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COMMONWEALTH OF THE BAHAMAS

2008

IN THE SUPREME COURT

SUPREME COURT

CLE/gen/FP/00073

Common Law & Equity Division

MAY 23 2008

FREEPORT, GRAND BAHAMA

BETWEEN

ZHIVARGO LAING

Plaintiff

AND

- (1) JOHN ROLLE
- (2) BERNARD NOTTAGE
- (3) FRANK SMITH

Defendants

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**DEFENCE OF THE SECOND DEFENDANT**

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1. No admission is made as to paragraph 1 of the Plaintiff's Statement of Claim, save that the Plaintiff was at the date of his Statement of Claim filed herein a Cabinet Minister and designated Minister of State for Finance and that the Minister of Finance of The Bahamas has various rights and duties under the Customs Management Act. The Plaintiff is put to strict proof of the matters therein that are not admitted to wit that the Minister of Finance has, or at all material times had, delegated certain powers under the Customs Management Act to the Plaintiff including the control and direction over the Comptroller of Customs, and the power to permit goods to be imported in such form and manner and by such persons as he may direct generally or in particular cases pursuant to Section 154 of the Customs Management Act.

2. Save that it is denied that allegations were made in Parliament that the Plaintiff had exercised his powers unlawfully and/or for an improper purpose, paragraph 2 of the Statement of Claim is admitted.

3. Paragraph 8 of the Statement of Claim is admitted

4. Save that the Second Defendant disseminated and published a document and accompanying statement ("Press Release") on behalf of himself and the Progressive Liberal Party on or about the 26<sup>th</sup> March 2008 and that the Second Defendant knew and intended the Press Release or its gist would be republished in the press and authorized the repetition of the same, paragraph 9 of the Statement of Claim is denied. The Plaintiff is put to strict proof of the content of the press release or document which was published or disseminated by the Second Defendant. The Second Defendant denies that anything that he published or which was disseminated by him was defamatory of the Plaintiff.

5. As to paragraph 10 of the Statement of Claim, and notwithstanding paragraph 4 above, the Second Defendant denies that the words complained of bore or were understood to bear any meaning defamatory of the Plaintiff and were understood to mean those as are set out in paragraphs 10.1, 10.2, 10.3, 10.4 and 10.5.

6 The Second Defendant contends that the words complained of in their natural and ordinary meaning are true in substance and in fact.

## PARTICULARS

**Pursuant to R.S.C. Order 72, rule 3 (2)**

**(a) The Plaintiff is and was at material times a Member of Parliament; a Minister of State for Finance and a member of the Cabinet of The Bahamas. As a public figure entrusted with the affairs of State the Plaintiff's conduct, performance and activities as a Minister and public servant are matters of public interest.**

**(b) The Plaintiff as a minister of Government is and was at all material times under a positive duty to avoid conflict of interest situations in the execution of his public duties which bestowed or which tended to or appeared to bestow favour upon himself, his family and/or his friends.**

**(c) The Plaintiff by his own admission in a statement made on 28<sup>th</sup> February, 2008 in Parliament confirmed that he undertook upon the invitation of his brother, despite his initial**

reservations about the propriety thereof, to investigate his brother and sister-in-law's complaint about the customs duty rate payable on a product imported by them.

(d) The Plaintiff through the Secretary for Revenue determined to direct or instructed the Comptroller to classify a product imported by his relatives, namely his brother and/or his sister-in-law, in a lower rate of duty category contrary to the determination of the proper classification thereof in law by the Department of Customs and the World Customs Organization.

(e) The Plaintiff had no legal authority to cause the reclassification of the Mona Vie nutrition drink to a lower rate of duty category which was inconsistent with its proper classification under Tariff Heading 2202.9090 in the Tariff Act.

(f) The Plaintiff's statement to Parliament on 28<sup>th</sup> February, 2008 clearly indicated that he had notice of the ruling by the World Customs Organization on the proper classification of the Mona Vie drink, yet he sought, through the Secretary of Revenue, to direct the Comptroller of Customs to continue the practice of charging the 10 % rate of duty even though the product properly classified would attract 45 % rate of duty. This decision has had the effect of benefiting importers of the Mona Vie drink including the Plaintiff's brother and/or sister-in-law.

(g) The Plaintiff purported to justify his overruling of such reclassification on the basis that it represented a "change of rate" as opposed to a "reclassification" which is not borne out by the factual circumstances of the case, to wit:

(i) The Plaintiff's statement to Parliament dated the 28<sup>th</sup> February 2008 clearly indicates and confirms that the original complaint of the correct classification of the Mona Vie drink was made by the Plaintiff's brother and sister in law;

(ii) It is also clear from the aforesaid statement of the Plaintiff that his brother and sister in law would and did benefit from his intervention on maintaining the classification at 10%;

(iii) The Secretary of Revenue on instructions from the Plaintiff directed that the drink Mona Vie remain in the lower classification of 10% which was the

**wrong classification under the Tariff Act based on the ruling from the World Customs Organization;**

**(iv) The Minister of Finance (or the Plaintiff, if properly authorised, acting in such capacity) failed to cause the issue of regulations in accordance with Section 12 of the Tariff Act or Section 3 of the Protection of Revenue Act to vary and cause the reclassification of the Mona Vie nutrition drink to a lower rate of duty category which was inconsistent with its proper classification and as such the Plaintiff had no statutory or other authority to do so;**

**(v) By seeking the intervention of the Secretary of Revenue the Plaintiff ought to have appreciated that he was interfering in the day- to-day management of the Customs Department in circumstances where the original complaint was made by his relative.**

**(h) The conduct of the Plaintiff as outlined in his statement of 28<sup>th</sup> February, 2008 which gave rise to additional questions about the propriety of the Plaintiff's conduct ought to have been disclosed and clarified in the public interest.**

**(i) Additional Particulars will be served separately (if necessary).**

7. Further and in the alternative, and notwithstanding paragraph 4 above, if the said words complained of were spoken, they were the opinion of the Second Defendant and protected speech as fair comment on matters of public interest.

**PARTICULARS OF FAIR COMMENT**  
**Pursuant to RSC Order 72, rule 3(2)**

The Second Defendant repeats sub-paragraphs (a) to (i) of paragraph 6 above.

**(i) Additional Particulars will be served separately (if necessary).**

8. Further and in the alternative and notwithstanding paragraph 4 above, if the said words complained of were spoken by the Second Defendant, the Second Defendant claims with regard to the words complained of that he is protected by qualified privilege and that he acted with reasonableness in that he took reasonable steps to ensure the accuracy of the words complained of and did so publish them with reasonable care.

#### **PARTICULARS OF QUALIFIED PRIVILEGE**

(1) The Second Defendant took all reasonable care in the investigation of the matters and facts the subject of the reclassification of the Mona Vie drink inclusively of those matters which were spoken by the Plaintiff and which were reported in the newspapers on the subject;

(2) The Second Defendant exercised all due care and diligence in the review of the said information and came to the measured conclusions that he did as set out in the Press Statement (which will be relied on at the trial for its full terms and effect);

(3) The public has a right to be informed and the citizens have a right to expect those elected to engage in a national and public debate and exchange of views of such matters which affect the conduct of a duly elected Member of Parliament and his conduct in the discharge of his public duties.

(4) The Second Defendant repeats sub-paragraph (h) of paragraph 6 above.

(i) Additional Particulars will be served separately (if necessary).

9. Paragraphs 11 and 17 of the Statement of Claim are denied.

10. Save as is hereinbefore specifically admitted or not admitted, the Second Defendant denies each and every allegation contained in the Statement of Claim as though the same were herein set forth and traversed seriatim.

DATED this 22<sup>nd</sup> day of May, A.D., 2008

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## SERVICE FORM

PLAINTIFF

Zhiuargo LingJohn RolfeFrank Smith

DEFENDANT

Bernard Nottage

CASE NO

CLE Gen / EP / 00873 / 2008

DOCUMENT

Defence of the Second defendant  
Callender & Co

ACCEPTED BY

M Brown

DATE

23/5/08

TIME

11:35am

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**Defendants**

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**DEFENCE OF THE SECOND DEFENDANT**

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Dated this *23<sup>rd</sup>* day of *May*

A.D. 2008

*Gwendolyn House*  
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