the legal costs of the same.

[23] Finally, Counsel for the Plaintiffs submitted that the Plaintiffs were not satisfied that the Court was armed with the technological skills and manpower to effectively and efficiently manage the presentation of the volume of material in all three cases. He argued that in determining whether to consolidate the Court could not ignore the need to allocate resources to other cases and that the complexity of the cases demanded certain court resources found only in criminal courts whose use might have the effect of impeding cases being heard in the assizes.

The Defendants' Reply

[24] Counsel for the Defendants, on the other hand, submitted that the Defendants were satisfied that the Court had access to the technological skills required to handle the matter and were confident in its ability to do so. Ultimately, it was accepted by the parties that this was an issue for the Court to determine.

[25] Sir Henry argued, however, that a proper examination of the List of Documents filed in each of the claims revealed that many of the documents are common to all three actions and accordingly consolidation would not cause any further confusion and it would be no more difficult to efficiently and effectively manage the volume of exhibits in a consolidated action than if each action were to be heard separately. Indeed, it was the submission of Counsel for the Defendants that consolidation would more likely shorten the length of the trial since the documents would only have to be presented once not twice.

The Power of the Court to Consolidate

[26] There is little dispute on the legal principles governing the Court's discretion to consolidate matters before it.

[27] **Part 26** of the **CPR** sets out the various powers available to the Court at case management. **Rule 26(2)** expressly provides:

> "Except where these Rules provide otherwise, the court may
>
> (a) consolidate proceedings;
>
> (b) …."

[28] Under its case management powers in **Part 26**, the Court therefore has a broad discretion to consolidate separate claims appearing before it, where it considers it appropriate to do so.

[29] The Rules provide no guidance as to how the Court's discretion in relation to consolidation should be exercised. It is trite law, however, that in the exercise of this power the Court must take into account the overriding objective set out in **Rule 1.1**: **Rule 1.2**. See also ***Treasure Island Company v Audubon Holdings Ltd (unreported) BVI Civil Appeal No. 22 of 2003, Decision of September 20, 2004 per Saunders CJ (ag)***.

[30] **Rule 1.1** provides:

> "(1) The overriding objective of these Rules is to enable the court to deal with cases justly.
>
> (2) Dealing justly with a case includes, so far as is practicable,
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate to
>
> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[31] It has been suggested, quite reasonably, in **Blackstone's Civil Procedure (2011)** at paragraph 14.2 that the Court's power to consolidate should be used to deal with separate "claims involving common questions of law or fact between different parties, or different causes of action involving the same parties…in the same proceedings".

[32] In **Civil Procedure: Volume 1 (The White Book Service 2003)** the learned authors opine that the power of the Court to consolidate proceedings is derived from its power to do so under the old Rules of the Supreme Court (RSC) UK and that the object under both civil procedure regimes is the same – "to avoid a

multiplicity of proceedings…and, thus, to reduce costs and delays". The Court accepts that this is clearly the objective of its power to consolidate.

[33] Although no explicit guidance is provided as to how the discretion under the CPR (UK) should be exercised, the authors of the text propose that, in light of the overriding objective, the conditions under which consolidation could be ordered under the RSC remain applicable to the exercise of this power under the CPR (UK).

[34] Under **Order 4, Rule 2** of our **Rules of the Supreme Court**, **1982 (RCS)** consolidation of two or more proceedings was ordered where the Court was satisfied that (i) the same common questions of law or fact arose in these proceedings; (ii) the right to relief in these matters arose out of the same transaction or series of transactions; or (iii) an order for consolidation was desirable for some other reason. The Court accepts that although the CPR does not require the Court to consider these factors in exercising its power to consolidate, and the Court is not limited to these three situations, consolidation is certainly appropriate where the Court is satisfied that they exist.

Should the Court consolidate the matters before it?

[35] There is no doubt that each of the claims has been vigorously litigated and as a result, the trials in each matter are likely to be complex and protracted. Counsel for the Plaintiffs submits that because each of the claims is complex in its own right, the Court would be unable to effectively and efficiently manage the proceedings, if they are consolidated. Consolidation, it is therefore argued, will lead to a prolonged hearing and increased legal costs, both of which, it is implied, can be avoided by dismissing the Defendants' application.

[36] The submissions of Counsel for the Plaintiffs are not entirely without merit. There is little doubt that each claim, on its own, has attracted voluminous affidavits and exhibits and significant judicial attention and may doubtlessly require more. Hearing all three matters together is therefore likely to take longer than hearing one of the matters separately. However, the Court is satisfied that hearing each of the claims separately is likely to consume far more time than to hear all three claims together and will, accordingly, also attract even greater legal costs.

[37] Counsel for the Plaintiffs has also suggested that consolidation will hinder the course of justice, as it will be inefficient and likely to cause confusion for the decision maker. This submission is grounded on two points: (i) the inability of the Court to efficiently manage the claims, if consolidated; and (ii) the use of entirely different form of media to publish the alleged defamation, leading to exhibits that exist in completely different media and therefore require different instruments to access.

[38] It is noteworthy, however, that Counsel for the Plaintiffs does not and, indeed, cannot dispute the overlap between the separate claims, the most glaring of which is the fact that each of the claims has been instituted by essentially the same plaintiffs. Equally clear is that, as pointed out earlier, the cause of action in each case pertains to similar or largely similar defamatory publications and complaints

arising out of similar facts. They all arise from certain allegations relating to the chicken farm operated by McDonald Farms Ltd, which allegations inspired the production (and publication) of the popular calypsos earlier mentioned.

[39] The overlap between these three separate actions is evident from an examination of the Statements of Claim filed in each. The Statements of Claim filed in Claim No. 1702 of 1990 (against Barbados Rediffusion) and Claim No. 861 of 1990 (against CBC), in particular, demonstrate considerable similarity.

[40] It is clear from paragraphs 1 and 2 of the Statements of Claim that the Plaintiffs in each are identical. This is not the only similarity. In paragraph 5 of both the claim in Suit No. 1702 of 1990 and Suit No. 861 of 1990 (both claims), the Plaintiffs plead "The Madd Chicken Song" in full and allege in each that the Defendant falsely and maliciously broadcast that calypso in June and July 1989 which contained words defamatory to the Plaintiffs.

[41] In paragraph 7 of each Statement of Claim, the Plaintiffs further pleaded that the natural and ordinary meaning of the words complained of meant and were understood to mean:

> "a) That the Third Plaintiff company had sold to the public for human consumption diseased chickens and chickens which had died before processing.
>
> b) That the Third Plaintiff company had deceived the public and endangered the health of the public by the sale of such chickens.
>
> c) That the First and Second Plaintiffs as directors of the Third Plaintiff company were knowingly responsible for the company's scandalous conduct as described in paragraphs a) and b) hereof.
>
> d) That the conduct of the First and Second Plaintiffs in relation to the sale of dead and diseased chickens amounted to a criminal offence, for which they deserved to be arrested and put in jail."

[42] In paragraphs 9 and 13 of the Statement of Claim in Suit No. 1702 of 1990, it was pleaded that the Defendant falsely and maliciously broadcast the calypso, "Pluck It" and "Tit for Tat" respectively, with the full lyrics of each calypso set out while in paragraph 12 of the Statement of Claim in Suit No. 861 of 1990, the Plaintiffs pleaded that the Defendant broadcast the Pic-O-De-Crop Calypso Finals in which "Pluck It" and "Tit for Tat" were both performed and the lyrics of each calypso were both also set out.

[43] In both Statements of Claim (paragraph 11 of Suit No. 1702 of 1990 and paragraph 14 of Suit No. 861 of 1990), it was pleaded that the Calypso "Pluck It" was understood to bear and did bear the following meanings:

> "i) That the Third Plaintiff company had put on sale for human consumption many chickens which had been processed after dying from disease and also pork from dead pigs and stinking meat.

ii) That as directors of the Third Plaintiff company, the First and Second Plaintiffs were knowingly responsible for the said conduct of the Third Plaintiff company.

iii) That the First and Second Plaintiffs had given instructions to the employees of the Third Plaintiff company to pluck and process dead chickens for human consumption.

iv) That the First and Second Plaintiffs had threatened the employees of the Third Plaintiff company in an attempt to ensure they kept silent about the company's said scandalous conduct.

v) That the First Plaintiff deserved to be kicked out of Barbados by reason of her alleged conduct."

[44] Similarly, the Plaintiffs further pleaded at paragraph 16 of the claim in Suit No. 861 of 1990 and paragraph 15 of the claim in Suit No. 1702 of 1990 that the calypso, "Tit for Tat" bore the following meanings:

"i) That the Third Plaintiff company carried on business as it pleased, exploiting people and abusing their rights.

ii) That the Third Plaintiff company put the public at risk by disregarding the public health and carrying on a dirty business with chickens at its farm.

iii) That the First and Second Plaintiffs were knowingly responsible for the conduct of the Third Plaintiff company described in paragraphs i) and ii) hereof.

iv) That the Plaintiffs and each of them behaved oppressively in searching the bags and trousers of young female employees of the Third Plaintiff company.

v) That the business of the Third Plaintiff company deserved to be boycotted by reason of its said conduct.

vi) That the First and Second Plaintiffs by reason of their said conduct deserved to be kicked out of Barbados."

[45] Finally, in both claims, the Plaintiffs have claimed damages and injunctive relief. Further particulars of damage were also subsequently filed in both actions by which the Plaintiffs also claimed loss of expected profits from MacDonald Farms Limited for the year 1989 in the amount of $885,536.00 as well as loss of anticipated annual profits for 1990-1993 in the amount of $1,593,000.00 and investment in machinery to the value of $380,551.00, both arising from the closure of its chicken processing business as a result of the loss of its reputation.

[46] The overlap between the pleadings in Suit No. 1702 of 1990 and Suit No. 861 of 1990 is immediately apparent from even a cursory reading of the Statements of Claim. In each, the Plaintiffs have relied heavily on the publication of calypsos. Only the Defendant sued, the form of publication and the circumstances surrounding it are different.

[47] There are more differences between Suit No. 324 of 1989 instituted against the Nation Publishing Co. Ltd and Harold Hoyte and Suits Nos. 1702 of 1990 and 861 of 1990. From the Plaintiffs' Amended Statement of Claim filed November 7, 1990 in Suit No. 324 of 1989 the Plaintiffs pleaded that defamation had occurred by the publication of a number of articles concerning the Plaintiffs and their business operations. The defamation pleaded in this action is not centred on the publication of the calypsos as in Suits Nos. 1702 of 1990 and 861 of 1990. According to the Plaintiffs, the words complained of in most of the articles meant and were understood to mean that the Plaintiffs habitually processed and sold for consumption chickens which had died before slaughter or which were diseased at the time of slaughter, that the Plaintiff Company's business was carried on in unsanitary and unhygienic conditions and was unsafe and that it used unsanitary procedures and practices.

[48] As to the relief claimed in Suit No. 324 of 1989, the Plaintiffs have sought general damages and injunctive relief but have also sought special damages for the loss of profits from MacDonald Farms for the year 1989 and anticipated profits for the years 1990-1993 and loss of investment in machinery, all in the amounts claimed in Suits No. 861 of 1990 and No. 1702 of 1990.

[49] It is clear, therefore, that each of the actions arises from the same set of circumstances and that the issue of whether the words pleaded were defamatory is similarly raised in the actions. Moreover, the relief claimed in each action is identical and, as the damages claimed as special damages, in particular, ought not to be obtained twice or thrice, it is only appropriate, fair and just that all three actions be heard together.

[50] In addition to the pleadings filed by the Plaintiffs in this matter, there is significant commonality in the List of Documents filed by the Plaintiffs in each action. The Plaintiffs have, in each action, sought to rely on the financial records of MacDonald Farms Limited, as well as articles published by the Nation, documents related to the employment of Darwin Athelston Trotman and documents issued by the Ministry of Health. In their claims against the CBC and Barbados Rediffusion they have also sought to rely on certain articles published by the Barbados Advocate and Weekend Investigator.

[51] In light of the pleadings filed by the Plaintiffs in each matter, the Court is satisfied that there is considerable overlap between the Plaintiffs' three separate claims. The intersection of the pleadings means that the issues raised in the three actions will necessarily be similar. On the basis of this similarity, the Court is persuaded that the matters before it are actions that it is more appropriate to hear together.

[52] The Court is not convinced by the Plaintiffs' submissions as to why these actions, given their clear commonality, should not be consolidated. While each action will be lengthy and will place a heavy demand upon the Court's resources, particularly if the matter proceeds to trial by judge and jury, as already ordered or now requested, these challenges will not be better addressed by hearing the actions separately. Separate hearings do not lead to a more efficient use of resources. Rather, there is little doubt that hearing the matters together will lead to a more

effective and efficient use of the Court's resources and is therefore in the interests of justice, which interests are not confined to the interests of the parties but include the judicial time and resources expended on a given matter. The Court believes that consolidation will facilitate the speediest possible disposal of these matters that have been lingering in the judicial system for far too long.

[53] In light of the foregoing, the Court grants the Defendants' application to consolidate the actions filed by Suit No 324 of 1989, Suit No. 861 of 1990 and Suit No. 1702 of 1990 and orders that these actions be consolidated.

TRIAL BY JURY IN SUIT NO. 861 OF 1990

[54] The Defendant in Suit No. 861 of 1990 (CBC) has submitted that the Court should order that the action be heard by judge and jury rather than judge alone. The Plaintiffs have objected to this late application to have the matter heard by judge and jury.

[55] There is little doubt that this application for a jury trial is intertwined with the application for consolidation. An order directing the matter to be heard by judge and jury is necessary in order to consolidate the three Suits filed by the Plaintiffs and hear them together, as in the other Suits, the Court has already made orders to have those matters heard by judge and jury, despite the Plaintiffs' objection in those proceedings. Without granting trial by jury in Suit No. 861 of 1990, the Court cannot properly consolidate the matters before it and this is a significant consideration.

The Parties' Submissions

[56] Counsel for the Defendant pointed out that the issue of whether the trial should be by jury was raised in both Suit No. 324 of 1989, as well as Suit No. 1702 of 1990. He noted that in the former, **King J.** had ordered that the matter be tried by jury and, on appeal, the Court of Appeal had held that no substantial difficulties were likely to arise if the matter were tried by jury and upheld his decision. Similarly in Suit No. 1702 of 1990, **Williams CJ** had, on February 17, 1995, ordered trial by jury pursuant to the **Cap 115B.**

[57] Counsel argued that under the **Cap 115B**, specifically **section 44(1)** thereof, trial by jury was only denied in actions relating to defamation where the judge was satisfied that such a trial would require "prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury".

[58] Counsel referred to the written decision of **King J.** in ***McDonald Farms Ltd and Another v Nation Publishing Co. Ltd. and Another (1996) Vol. 47 WIR 45,*** which had been affirmed by the Court of Appeal, and submitted that the considerations before **King J**. were the same as in this case and, like him, the Court should therefore allow trial by jury.

[59] The Plaintiffs, however, contended that in keeping with the overriding objective of the CPR to deal with a case justly and in a manner proportionate to the

financial position of each party and in a manner that insofar as practicable saves expense, the Court should not order the action to be tried by jury.

[60] To advance its argument against the holding of a trial by jury, Counsel for the Plaintiffs observed firstly that the Third Plaintiff was no longer a viable entity and that the costs of the trial would have to be borne by the remaining plaintiffs who were all individuals.

[61] Secondly, they argued that the determination of the issue of damages would involve a prolonged and constant examination and analysis of the numerous documents filed in this matter, which include the accounting records of the Third Plaintiff. They submitted that presenting those documents in a jury trial would require the experts to be called to explain those matters to the lay persons forming the jury panel who might not have been exposed to accounting principles and this would therefore increase the length and overall costs of the trial.

[62] Finally, the Plaintiffs contended that **King J**., in ordering trial by jury in the action against the Nation, did not consider the increased length of the trial or the increased costs attached to the same. They pointed out that his order was made some two decades ago and that since the making of that order no civil trial in Barbados had been heard by jury and the civil courts were no longer equipped to hold jury trials.

[63] In response to the submissions of Counsel for the Plaintiffs, Counsel for the Defendants argued that, given the relatively high level of education of the Barbadian population, any jury empanelled to hear the matter was likely to include persons working in the areas of finance or exposed to accounting principles through their education or work experience and it was unlikely that the jury would be confused with the evidence. They pointed out that juries regularly have to deal with complex scientific matters in criminal trials and have had little problem doing so.

[64] Counsel further pointed out, as a jury trial has already been ordered in the other claims, the costs of preparing the documents for jury trial in the case against the CBC was not likely to significantly increase the costs and expenses of holding the trial or place any undue hardship on the Court's resources.

[65] Finally, relying on the text, **Carter-Ruck on Libel and Privacy (6th edition)**, they argued that the right to have a jury trial in an action for defamation was a fundamental right crucial to the protection of the Defendant's right to freedom of expression and the Claimants' right to honour and reputation. Protecting their right to jury trial would not adversely affect the administration of justice.

The right to trial by jury

[66] Counsel for the Plaintiffs did not deny that the Defendants in an action in defamation have the right to have that action heard by a judge and jury rather than a judge sitting alone. This right to trial by jury has been characterised as a fundamental right that forms a "bulwark of our liberties" to which there was "no equal": ***Ward v James [1966] 1 QB 273 at 295*** per Lord Denning MR.

[67] Although the right to have a civil trial by jury is today rarely (if ever) exercised in Barbados, the right to a trial by jury in an action for defamation remains available. The statutory provision in which this right has been enshrined has neither been repealed nor amended. Accordingly, the Court has to consider whether the Defendant in Suit No. 861 of 1990 is, like the Defendants in Suits No. 324 of 1989 and No. 1702 of 1990, entitled to exercise this right which has been expressly conferred by statute on the parties to an action in defamation.

[68] The right to trial by judge and jury in an action for defamation is contained within **section 44** of **Cap. 115B**. This section is set out in full below:

> "44. (1) Where, on the application of any party to an action or matter to be tried in the High Court made not later than such time before the trial as may be prescribed by rules of court, the Judge is satisfied that
>
> (a) a charge of fraud against that party; or
>
> (b) a claim in respect of defamation, malicious prosecution or false imprisonment, slander to title and slander of goods,
>
> is in issue, the Judge shall order the action or matter to be tried with a jury unless he is satisfied that the trial thereof requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.
>
> (2) Save as provided in subsection (1), every action or matter shall be tried by a Judge without a jury unless the Judge sees fit to order otherwise.
>
> (3) The provisions of this section are without prejudice to the power of a Judge to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, the provisions of this section requiring trial with a jury in certain cases shall have effect only as respects questions relating to any such charge or claim as aforesaid."

[69] **Section 44** of the **Cap. 115B** is equivalent to **section 69** of the **UK Senior Courts Act 1981**, but the English section has now been amended by **section 11** of the **Defamation Act 2013** so as to provide that all claims shall be heard by a judge unless the Court provides otherwise. Even prior to that recent amendment, **section 69**, by means of **subsection (3),** emphasized that the Court should exercise the discretion conferred upon it against trial by jury: See ***Goldsmith v. Pressdram Ltd [1988] 1 WLR 64 at p. 68, per Lawton L.J***. (***Goldsmith***) Our section contains no similar provision.

[70] **Section 69** of the **UK Senior Courts Act** is set out below

> "(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue—
>
> (a) a charge of fraud against that party; or

> (b) a claim in respect of libel, slander, malicious prosecution or false imprisonment; or
>
> (c) any question or issue of a kind prescribed for the purposes of this paragraph,
>
> the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury.
>
> (2) An application under subsection (1) must be made not later than such time before the trial as may be prescribed.
>
> (3) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.
>
> (4) Nothing in subsections (1) to (3) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection."

[71] Reference is made to the English statutory position and its history not as a precursor to any analysis of the historical evolution of defamation proceedings in the UK, but to appreciate the limitations of **Carter-Ruck on Libel and Privacy** and the English cases cited therein, to which the Court has been referred by Counsel.

[72] From its plain language it is clear that **Section 44,** like **section 69** before its amendment, gives a party to an action for defamation, whether claimant or defendant, "the right to insist on trial by jury except in a few cases intrinsically unsuitable for trial by jury" (**See Carter-Ruck on Libel and Slander (Sixth Edition) at p. 35**).

[73] Although the qualification to the right to have a defamation action heard by jury effectively confers a discretion upon the Court to deny trial by judge and jury in certain instances, the section nevertheless creates a statutory presumption that the matters to which it applies will be heard by jury rather than by judge alone. The statutory presumption arises on the facts of Suit No 861 of 1990, as it does in every defamation action. The Court therefore has to consider whether that suit is one that it is not convenient to hear by jury because of "prolonged examination of documents or accounts or any scientific or local investigation".

[74] According to **Carter-Ruck on Libel and Privacy (Sixth Edition) at paragraph 29**, the Court when considering whether a defamation action falls within the exception provided by **section 44** (or **section 69**) is required to conduct what has been described as "a three-stage task". This task is to consider the following three questions set out by Lord Bingham in ***Aitken v Preston [1997] EMLR 415 at 420***:

(i) Will there be a prolonged examination of documents?
(ii) If so, can it conveniently be made with a jury?
(iii) If not, should the court nonetheless exercise its discretion to order trial with a jury?

[75] Given the differences between **section 44** and **section 69**, to my mind, the third of the three questions set out in **Carter-Ruck on Libel and Privacy** does not arise for the Court's consideration in this instance.

[76] The following principles of law extracted, according to Lord Bingham, by the trial judge in ***Aitken*** from an extensive consideration of the authorities remain largely applicable:

> "(i) The basic criterion, *viz.* that the trial requires a prolonged examination of documents, must be strictly satisfied, and it is not enough merely to show that the trial will be long and complicated (Rothermere v. Times Newspapers Ltd [1973] 1 W.L.R. 448). However, the word "examination" has a wide connotation, is not limited to the documents which contain the actual evidence in the case and includes, for example, documents which are likely to be introduced in cross-examination (Goldsmith v. Pressdram Ltd [1988] 1 W.L.R. 64).
>
> (ii) "Conveniently" means without substantial difficulty in comparison with carrying out the same process with a judge alone. This may involve consideration of several factors, for example:
>
> (a) the additional length of a jury trial as compared with a trial by judge alone;
>
> (b) the additional cost of a jury trial taking into account not only the length of the trial but also the cost of, for example, additional copies of documents;
>
> (c) any practical difficulties which a trial by jury would entail, such as the handling of particularly bulky or inconvenient files, the need to examine documents alongside each other, and the degree of minute scrutiny of individual documents which will be required;
>
> (d) any special difficulties or complexities in the documents themselves (**Beta Construction Ltd v. Channel Four Television Co. Ltd [1990] 1 W.L.R. 1042** especially *per* Stuart Smith L.J. at page 1047C-D and *per* Neill L.J. at page 1055H, referred to and applied in the recent case of **Taylor v. Anderton [1995] 1 W.L.R. 447**) **.**

> (iii) The ultimate exercise of discretion will in each case depend substantially on the circumstances of each individual case, and it would be idle to attempt to enumerate all the factors which might arise."

Will there be a prolonged examination of documents?

[77] The Court now turns to consider whether the trial of the action in Suit No. 861 of 1990 will require a prolonged examination of documents.

[78] It was submitted on behalf of the Plaintiffs that determining the issue of damages is likely to require "a prolonged and constant examination and analysis of numerous documents and accounting records of the Third Plaintiff". Counsel for the Defendant has not disputed this assertion.

[79] In considering whether a prolonged examination of documents is required what is important is not merely the number of documents but the nature of the documents in question. As Slade LJ pointed out in ***Goldsmith v. Pressdram Ltd [1988] 1 WLR 64 at p. 68, per Lawton L.J***. (***Goldsmith***), there may be cases where although the jury is required to examine numerous documents, such an examination does not raise "substantial practical difficulties" while in other cases the documents while few in number may call for a "long and minute examination".

[80] There is no doubt that a lengthy list of documents has been filed by the Plaintiffs and that the documents so filed, particularly the accounting records of McDonald Farms Ltd. may well require close examination and consideration by any jury trying the matter. The Court therefore accepts that the trial may be likely to require a prolonged examination of documents including the financial records of McDonald Farms Limited.

[81] This, however, does not mean that the Defendant should be denied its right to trial by jury. The Court must next consider whether any examination of documentary records or evidence required can be conveniently made by a jury.

Can the matter be conveniently heard by jury?

[82] Under **section 44(1)** a judge dismissing an application to hear a defamation claim by judge and jury must be satisfied not only that trial of the action will require a prolonged examination of documents but that this examination cannot be conveniently made by jury.

[83] According to May LJ in ***Viscount De L'Isle v Times Newspaper Ltd [1987] 3 All ER 499 p. 506e***:

> "…the second phrase in [section 44(1)] directs one's attention to the question of the efficient administration of justice rather than to the difficulty or complexity of the issues involved in the litigation. The question is whether the trial is likely to involve so lengthy an examination of documents and accounts that it is likely that the administration of justice will suffer if the trial is with a jury rather than by a judge alone."

[84] In considering whether the administration of justice will be rendered less convenient by having trial by jury, relevant considerations include the physical resources available to handle the case, any prolongation of the trial, the additional cost of litigation and the risk of misunderstanding by the jurors (see ***Beta Construction v Channel Four Television [1990] 2 All ER 1012 at 1016-18, per Stuart-Smith LJ***).

[85] The Court has carefully considered the factors listed above and the specific points highlighted by the parties in their submissions. The Court finds that these factors favour trial by judge and jury. Trial by jury has already been ordered in Suits No. 324 of 1989 and 1702 of 1990. The Court has already held that, given the similarity between this action (Suit No. 861 of 1990) to those other suits, consolidation of the three claims is appropriate and in the interests of justice and its efficient administration. Trial by jury in Suit No. 861 of 1990 is necessary if the matters are to be consolidated. Moreover, the fact that Suit No. 861 of 1990 will not be heard by a jury hearing this matter together with Suits No. 324 of 1989 and No. 1702 of 1990 ordering trial by jury will not lead to any additional expense or unnecessary prolongation of the action.

[86] As to the risk of misunderstanding, like **King J** in ***McDonald Farms Ltd and Another v Nation Publishing Co Ltd and Another (1996) 47 WIR 45***, I am satisfied that jurors in Barbados are well educated persons capable of understanding, remembering and determining the issues before them, and once properly directed by the Court, can reach an appropriate verdict. There is no evidence before me and I am not persuaded that the financial records on which the Plaintiffs intend to rely are of such a nature as to impede their ability to do so.

[87] The Court is further satisfied that, with the co-operation of parties and the use of technology all three claims can be adequately heard before a jury.

[88] It must be noted that some of the court rooms in the Supreme Court of Judicature are equipped with audio visual and other technological aids which can and will be available for use for the trial of these actions.

[89] In these circumstances, the Court therefore orders that Suit No. 861 of 1990 intituled "Asha Mirchandani et al v Caribbean Broadcasting Corporation" be heard by judge and jury.

PLAINTIFFS' PROPOSED AMENDMENTS

[90] The Plaintiffs have sought to amend their statement of claim in their action filed in Suit No. 1702 of 1990 against Barbados Rediffusion. Counsel for the Defendant has strongly objected to some of the proposed amendments on the ground that these amendments seek to introduce new causes of action.

Submissions filed on behalf of the Plaintiffs

[91] Counsel for the Plaintiffs submitted that its Statement of Claim was properly amended under the **Order 20 Rule 5(1)** of the **RSC**, contending that this rule gave the Court a general power to amend the Plaintiffs' pleadings at any stage of the proceedings.

[92] In making their submissions, Counsel cited an extensive body of case law in support of what they considered to be the relevant principles of law. The most important of these principles are reiterated below.

[93] First, on the authority of ***Baker HD v Medway Building and Supplies Ltd [1958] 3 All ER 540***, Counsel submitted that the purpose of amending pleadings was either to determine the real questions in controversy or to correct any defects or errors in the proceedings. He noted also that where the amendment pertained to the remedy being claimed rather than introducing a new cause of action, the Court does not refuse leave for the amendment.

[94] Citing ***Roe v Davies (1876) 2 Ch. D. 729*** and ***The Duke of Buccleuch (1892) P. 201***, Counsel pointed out that the Court's discretion was broad and amendments were permitted at any stage of the proceedings and had even been allowed at trial or after judgment or on appeal.

[95] According to Mr. Lashley's written submissions, the Court would not refuse an amendment simply because it introduced a new case, but he conceded that it would do so where the amendment would alter the nature of the action into one of a substantially different character.

[96] Counsel for the Plaintiffs also accepted that any amendments which prejudiced the rights of the opposite party existing at the date of the proposed amendment were not generally admissible. He emphasized, however, that where the amendment proposed neither added a new cause of action nor raised a different case the amendment should be allowed.

[97] Counsel placed particular emphasis on the decision of the Court of Appeal in ***The Manufacturers Life Insurance Company v Marcus Jordan (unreported) Civil Appeal No. 35 of 2001, Decision of June 30 2006***. ***(Manufacturers Life)***. He noted that the Court of Appeal had been required to consider whether it was just to grant leave to amend pleadings where to do so would create a new cause of action and held that one of the factors that had to be considered was whether leave would deprive the defendant of an accrued right to a limitation defence but that this factor was not necessarily determinative of the issue.

[98] Counsel denied that the proposed amendments introduced any new causes of action as alleged by Counsel for the Defendant but argued that they added clarity to the pleadings. They submitted that paragraphs 8 and 12, in particular, contained remarks and commentaries pleaded in support of the claim for aggravated damages and did not give rise to new causes of action.

[99] Counsel also contended that the issue of amendments was raised when the matter was before the CCJ which had implied that the amendments should be granted as a matter of course and before which the Defendant had also undertook to co-operate in relation to the same. No reference was made to this undertaking (or issue) by the CCJ in its written decision.

Submissions of the Defendant

[100] Counsel for the Defendant objected to the proposed amendments at paragraphs 8 (incorrectly described as paragraph 6), 12 (incorrectly 9.1), 11(i) and (iv), 13

(incorrectly 12 and only to the extent that it added the words "on a programme Tell It Like It Is") and 15(iv) (incorrectly 14(iv)), submitting that they raised new causes of actions outside the limitation period for bringing such actions and should not therefore be permitted.

[101] Like Counsel for the Plaintiffs, Counsel for the Defendant relied primarily on ***Manufacturers Life*** submitting that the decision set out clearly the legal principles for determining whether a proposed amendment to pleadings should be permitted after the limitation period had clearly passed. These principles are discussed in greater detail later in this decision.

[102] On the authority of that case, it was contended that where an application to amend had been made after the expiry of the limitation period, the Court was required to consider not only whether the amendments added or substituted new causes of action arising out of the same or substantially the same facts, but was required to be mindful of the overriding objective and take into account the effect of the amendments and whether they would cause prejudice to any of the parties.

[103] Counsel pointed out that, in its original Statement of Claim, all of the Plaintiffs' allegations had pertained to the words of the three calypsos, but by paragraphs 8, 12 and 16, they now sought to introduce new allegations relating not to the words of the calypsos but to commentaries made by the announcers at the time of its publication or thereafter. Relying on the English case of ***The Convergence Group PLC et al v Chantrey Vellacott (2005) EWCA Civ. 290,*** Counsel contended that these new allegations had the effect of creating entirely new causes of action. A new cause of action, he submitted, was also raised by amending para 11(i) and (vi) and paragraph 15 with the words "thereby committing the criminal offence of assault".

[104] Counsel for the Defendant also argued that the amendments proposed by paragraphs 8, 12 and 16 did not arise out of the same facts or substantially the same facts because they did not relate to the broadcast or publication of the calypsos forming the focus of the original Statement of Claim but arose from commentary related, *inter alia*, to an article in a newspaper and Furniture Ltd, a company not party to the action before the Court.

[105] Referring to ***Hancock Shipping Co. v Kawasaki Ltd (1992) 3 All ER 133***, Counsel further submitted that the Court could not disregard the important fact that the Defendant would, if leave were granted, be deprived of an accrued defence. He noted that as the Plaintiffs were aware of these allegations and could have pleaded these allegations in the original Statement of Claim, it would be unfair and prejudicial to permit them some 25 years after they could have been made, forcing the Defendant to incur additional time and expense to find and produce evidence to defend itself from the same and lengthening the trial of the action. He therefore urged the Court to deny the amendments other than those in paragraphs 3, 5 and 9 in accordance with the overriding objective.

[106] Counsel for the Defendant also objected to the addition of aggravated damages to the Statement of Claim. On the authority of ***Collins Stewart Limited et al v the Financial Times Limited (2005) EWHC 262 (QB)*** and ***Kevin Clarke t/a Elumina***

Iberica UK v Lawrence D. Bain and Prolink Holdings Corp. (2008) EWHC 2636 (QB), he pointed out that MacDonald Farms was not entitled to aggravated damages and argued that this amendment too should be denied in the interests of justice as the detriment to the parties and public in allowing it at this late stage far outweighed any benefit that could be obtained by the Plaintiffs.

The Court's Power to Amend

[107] According to the Amended Summons for Leave to Amend filed 14 March 2014, the Plaintiffs sought to amend their Statement of Claim pursuant to **Order 20 Rule 5(1) of the RSC** and/or the inherent jurisdiction of the Court.

[108] **Order 20 Rule 5** of the **RSC**, set out below, gives the Court wide and ample powers to permit the amendment of pleadings at any stage of the proceedings:

> 5. (1) Subject to Order 15, rules 6, 7 and 8 and this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any), as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> (3)…
>
> (4)…
>
> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make amendments."

[109] In relation to the attitude of the Courts to the issue of amendments to pleadings, it is useful to have regard to the decisions in other jurisdictions with a similar juridical architecture to Barbados. **Bowne LJ in Cropper v Smith (1883) 26 Ch. D. 700 at 710 said:**

> **"**Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of

discipline, but for the sake of deciding maters in controversy, and I do not regard such amendment as a matter of favour or of grace."

[110] The Court's power to amend arises from "the combined effect of the ***RSC, Order 20, rule 5*** and ***section 57*** of the ***Limitation of Actions Act, Cap 231***": ***The Manufacturers Life Insurance Company v Marcus Jordan (unreported) Civil Appeal No. 35 of 2001, Decision of June 30, 2006 at para 14, per Williams JA.***

[111] **Section 57** of the **Cap. 231** provides that the Court shall not allow a party to make a new claim within the course of a claim that has already commenced after the expiry of a limitation period except where permitted by the rules of the court and provided that the following two conditions are satisfied:

(a) in the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue or any claim previously made in the original action; and

(b) in the case of a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.

[112] The Court has a broad discretion to grant amendments after the expiry of a relevant limitation period. However, in exercising this discretion the Court must, according to the Court of Appeal in ***Manufacturers Life*** consider and determine the following three issues:

> *"(i)* Will the effect of the amendment be to add or substitute a new cause of action?
>
> *(ii)* If the answer to *(i)* is "yes", does the new cause of action arise out of the same or substantially the same facts as are already in issue on the claim previously made in the original action?
>
> *(iii)* If the answer to *(ii)* is "yes", does the court nevertheless think it just in the circumstances mentioned in *(ii)* to grant leave to make the amendment?"

[113] In ***Manufacturers Life***, the Court of Appeal, after examining a number of authorities, defined a cause of action as "a legal claim constituted by a set of pleaded facts which *prima facie* entitle a claimant to a legal remedy."

[114] As to what was meant by "the same or substantially the same facts", **Williams JA** observed at paragraph 29 that:

> "There is no authority on what is meant by the words "the same or substantially the same facts as are in issue". The provisions in ***the Act*** and the ***RSC*** are similar to the equivalent English provisions, but the English Court of Appeal has refrained from attributing any specific meaning to the words, but has relied on the natural meaning of the words as they apply to the various situations of different cases: ***Laws v. Society of Lloyd's [2003] EWCA 1887 (19 December***

2003) at ***52***. In some cases it was said that whether one cause of action arises out of the same or substantially the same facts as another was substantially a matter of impression: ***Welsh Development*** at ***1419D. Millett LJ*** in ***Paragon*** said at ***418g***:

> 'In borderline cases this may be so. In others it must be a question of analysis'.

Jonathan Parker LJ said in ***Convergence Group Plc v. Chantrey Vellacott [2005] EWCA Civ 290 (25 April 2005)*** at ***104*** that in order to answer the question

> 'it is necessary to make what is essentially a qualitative judgment'.

Later he said at ***115***:

> 'Although, as Millett LJ indicated, the issue whether the new claim arises out of substantially the same facts as that already pleaded is substantially a matter of impression, the impression must nevertheless be derived from a reasoned assessment of the relevant factors'.

[115] This Court accepts the reasoning of Williams JA, as well as that of Bowne J in ***Cropper v Smith***.

[116] No objection has been made by Counsel for the Defendant to paragraphs 3, 5 and 9 of the Amended Statement of Claim and these amendments are therefore allowed.

[117] Counsel for the Defendant has contended that the amendments proposed to paragraphs 8, 12, 16, 11(i) and (vi) and 15 have the effect of adding or substituting new causes of action. These amendments are set out in the table below.

Statement of Claim filed 28 December 1990	**Amended Statement of Claim filed 13 March 2014**
	Paragraph 8: Further the Plaintiffs will rely on commentaries made on Voice of Barbados by the Defendant's announcers with intent to disparage the Plaintiffs. Particulars of such commentaries are as follows: on the 19.7.1989: "Alright, you got to check out today's Nation. It is a 48 page edition of the mid week Nation. McDonald Farms and Furniture Limited will have to pay the costs of the

	Application by the Nation Publishing Company to Strike Out two Writs filed earlier this year plus the "Chicken Song" is off the Station in the Pine…" The Mirchandanis may take our station to Court……full stories in today's Nation…. We are the Voice of Barbados. What I was going to say – Why we are V.O.B. – Voice of the brave – whatever else and why they are chicken at the Pine". These words were intended to ridicule the Plaintiffs for resorting to the Courts and to criticize the Caribbean Broadcasting Corporation which had stopped playing the songs complained of herein after the Corporation had taken legal advice. Further on the 21.7.1989: Caller on V.O.B. – "I want to hear the "Madd Chicken" song right now". The Announcer indicates he couldn't play it then but plays part of the song. The Announcer replies: "get a piece after all…going to the march tomorrow? Can't imagine Madd ever thought they would create a marching song. But they have. Madd Chicken Song gone Madd, I tell ya." The commentary meant that the Defendants intended to continue to play the Madd Chicken Song despite previous complaints by the Plaintiffs thus having no regard for the rights of the Plaintiffs.
Para 10. Paragraph 11. In their natural and ordinary meaning the words of and performance accompanying the calypso "Pluck It" bore and understood to bear the following meanings: i) That the Third Plaintiff company had put on sale for human consumption many chickens which had been processed after dying from disease, and also pork from dead pigs and stinking meat. ii) That as directors of the Third	Paragraph 11. In their natural and ordinary meaning the words of and performance accompanying the calypso "Pluck It" bore and understood to bear the following meanings: i) That the Third Plaintiff company had put on sale for human consumption many chickens which had been processed after dying from disease, and also pork from dead pigs and stinking meat in contravention of the criminal law and in particular contrary to Section 4(1) of the Foods and Drugs Adulteration Act, Cap

Plaintiff company, the First and Second Plaintiffs were knowingly responsible for the said conduct of the third Plaintiff company. iii) That the First and Second Plaintiffs had given instructions to the employees of the Third Plaintiff company to pluck and process dead chickens for human consumption. iv) That the First and Second Plaintiffs had threatened the employees of the Third Plaintiff company in an attempt to ensure they kept silent about the company's said scandalous conduct. v) That the First Plaintiff deserved to be kicked out of Barbados by reason of her alleged criminal conduct.	327 in so far as the food of the type alleged herein was sold to the prejudice of Purchasers and was not of the nature, substance or quality demanded by them. ii) That as directors of the Third Plaintiff company, the First and Second Plaintiffs were knowingly responsible for the said conduct of the third Plaintiff company. iii) That the First and Second Plaintiffs had given instructions to the employees of the Third Plaintiff company to pluck and process dead chickens for human consumption. iv) That the First and Second Plaintiffs had threatened the employees of the Third Plaintiff company in an attempt to ensure they kept silent about the company's said scandalous conduct. v) That the First Plaintiff deserved to be kicked out of Barbados by reason of her alleged criminal conduct. vi) That the First and Second Plaintiffs were worthy of being ridiculed.
	Paragraph 12. In his introductory remarks before the song was broadcast the Master of Ceremonies was heard to say on the night of the Finals:- "He can't pluck it unless he fit the guitar string – so he can pluck it. You know when we say "pluck it" – it's very dangerous to say "pluck it" you know when I come from Bombay I came by Jumbo Jet." These words were spoken with an Indian accent by the Master of Ceremonies and were intended to let the audience know that the song referred to the First and Second Plaintiffs who were Indians and with the clear intention of mocking and ridiculing the said First and Second Plaintiffs before the audience at the National Stadium and throughout Barbados, the Eastern Caribbean and Trinidad and Tobago.
Paragraph 13: In their natural and	Paragraph 15: In their natural and

ordinary meaning the words of the calypso "Tit for Tat" bore and were understood to bear the following meanings: i) That the Third Plaintiff company carried on business as it pleased, exploiting people and abusing their rights. ii) That the Third Plaintiff company put the public at risk by disregarding the public health and carrying on a dirty business with chickens at its farm. iii) That the First and Second Plaintiffs were knowingly responsible for the conduct of the Third Plaintiff company described in paragraphs i) and ii) hereof. iv) That the Plaintiffs and each of them behaved oppressively in searching the bags and trousers of young female employees. v) That the business of the Third Plaintiff company deserved to be boycotted by reason of its said conduct. vi) That the First and Second Plaintiffs by reason of their said conduct deserved to be kicked out of Barbados.	ordinary meaning the words of the calypso "Tit for Tat" bore and were understood to bear the following meanings: i) That the Third Plaintiff company carried on business as it pleased, exploiting people and abusing their rights. ii) That the Third Plaintiff company put the public at risk by disregarding the public health and carrying on a dirty business with chickens at its farm. iii) That the First and Second Plaintiffs were knowingly responsible for the conduct of the Third Plaintiff company described in paragraphs i) and ii) hereof. iv) That the Plaintiffs and each of them behaved oppressively in searching the bags and trousers of young female employees, <u>thereby committing the criminal offence of assault</u>. v) That the business of the Third Plaintiff company deserved to be boycotted by reason of its said conduct. vi) That the First and Second Plaintiffs by reason of their said conduct deserved to be kicked out of Barbados.
	Paragraph 16. <u>During the Semi Finals held at the National Stadium on the 28th July 2005 and the Finals held at the said National Stadium on the 4th August 1989 before the two calypsos "Pluck It" and "Tit for Tat" were sung the said songs were accompanied by introductory remarks and commentaries by the announcers. Further, on occasions when the "Madd Chicken Song" was played further commentaries were made as pleaded above. The Plaintiffs will rely upon these commentaries in addition to</u>

	the frequency of the recorded broadcast over an extended period long after June 1989 and in the face of objection by the Plaintiffs in support of their claim for aggravated damages as a consequence of the defamatory matters pleaded herein which have brought the Plaintiffs into public odium, contempt and ridicule.

[118] The Court does not agree that the proposed amendments to paragraphs 11 and 15 add new causes of action. The cause of action is and remains an action in defamation. These amendments do not have the effect, to my mind, of providing greater clarity to the issues in dispute in the proceedings. They relate largely to the issue of aggravated damages and proof thereof, which is part of the Plaintiffs' claim. I find that they are properly allowable.

[119] The Court accepts that by the amendments proposed by paragraphs 8, 12 and 16 of the Amended Statement of Claim, the Plaintiffs plead new facts that may entitle the Plaintiffs to a legal remedy. These pleadings, however, arise from substantially the same facts as the original cause of action. Additional facts, it is true, have been pleaded but these facts are so closely connected to those pleaded in the original claim that their addition does not substantially transform the claim into one of a wholly different nature.

[120] Counsel for the Plaintiffs explained in his submissions that the Plaintiffs sought to amend its claim by those paragraphs above mentioned in order to claim aggravated damages. In ***Kevin Clarke t/a Elumina Iberica UK v Lawrence D. Bain et al (supra)***, the Court was required to consider whether to grant leave for amendments made in order to plead the facts required to claim aggravated damages. After setting out the principles applicable to the award of aggravated damages and concluding that the amendments were unlikely to increase the compensatory damages to which the claimant was entitled, the Court held that granting leave to amend would increase the scope of the trial and create confusion for the jury disproportionate to any benefit that may accrue to the Claimant.

[121] The amendments proposed in this case will also increase the scope of the claim in Suit No. 1702 of 1990 and thereby the burden on any jury empanelled to hear it. Given the consolidation of the claims before me and the nature of the original claim, the Court is unable to find, however, that these amendments are so disproportionate to their expected benefit so as to make permitting them contrary to the interests of justice.

[122] The Court agrees that the claim for aggravated damages should have been made at a much earlier stage of the proceedings. Counsel for the Defendant argued that granting the amendments would cause "serious injustice and severe prejudice as they raise new allegations which would require the Defendant to produce evidence which was not required in the allegations made in the existing Statement

of Claim". They argued that merely to answer a claim 25 years after its occurrence is unfair and prejudicial.

[123] While it is unfortunate that an action has taken so long to reach trial, and ultimately resolution, the Court is not satisfied that the amendments would cause "serious injustice and severe prejudice" to the Defendant. No evidence has been adduced of any such prejudice or injustice and making a bare allegation without showing any evidence of it is far from sufficient. Evidence of prejudice is required. Moreover, the Court is of the view that any likely prejudice or injustice can be remedied by giving leave to the Defendant to amend its Defence within a reasonable period of time after service of the Amended Statement of Claim.

[124] Counsel for the Defendant justified the absence of evidence by alleging that he could not provide any evidence of the difficulties likely to be faced because of the proposed amendments, as the Defendant had not received the particulars of the allegations and could not, therefore, say whether the evidence required to answer it remained available. To my mind, this is not persuasive; it is merely speculative.

[125] The existing claim remains to be resolved. The Defendant will still need to call evidence in its defence of that claim. There is no reason why in its defence, the Defendant cannot (or will not be able to) answer both the existing claim and the amended claim at the same time. In these circumstances, the Court is not persuaded that granting leave to amend as proposed would be unjust and prejudicial to the interests of justice and therefore grants leave to the Plaintiffs to amend the Statement of Claim filed in this matter.

DISPOSAL

[126] In light of the foregoing, the Court hereby orders that:

(i) Suit No. 324 of 1989 intituled: Macdonald Farms Ltd and Asha Mirchandani v The Nation Publishing Co. Ltd and Harold Hoyte, Suit No. 861 of 1990 intituled: Asha Mirchandani, Ram Mirchandani and Macdonald Farms Ltd v Caribbean Broadcasting Corporation and Suit No. 1702 of 1990 intituled: Asha Mirchandani, Ram Mirchandani and MacDonald Farms Ltd v Barbados Rediffusion Service Ltd be consolidated;

(ii) Suit No. 861 of 1990 intituled: Asha Mirchandani et al v Caribbean Broadcasting Corporation be heard by judge and jury;

(iii) the Plaintiffs in Suit No. 1702 of 1990 be granted leave to amend the Statement of Claim by means of the Amended Statement of Claim filed therein on 14 March 2014;

(iv) The Plaintiff in Suit No. 1702 of 1990 do file and serve their Amended Statement of Claim within 7 days;

(v) The Defendants will be permitted to file and serve an amended defence within 14 days of the service of the amended statement of claim on them; and

(vi) The costs of this application be costs in the cause.

WILLIAM J. CHANDLER
JUDGE OF THE HIGH COURT