[2014] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 73/2008

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JAMAICA OBSERVER LIMITED**	**1ST APPELLANT**
AND	**PAGET deFREITAS**	**2nd APPELLANT**
AND	**GLADSTONE WRIGHT**	**RESPONDENT**

Winston Spaulding QC, Charles Piper and Miss Marsha Locke instructed by Charles E. Piper & Associates for the appellants

Maurice Frankson instructed by Gaynair & Fraser for the respondent

5, 6, 7 November 2012 and 30 May 2014

MORRISON JA

Introduction

[1] The 1st appellant is a limited liability company incorporated under the Companies Act. It was at the material time the proprietor, publisher and distributor of 'The Weekly Observer', a weekly tabloid newspaper ('the newspaper'), which enjoyed a wide and

substantial distribution throughout Jamaica and overseas. The 2nd appellant was at the material time its editor-in-chief.

[2] Immediately prior to his resignation on 19 March 1998, the respondent had been the manager of the Montego Bay branch ('the branch') of the Bank of Nova Scotia Ltd ('the bank'). Up to that time, the respondent had been employed to the bank in various capacities for over 20 years.

[3] In its edition published on 27 March 1998, the newspaper carried an article, under the heading "BNS PROBES $94 MILLION EXPOSURE – Branch Manager sent home" ('the article'). The respondent, who considered that he had been referred to in, and defamed by, this article, commenced action against the appellants for damages for libel by writ of summons filed on 21 July 1998.

[4] On 22 May 2008, after a trial before Roy Anderson J and a jury, judgment was given in the respondent's favour against the appellants for $30,000,000.00, with interest at 3% until payment, and costs. The total award was made up of $20,000,000.00 for general damages and $10,000,000.00 for punitive or exemplary damages.

[5] This is an appeal from the judgment of the court below, as to both liability and damages, in which the appellants seek orders (i) that the judgment be set aside and judgment be entered in their favour; (ii) alternatively, that the matter be remitted to the court below for a retrial; or (iii) that this court grant such further or other relief or remedy as it deems appropriate in the circumstances. The appeal raises issues as to the

appropriateness of the trial judge's handling of the trial, the correctness of his directions to the jury and the quantum of damages awarded by the jury.

The Pleadings

[6] Paragraph 4 of the statement of claim filed on the respondent's behalf on 21 July 1998 stated as follows:

> "4. In the March 27, 1998 edition of the said Weekend Observer weekly tabloid under the Title "BNS PROBES $94 MILLION EXPOSURE – Branch manager sent home" the Defendant falsely and maliciously printed, published and distributed and/or caused to be printed, published and distributed the following words, defamatory of the character of the Plaintiff:
>
> > 'Sources say that Scotiabank is also investigating the recent acquisition of land in Westmoreland by Wright, and to establish if there is a connection with the 'indiscretion' at the branch.'
>
> 5. In their natural and ordinary meaning the said words meant and were understood to mean that;
>
> > (i) The Plaintiff had acquired land in the parish of Westmoreland.
> >
> > (ii) That the Plaintiff possibly acquired the alleged land fraudulently, dishonestly and/or through other unlawful means.
>
> 6. The Plaintiff is not, nor has the said Plaintiff ever been, the owner of any realty in the parish of Westmoreland.
>
> 7. As a consequence of the matters aforesaid the Plaintiff has been severely injured in his credit and reputation and has been brought into scandal, odium and contempt, put to great distress and inconvenience and has suffered great loss and damage."

[7] By their amended defence dated 2 November 1999, the appellants stated the following:

> "4. The Defendants will say that the said words merely constitute the final paragraph of the article which in its entirety read as follows:
>
> "Bank of Nova Scotia has been hit by a $94-million exposure to unauthorised credit, and has sent home a senior officer, Gladstone Wright, of the Montego Bay branch, while it deepens its probe into the irregularities.
>
> It is the first major case to surface at Scotiabank, cracking the apparent insularity of this institution to the wave of multimillion dollar scams and unauthorised credits which have haunted much of the sector within the past year.
>
> Scotia's managing director, Bill Clarke, declined to discuss the issue with the Observer, claiming that it was against the bank's policy to discuss the affairs of its employees or customers with the media.
>
> But authoritative sources inside Scotiabank confirmed that Wright was immediately sent on leave two weeks ago after inspectors from the bank's headquarters uncovered the irregular loans – involving advances which exceeded the limit of the branch, and loans and overdraft facilities for which there were woefully inadequate collateral.
>
> 'The bank stands to lose $94 million, and that is what has been discovered so far', the Observer source said. 'But there is a likelihood that the exposure will climb even further.'
>
> Sources say that Scotiabank is also investigating the recent acquisition of land in Westmoreland by Wright, and to establish if there is a connection with the 'indiscretion' at the branch."
>
> 5. The Defendants make no admission that the words outlined in paragraph 4 are false and deny that the said words were published maliciously. The Defendants further,

> make no admission that the said words were defamatory of the Plaintiff.
>
> 6. The Defendants make no admission that the said words in their natural and ordinary meaning are capable of having the meanings which have been attributed to them in paragraph 5 of the Statement of Claim.
>
> 7. If, which is not admitted the words set out in paragraph 4 of the Statement of Claim are false and if, which is not admitted, the words are capable of having the meaning attributed to them in paragraph 5 of the Statement of Claim the Defendants say that the contents of the article as a whole are substantially true and accordingly if the words set out in paragraph 4 of the Statement of Claim are not true the publication of the said words by the Defendants did not materially injure the reputation of the Plaintiff having regard to the truth of the remaining contents of the article."

[8] The effect of the amended defence was therefore that the appellants (a) admitted publication of the words complained of; (b) denied that they were published maliciously; (c) put the respondent to proof that they were false, that they were defamatory of him or that they were capable of having the meanings attributed to them by him; and (d) raised (albeit not in so many words) the statutory defence provided by section 7 of the Defamation Act ('the Act').

[9] Section 7 of the Act provides as follows:

> "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

The trial

[10] The jury was empanelled and a foreman selected on the morning of 20 May 2008. In his opening charge to the jury, the learned trial judge advised them of their role:

> "Let me thank you jurors for agreeing to serve. In your roles as adjudicators of fact I would advise you of your duties; to base your decision upon the evidence which is led. At the appropriate time I will direct you as to what specific questions I would require answered from the jury panel. But I would also caution you not to discuss the matter and not to be influenced by anything you may have heard outside or anywhere else or read anywhere else and focus on the evidence which you hear. Particularly, I warn you not to discuss the matter outside of the precincts of the court."

[11] Thereafter, the trial commenced and continued for three days, with refreshment, lunch and overnight adjournments being taken as appropriate. It does not appear from the transcript of the proceedings that, at the point at which each of these adjournments was about to be taken (there were five in all), the judge either reminded the jury of his warning to them not to discuss the matter with anyone or sought to give them a fresh warning to the same or similar effect. However, as will be seen, he did revisit the question one more time during his summing-up to the jury (see para. [34] below).

[12] Three witnesses gave evidence before the jury: the respondent himself, a witness called on his behalf (Mr Michael Bancroft) and the author of the article, Mr Moses Jackson, an employee of the 1st appellant. The witness statements were tendered in evidence and read to the jury and each witness was in turn cross-examined.

[13] At the time of the trial, the respondent was 62 years old, married and the father of four children. He had risen through the ranks from the position of teller at the bank in 1966, to his first managerial appointment at the Savanna-la-mar branch of the bank, where the loan and deposit portfolios both grew rapidly under his watch. His time as manager of the Savanna-la-mar branch was distinguished when that branch won the bank's inaugural branch of the year award. In 1990, he was transferred to Montego Bay as manager of the branch. After about a year, he was sent to the bank's head office in Toronto, Canada for training. He remained there for 18 months, before returning to the branch. Between 1992 and March 1998, the respondent testified, the loan and deposit portfolios at the branch also grew rapidly and he again enjoyed the distinction of the branch being named branch of the year.

[14] The respondent's account of the events which immediately preceded the publication of the article on 27 March 1998 is at the heart of the case:

> "In my quest to continue to show growth in my loan portfolio overruns in approved overdrafts were granted ever so often to various customers including the Bank's major customers in Montego Bay without reference to Head Office which was a requirement of the bank.
>
> These overruns were also not highlighted in my monthly reports to Head Office mainly because I was of the firm opinion that they would be fully satisfied by the customers and in some instances they were.
>
> The matter came to the attention of Head Office and sometime in or about March, 1998 I was called to a meeting by my supervisor Mr. Winston Barrett the District General Manager. After discussions with him he referred the matter to the Managing Director Mr. William Clarke. It was decided between the three of us that I should return to the branch

> and work assiduously at regularising these accounts. In fact, Mr. Winston Barrett journeyed to Montego-Bay and accompanied me as I made various calls upon various customers.
>
> Sometime after this meeting I got a call from Mr. Clarke in which he told me that it would be best if I took some leave as he was asking his senior credit managers in Head Office to conduct an audit of the branch's credit portfolio.
>
> I followed his suggestion and while I was at home I was asked to attend a meeting with Mr. Clarke but as a result of pride and stupidity I declined to attend the meeting and instead I submitted my resignation from the Bank. Sometime after that I received a call from Mr. Clarke at which time he advised me that he had received a call from a reporter from the Observer relating to the matter of credit exposure or overruns at the branch. He specifically stated that he had refused to comment but that I should expect to see an article in the newspaper.
>
> On Friday the 27th March, 1998 I first learned of an article in the Weekend Observer while listening to the Breakfast Club on the radio as the hosts were reading the newspapers.
>
> Immediately after that I began to receive telephone calls including calls from New York. I immediately called Mr. Clarke and asked him if I was being investigated by the Bank in respect of the purchase of land in Westmoreland as stated in the article and his reply was negative. He said 'No'.
>
> The fact of the matter was that I have never bought land or sought to buy land in Westmoreland."

[15] Having read the article for himself, the respondent testified, he was "devastated". On the road a few days after the publication of the article, a passing bus driver shouted out to him, "What happen to the Bank money??!!" He immediately returned to his home, where he remained for some time, so much so that people began to call him, asking if he was under house arrest. Another day, he said –

> "…my neighbour was smoking what I thought was ganja and when I asked him to at least close his door he responded by saying words to the effect that 'you a thief that's why they run you from the Bank'."

[16] Following the publication, the respondent continued, his friends began to shun him and his colleagues in management alienated themselves from him. He ceased attending meetings of the service club of which he was a member, because he was ashamed, "and was no longer welcome in the circles in which I was accustomed to move". On one occasion, a prominent member of Parliament, who had been a customer of his at the bank and with whom he had developed a friendly relationship, turned his head the other way when the respondent called to him. The respondent's daughter, who was a university student at the time, was also affected in her studies. Members of his family living abroad including his mother, who would normally stay with him in Jamaica, "stayed away". Indeed, his mother had called him following the publication and, despite what he had told her, had said, "I never know that I bring up a thief." It would be some months after the publication, he said, before he felt able "to face the world", and it was about two years before he was able to go back to Montego Bay, something which, even at the date of the trial, he continued to find difficult to do. Despite making a number of job applications, it was not until sometime in October or November 1998 that he was able to gain employment.

[17] Finally, assessing the position as at the date of his witness statement over six years after the publication, the respondent said this:

> "There are now some people who shunned me in the period following the publication with whom I have managed to repair the relationship to some degree. In some instances it took me in excess of 4 years. Despite regaining the friendship of some people, I have lost much of the social standing which I had enjoyed previous to the publication."

[18] Under cross-examination, the respondent explained that the "requirement of the Bank" to which he had referred in his witness statement was that, before a customer was allowed to overrun an agreed overdraft limit, a call seeking approval should be made from the branch to the head office. The respondent confirmed that he did not always do so, nor did he highlight such overruns in his monthly reports. Asked to explain these omissions, the respondent's answer was that, "I did this mainly…to maintain…to show Head Office that I was running a good credit portfolio." The respondent said that he allowed overruns based on his "judgment call". Although he accepted that by doing so he had done wrong, he maintained that the overdrafts nevertheless remained sufficiently collateralised and that the bank had suffered no loss as a result. However, he agreed that, by his activities, he had exposed the bank to financial loss. The respondent also accepted that any issue arising from large overruns at the branch would ultimately be his responsibility.

[19] The respondent was asked about the statement in the article that the bank was "also investigating the recent acquisition of land in Westmoreland by Wright, and to establish if there is a connection with the 'indiscretion' at the branch":

> "Q: You are saying that those are the words you interpret to mean that you had stolen money and bought land?

A: Not me, is people who have seen me accused me. People who shun away from me.

Q: And you are saying that the article said you had stolen money and bought land?

HIS LORDSHIP: He said that people said that.

Q: I see …"

[20] Mr Michael Bancroft, a businessman, testified that he had met the respondent in 1991, after the latter had become manager of the branch. They became close friends and would visit each other's homes. Mr Bancroft knew the respondent "as a decent and honest person, an honourable man who was well thought of in Westmoreland and St. James, where he was well known". People "expressed delight" when they discovered that he knew the respondent, who he called 'Wrighty'. The respondent had in fact been master of ceremonies at his wedding. Continuing, Mr Bancroft said this:

> "Sometime on or about the 27th of March 1998, I read an article in the Weekend Observer containing allegations that Wrighty was involved in a multi-million dollar scam and that he had stolen money from the bank and used it to buy land in Westmoreland. It made me feel bad.
>
> I felt bad for several reasons:
>
> One, that my friend's name was mixed up in something like this coming from hearing about all sorts of irregularities in the banking industry; two, there arose a niggling question in the back of my mind as to whether there was any truth to it. I saw Wrighty as one of the managers in the bank who was on his way to the top and I asked how could he throw it all away like that.
>
> Immediately after reading the article I called Wrighty and spoke to him about it. I said, 'Pardy, what is this I see in the newspaper?' He said, 'Those people are mad, they are going to have to prove it,' and he denied that he was into any scams or that he had bought land in Westmoreland. He was

> my friend and I wanted to believe him but the Observer is a reputable newspaper and it was one that I read every day and so even though Wrighty denied it I still had a doubt in my mind."

[21] In time, Mr Bancroft said, the relationship between himself and the respondent changed and declined. Mr Bancroft's stay-over visits to the respondent's home ceased, as he feared that continued association with the respondent could cause him to lose business. During his travels, Mr Bancroft would hear people "saying things about Wrighty which were not nice or in any way complimentary of him". It was not until about December 2002, when the respondent called to invite him to be a groomsman at his wedding, that they resumed their relationship:

> "I went to the wedding in January 2003 and at the reception we began talking again and that is when he told me that he is trying to clear his name. When he spoke to me about it I thought it interesting that he was still thinking about the whole matter and I heard the anger and pain in his voice even though he should have been happy and I thought to myself that maybe he had really been wronged."

[22] Challenged in cross examination as to why he had chosen not to look for the respondent, "in his hour of need; when he needed you most," Mr Bancroft's answer was that "…in retrospect I might have taken a different approach, but at the time that is how I felt".

[23] That was the respondent's case. In opening the appellants' case, Mr John Graham, who appeared in the court below, told the jury the following:

> "Members of the jury, the case of the defendant [sic], is that the words, which were used in the article about which Mr. Gladstone Wright has complained, that those words in their natural and ordinary meaning were not defamatory of Mr. Gladstone Wright. It is the defendant's [sic] contention that it has been demonstrated already, and that we will attempt by evidence to further demonstrate that most, let me put it even more precisely, that all of the matters of fact which has [sic] been set out in the article that those matters are true. It is our contention that most of them has [sic] already been admitted and we propose to call evidence to deal with those matters which have not been admitted by the claimant and his witness."

[24] Counsel went on to tell the jury that it was not appropriate "to fragment the article and deal with one paragraph", as had been done in the statement of claim. Rather, it was necessary to read the article as a whole to get the full sense of what it said:

> "…and in time his Lordship will indicate to you that one of the main portions of our defence is that section 7 of the Defamation Act recognizes that if the article is true in its substance the fact that some detail of it may not have been proved does not affect the substance of the defence."

[25] The appellants then called Mr Moses Jackson to give evidence. He told the court that he had received information from a confidential source that the respondent "was involved in certain irregularities" at the branch:

> "These irregularities involved granting unauthorized credit, allowing advances which exceeded the limit of the branch, and provided loans and overdraft facilities where there was clear evidence of inadequate collateral.

> The above activities, I was credibly informed, had exposed the bank to millions of dollars in potential losses. I checked this information with a former BNS manager, who was then working with a commercial bank in Kingston. This source knew Mr. Wright well, having worked with him at BNS for a number of years.
>
> Further information ascertained by me revealed that the plaintiff, Gladstone Wright, had been sent home as a result of the irregularities, and that the bank was investigating his personal finances, including all his asset acquisitions. I firmly believe this information to be correct, as it came from sources with whom I had developed a working relationship, and in whom I had confidence. Nevertheless, I sought verification from senior officials in the banking sector in Montego Bay and Kingston to ascertain the extent of the scam, and was credibly informed that my information was accurate."

[26] Mr Jackson referred to the various sources with whom he had checked and confirmed his information, including the loans manager at the bank, a former senior manager of the bank, a former branch manager of the bank and the managing director of a commercial bank in Kingston, who had previously worked with the bank, "and knew all the people involved". Still in search of "more tangible information", Mr Jackson said, he arranged to be privy to a telephone conversation between the respondent and a former colleague:

> "During the course of that conversation, the source informed [the respondent] that he heard he was no longer at the bank and asked him why. [The respondent] admitted that he was involved with some indiscretions at the bank and that the bank had sent him home.
>
> He further stated that the bank was indeed looking into all of his personal finances, including all his assets."

[27] At the outset of his cross-examination, Mr Jackson was asked to define a 'scam'. His answer was that "[a] scam is a [sic] activity which violates the rules of the institution in question". Pressed to say whether it necessarily involved criminal activity, Mr Jackson said that "a scam may or may not involve criminal activities". It would be "a reasonable presumption", he also said, that the perpetrator of a scam would expect to receive some gain. Mr Jackson agreed that the article said that there was a $94,000,000.00 scam taking place at the bank and that the respondent was the author of it. He also agreed with the suggestion put to him by counsel that "a scam is not a nice thing".

[28] As regards the statement in the article that the bank was investigating a recent acquisition of land in Westmoreland by the respondent, Mr Jackson was asked whether, by writing that, he was "putting it forward as a fact that [the respondent] recently acquired land in Westmoreland?" His answer was that, "that was the information provided me to the best of the knowledge of my sources and my sources have always been very credible". He confirmed that all the information contained in the article was provided by sources and that he had no personal knowledge of the allegations reported in the article. However, Mr Jackson maintained, he was "very confident in the veracity of the information" which he published.

[29] Mr Jackson also said that, before publishing the article, he made "significant attempt [sic]", without success, to make contact with the respondent. He had called the branch and he had called the managing director's office in Kingston. He did not know the respondent and did not know where he lived. It was the failure of these efforts

which led him, Mr Jackson said, to be, through his source at a bank in New Kingston, "privy" to the telephone conversation between the respondent and another banker. This was his account of the actual circumstances of that conversation:

> "WITNESS: Your honour, I called my source at the bank in New Kingston.
>
> HIS LORDSHIP: By what means?
>
> THE WITNESS: Telephone. The source says "Come", I jump in my car and went inside the source's office. The source then called his office in Montego Bay, one of the branches in Montego Bay.
>
> Q: Called whose office?
>
> A: My primary source at the bank in New Kingston.
>
> Q: That was which bank now?
>
> A: I can't give you that information.
>
> Q: Why you can't give that information?
>
> HIS LORDSHIP: You went to the bank at New Kingston your source.
>
> THE WITNESS: Your honour, the source then called the manager of one of his branch [sic] in Montego Bay.
>
> HIS LORDSHIP: Called another source.
>
> THE WITNESS: Yes, sir.
>
> HIS LORDSHIP: Call his source who was very close to Mr. Wright.
>
> Q: Excuse me?
>
> A: May I provide the answer, sir?
>
> THE WITNESS: May I continue your, Honour
> Your honour, the gentleman in Montego Bay called Mr. Wright and had a conference call.
>
> HIS LORDSHIP: No. Mr Jackson, let me tell you how this thing goes. You are in New Kingston with somebody who

> called somebody else in Montego Bay who called somebody else in Montego Bay and you know who that person is on the line?
>
> No, man, that is ridiculous."

[30] A mild protest from Mr Graham as to the learned judge's comment that the witness' account was "ridiculous", resulted in the judge saying, "Let's see if we can retract, I said that in an effort to caution the witness." Mr Jackson then proceeded to restate the position, which was that his source in New Kingston called the manager of a branch in Montego Bay, who was "close" to the respondent; that person then called the respondent and placed that call "on a conference, so I am sitting inside the head office in Kingston listening to that conference call". Mr Jackson himself did not speak to the manager in Montego Bay. Neither that person nor the respondent was aware that he was on the line. He was, Mr Jackson agreed "working undercover".

[31] Mr Jackson disagreed with the suggestion that he had not been fair to the respondent and that he had not shown sufficient due diligence in researching his news story. However, he agreed that he did not make "any checks at the Titles Office to determine whether or not [the respondent] had bought land in Westmoreland". Briefly questioned about the extent of the circulation of the newspaper in March 1998, Mr Jackson could say no more than that, "The Observer was about ten thousand below the Gleaner on a daily basis…"

[32] In answer to the judge's questions after the cross-examination had ended, Mr Jackson rehearsed the attempts that had been made to contact the respondent before

the article was published on 27 March 1998. These included having called the branch and the managing director's office on several occasions. During this time, Mr Jackson told the judge, he was aware that the respondent was on leave and he tried to get a telephone number for him, without success. In the end, Mr Jackson agreed, the respondent was never aware, as far as he knew, that he was seeking to speak with him.

[33] And that was the appellants' case.

The judge's directions to the jury

[34] Close to the outset, Anderson J again told the jury to have regard only to the evidence given in court:

> "I have to remind you at this stage that your decisions must be based entirely upon the evidence that you have heard in this courtroom. You must come to your conclusions exclusively on that evidence and not on anything that you may have heard outside of the courtroom. Nor, should you be influenced in any way by any prejudice against any party or any sympathy for any party involved in the case or indeed any of the witness [sic] of those parties. You are to discard any likes or dislikes of any or anyone of the parties who you have had the opportunity to view as they gave their evidence. Nothing of that kind must enter into your deliberations or your thoughts. Your role is to look at the evidence which has been adduced in this case in its entirety and to make findings on that evidence."

[35] On the main issue for their determination, the judge told the jury this:

> "In this case, the claimant has set out at paragraph four of the statement of the claim, the words which he said libeled him. The particular words to which he refers are to be found

> in the last paragraph, and the words are as follows: I quote, 'Sources say that Scotiabank is also investigating the recent acquisition of land in Westmoreland by Wright, and to establish if there is a connection with the 'indiscretion' at the branch.' In his pleadings, the claimant says that words set out in the article were understood to mean and did, in fact, convey in there [sic] natural and ordinary meaning or by innuendo in the context used by the defence meaning that the plaintiff: A. that he had acquired land in the parish of Westmoreland; and B. that the plaintiff has possibly acquired the alleged land fraudulently, dishonestly or through other means. As counsel for the claimant said in his submissions, the words meant that the claimant was either dishonest or acting in some illegal or criminal way, and as a result of him so acting, he acquired land in the parish of Westmoreland. The question for you, therefore, is whether given the benefit of the evidence that you have found, you can conclude that [sic] passage sighted [sic] by the claimant in his statement of claim can be said to have in the ordinary or natural meaning, or by innuendo libel [sic] him by casting doubt on his character or the personal integrity, as he alleges in his procedure [sic]. In looking at this passage it is entirely going to be your jurisdiction to make two determinations. I suggest that in those determination [sic] you firstly say, what on the face of the words is the meaning to be given to the words; and the second question is, having ascribed a meaning to them is that meaning defamatory within the terms of the law which is [sic] outlined to you."

[36] The judge then told the jury "what this case is not about":

> "It's not about whether there were overdrafts, overruns concerning accounts maintained by customers at the Bank of Nova Scotia, Sam Sharpe Square, in Montego Bay. Certainly, the claimant is not claiming that he was libel [sic] in his professional calling by any assertion about any overruns, that is not his case. In fact, the only real evidence of overruns in his case, is that of the claimant who acknowledges that there were overruns, but, he says they were normally within the discretion of the Manager...

> Secondly, this case is not about whether the author of the article acted in compliance with the professional approach of a good journalist. Such issues may be relevant where the defendant is seeking to show that he is entitled to the defence of qualified privilege and as such negative an allegation of malice on the part of the defence."

[37] Next, on matters of law, the jury were told the meaning in law of the word 'defamatory' ("A statement is defamatory if it tends to harm the reputation of another so as to lower him or her in the estimation of right-thinking members of society or to deter third parties from associating or dealing with him; or causes people to shun him…"). In this regard, the judge also stressed to the jury the importance of context ("…you have to look not only at the words used, but the context in which they were used").

[38] And finally, on the question of the defence based on section 7 of the Act, the judge said this:

> "As a matter of law, this section of the Act refers to were [sic] there are two distinct charges in a claim. In this case there is only one charge, a charge that is in the last paragraph of the defence article [sic] is libelous. It is not clear to me therefore, that the defendant could rely on this, but you will still have to consider whether you accept that the general tender [sic] of the article is true and make your determination according to the questions I shall ask you."

[39] On this basis, the judge left the following questions to the jury for their determination:

1. What is the meaning of the words complained of?

2. Are the words defamatory?

3. Taken in the context of the article as a whole, has the claimant been libelled?

4. If so, what is the measure of damages which would be appropriate for the libel, given the claimant's circumstances, the extent of the circulation of the libel and the effect of the libel on the claimant?

A question from the jury

[40] About an hour and a quarter after they had been invited to retire to consider their verdict, the jury returned to court, apparently in need of clarification on an issue. In answer to the judge's enquiry, the following ensued:

> "MR FOREMAN: Yes sir, there was a particular question on which we sought the Clerk's advise [sic].
>
> HIS LORDSHIP: Unfortunately, the Clerk can't give you advice, sir. You have to direct the question to me, so I can see how I can assist you further. What is the question?
>
> MR. FOREMAN: Well the question would be in relation to what comes after the verdict.
>
> HIS LORDSHIP: In terms of
>
> MR. FOREMAN: Compensation
>
> HIS LORDSHIP: Okay. Damages
>
> MR. FOREMAN: Yes
>
> HIS LORDSHIP: Well, I sought to explain…well, perhaps not as well as one ought to, the way that one kind of seeks

> to compensate the injured claimant. There are different types of the damages. There is ordinary general damages. There is also what is called aggravated damages, and there is what is called exemplary damages or sometimes called punitive damages. Yes sir.
>
> MR. FOREMAN: We were of the view that in addition to compensatory damages that some measure of punitive damages should be applied to protect, to send a message, that the rest of us in society needs [sic] to be protected from arrogant and careless journalism; which could have the effect of undermining one of the pillars of our legal system, which is that, a man is innocent until proven guilty.
>
> HIS LORDSHIP: Okay, well let me see if I can assist you."

[41] The learned judge then told the jury that, when a claimant claims damages for injury, "the basic principle" is compensatory. Then, in some cases, he went on, "and in particular cases including defamation", there is the principle of aggravated damages, which are awarded where "undue hurt, anger, indignation" on the part of the claimant have resulted from the libel. And next, the judge said, there is the category of exemplary damages, where an additional sum by way of damages is considered to be "an appropriate sum to send a message". The judge then left the question to the jury, with the caveat that they should keep in mind "the principle of reasonability…so that we don't make an award which is so punitive as to be unreasonable in all the circumstances".

[42] When the judge then invited the jury to retire again on the basis of his additional directions, the foreman declined, saying "we have already, based on what you have already told us, we will be willing to give what we have decided". However, the learned

judge insisted that they retire again, "out of an abundance of caution and that it don't [sic] compromise the process, having asked for the advice…".

The verdict

[43] After retiring again for a further 18 minutes, the jury returned with a verdict in favour of the respondent:

> "HIS LORDSHIP: Mr. Foreman.
>
> MR. FOREMAN: Yes, sir.
>
> HIS LORDSHIP: The jury has reached a verdict?
>
> MR. FOREMAN: Yes, sir.
>
> HIS LORDSHIP: Let me ask you the question I asked you to consider.
>
> MR. FOREMAN: Yes, sir.
>
> HIS LORDSHIP: What did you find to be the meaning of the words which were being complained of by the Claimant?
>
> MR. FOREMAN: The jury was unanimous, in that, the tone of the article and in particular, the last paragraph, which stated as fact, that Mr. Wright had acquired lands, it was not alleged, it was stated and that this fact was being investigated in relation to indiscretion [sic] that was mentioned at the Bank. And the fact that he was, the tone of the article suggested a scam which to us means a dishonest practice.
>
> So, we are of the opinion that the whole article in itself was defamatory to Mr. Wright's character.
>
> Notwithstanding, the fact that there might have been elements of truth in it as regards his indiscretions as an

officer of the Bank; which you pointed out to us was [sic] not an issue.

HIS LORDSHIP: You found that he was defamed?

MR. FOREMAN: Yes, sir

HIS LORDSHIP: By the words and even within the context of the entire article?

MR. FOREMAN: Yes, sir.

HIS LORDSHIP: And you went on to consider the settling of damages?

MR. FOREMAN: Yes, sir.

HIS LORDSHIP: Your figure?

MR. FOREMAN: We recommend that Mr. Wright should be awarded compensatory damage of a minimum of $20 million Jamaican dollars and we further have decided that a punitive award of $10 million dollars should be paid by the defendant. And that an apology of equal prominence to the article should be printed by the newspaper to Mr. Gladstone Wright."

[44] A brief discussion followed between the judge and counsel, in which the question of whether the court could order an apology in addition to damages was canvassed. The consensus was that it could not and, in the result, the court made an award to the respondent of $30,000,000.00, with interest at 3% per annum until payment, plus costs to be taxed or agreed.

The appeal

[45] The appellants challenge this award on a total of nine grounds of appeal:

"(1) The trial procedure was irregular, improper and tainted since among other things:

(i) The Learned Trial Judge neglected to adequately direct and/or remind the Jurors of their duty to refrain from discussing the case with anyone.

(ii) The Jury held discussions with the Clerk assigned to the Court in which the trial was conducted, with respect to matters which were the subject of their deliberations.

(iii) Upon being advised by the Foreman of the jury that there had been discussions between the Jury and the Clerk, the Learned Trial Judge did not make any enquiries of the Jury to ascertain the full contents of their discussions with the Clerk as was necessary in the circumstances to determine how it could have affected the Jury's deliberations, despite having addressed his mind to the possibility of the process being compromised.

(iv) Despite having addressed his mind to the issue of the process being compromised the Learned Trial Judge failed to address this issue to prevent a miscarriage of justice. This was particularly grave having regard to the fact that the Jurors having spoken with the Clerk had indicated to the Judge, before his final directions, that they had already made up their mind.

(2) The Learned Trial Judge misdirected the Jurors and or usurped their functions on vital aspects of the case concerning the publication, as follows:

(i) He failed to ascertain from the Jury their findings on specific issues relevant to determining liability.

(ii) He failed to properly direct the Jury and obtain answers from them as to whether the publication, taken as a whole, was true or substantially true.

(iii) He directed the Jury that they could award aggravated and exemplary/punitive damages, although there was no claim or pleadings in respect of such damages.

(3) The Learned Trial Judge generally failed to adequately direct the Jurors on the issues of fact and law applicable to the case.

(4) The Learned Trial Judge in directing the Jury after the Jury's conversation with the Clerk, misdirected them that it was open to them to make an award of punitive/exemplary and aggravated damages, despite the fact that they were not claimed. He thereby not only misdirected them on the issue of damages but also inescapably left with them the conclusion that the publication was unjustifiably defamatory to the extent that it could in the circumstances even attract punitive/exemplary and aggravated damages. His direction was not only adverse on the issue of damages but on the issue of whether unjustified defamation had been established on the facts.

(5) The Learned Trial Judge misdirected the Jurors and/or usurped their functions on a vital aspect of the case concerning the publication, leading them to accept as understood and so stated by them that "**The fact that there might have been elements of truth in it** [referring to the publication] **as regards to his** [the Claimant's] **indiscretion as an officer of the Bank, which you** [referring to the judge] **pointed out to us was not an issue"**. The misdirection that the article was essentially untruthful with elements of truth which was not an issue, was a misdirection of both fact and law concerning the publication.

(6) The Learned Trial Judge misdirected the Jurors and/or usurped their functions when he disparaged the Defendant's evidence by stating that the evidence of the Defendants' witness, Moses Jackson, was ridiculous. This was a usurpation or an improper interference by the Learned Trial Judge with the Jurors' function as judge's [sic] of fact and was a misdirection concerning the weight to be placed by the Jury on that evidence, as compared to the evidence for the Claimant generally.

(7) The verdict of the Jury is manifestly unreasonable having regard to the evidence.

(8) Even if there were any bases on which the publication or any part of it could have been held to have been unjustifiably defamatory:

(i) The award of general damages was so manifestly excessive that no jury properly applying their minds to the relevant evidence could reasonably have awarded that sum.

(ii) The issue of the award of exemplary or punitive damages which had not been claimed, was improperly left by the Learned Trial Judge with the Jury, as a head of damage with respect to which it was not open to them to return a verdict.

(iii) The sum awarded for general damages is out of all proportion to any sum which could have been awarded to the Claimant/Respondent for compensation having regard to the absence of evidence to support such an award.

(iv) The award as a whole represents a wrong measure of damages and is inconsistent with any many [sic] of damages which the Claimant/Respondent claimed and testified he sustained as a result of the publication.

(9) The cumulative deficiencies of the trial both substantive and procedural, made the trial irregular and flawed to the prejudice of the Defendants and is [sic] unsustainable in law." [Emphases in the original]

An early concession

[46] Grounds (2)(iii), (4) and (8)(ii) challenge (a) the judge's directions to the jury (see para [41] above) that it was open to them to make an award of aggravated and/or exemplary or punitive damages; and (b) the jury's award of $10,000,000.00 to the respondent by way of exemplary damages. Mr Piper for the appellants submitted that, in the absence of a claim in this case for damages on the footing of aggravated or exemplary damages, it was not open to the jury to make an award on that basis and that the judge had accordingly erred in directing them to the contrary. At the very outset of his oral submissions before us, Mr Frankson for the respondent conceded that the judge had erred in this regard and he therefore did not seek to support the jury's award of $10,000,000.00 for exemplary damages.

[47] It is clear that Mr Frankson's concession was properly made. Ever since the landmark decision of the House of Lords in ***Rookes v Barnard*** [1964] AC 1129, it has been recognised that the remedy of exemplary damages is only available in the three exceptional categories of case laid down by Lord Devlin in his judgment in that case. These are, first, where there is "… oppressive or unconstitutional action by the servants of the government" (page 1220); second, where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the [claimant]" (page 1226); and third, where the award of exemplary damages is expressly authorised by statute. In addition to ***McCarey v Associated Newspapers Ltd and Others (No. 2)*** [1965] 2 QB 86, to which we were referred by Mr Piper, there is also the decision of this court in ***Douglas v Bowen*** (1974) 22 WIR 333, in which it was held (albeit by a majority) that Lord Devlin's categorisation of the cases in which exemplary damages might be awarded should be adopted and applied in Jamaica (and see further the decision of the House of Lords in ***Kuddus v Chief Constable of Leicestershire Constabulary*** [2001] UKHL 29).

[48] In this case, there was nothing in either the respondent's pleading or the evidence to bring the case within any of these categories. I would however observe parenthetically, as regards the pleading point, that I would not myself put it on the basis of rule 8.7(2) of the Civil Procedure Rules, 2002, as Mr Piper did. That rule, which provides that a claimant seeking aggravated and/or exemplary damages "must say so in the claim form", was not in force in 1999, when these proceedings were commenced by writ of summons. There was no provision in the Judicature (Civil Procedure Code) Act,

which was in force at that time, equivalent to the English Order 18, rule 8(3), which required that a claim for such relief be specifically pleaded. But it is nevertheless clear that, despite the absence of any explicit requirement in our rules that such claims be pleaded at that time, there would have had to be something in the pleading to indicate the factual basis for such a claim.

[49] It follows from this that Anderson J was clearly in error in considering and directing the jury that this was a case in which it was open to them to make an award of exemplary damages. The jury's award of $10,000,000.00 must therefore fall away completely.

The appellants' submissions

[50] Taking grounds (1), (2) and (3) together, Mr Piper pointed out that the trial judge had, at each adjournment during the five day trial, failed to warn the jury against discussing the case with anyone. It was submitted that the single occasion on which the judge did in fact do so was inadequate in the circumstances. As regards the discussion with the clerk adverted to by the foreman of the jury (see para. [40] above), Mr Piper submitted that the judge ought to have investigated the alleged contact with the clerk and to have given proper directions to the jury accordingly. And lastly, in respect of ground (3), Mr Piper submitted that the judge had failed to obtain proper answers from the jury to the questions which had been put to them by him at the end of the summing-up.

[51] On ground (5), which was in fact argued first, Mr Piper noted that in paragraph 4 of the statement of claim the respondent's complaint related only to the final paragraph of the article. But he emphasised what he described as the critical importance of the jury being invited to consider the article as a whole, given the appellants' reliance on section 7 of the Act by way of defence. The real 'sting' of the article, it was submitted, related to the respondent's admitted misconduct, which revealed him to be dishonest, deceitful, devious and untrustworthy. In the summing-up, instead of bringing these factors to the jury's attention, the judge focused entirely on the final paragraph of the article, without directing the jury to consider it in relation to the preceding paragraphs, as well as section 7. By failing to highlight to the jury the relevant considerations arising from section 7, it was submitted, the judge effectively removed from their consideration a significant part of the appellant's case. Even at the stage of the final exchanges between the judge and the foreman, the judge ought to have corrected the jury's misapprehension that the respondent's "indiscretion as an officer of the Bank...was not an issue…" In support of this ground, Mr Piper placed great reliance on the decision of the House of Lords in ***Bray v Ford*** [1896] AC 44, which I will consider in a moment.

[52] On ground (6), Mr Piper acknowledged that the appellants' complaint that the judge "misdirected the Jurors and/or usurped their functions when he disparaged the Defendant's evidence by stating that the evidence of the Defendants' witness, Moses Jackson, was ridiculous" was too widely stated, since the judge's comment that an aspect of Mr Jackson's evidence was "ridiculous" was not in fact part of his directions to the jury. However, he maintained that the judge, by his comment, had usurped the

jury's function and that its effect was to disparage and ridicule the witness' evidence in the eyes of the jury. There were, Mr Piper also complained, other instances of the judge having treated this witness unfairly.

[53] As regards ground (7), Mr Piper pointed out that this ground, in which the appellants complain that the verdict of the jury was manifestly unreasonable, overlapped to some extent with ground (5). It again invited a consideration of the part of the article complained of in the context of the entire article and the respondent's admitted wrongdoing with a view to enhancing his status within the bank. It was significant, it was submitted, that the respondent did not complain about the article as a whole, but chose to sue only on the basis of the statement in the final paragraph that the bank was investigating a recent acquisition of land by him.

[54] In ground (8), the complaint was made that the jury's award of general damages, as distinct from exemplary damages, was manifestly excessive. It was submitted that the jury's award, taking the words complained of in their context and having regard to section 7 of the Act, could not logically represent a reasonable level of award. It was submitted further that, because the jury were not properly directed with regard to the various charges contained in the article, as well as to section 7, they would not have had a reasonable appreciation of how to approach the matter of compensation. In support of this ground, Mr Piper referred us to and relied on a number of cases, to which I shall also shortly come.

[55] On the basis of these submissions, in which their complaints related primarily to the judge's directions to the jury, the appellants asked for an order for a retrial of the action.

The respondent's submissions

[56] Taking grounds (1), (2) and (3) together, as Mr Piper had done, Mr Frankson submitted, firstly, that the warnings given by the judge not to discuss the case with anyone were adequate in the context of a civil case. The jury having been told at the outset to ignore extraneous matters, it was submitted, it was unnecessary for them to be given a reminder at each adjournment. Secondly, it was submitted that the judge did seek to ascertain from the foreman the question upon which the clerk's advice had been sought and that it was clear that, immediately after the question was asked, it was brought to the judge's attention. In any event, Mr Frankson submitted, the jury's exchange with the clerk had caused no injury to the appellants' case. And thirdly, it was submitted that, contrary to the appellants' complaint, the judge did in fact ascertain the jury's answer to the questions he had left to them: the jury gave a comprehensive answer, in which they differentiated clearly between compensatory and punitive damages.

[57] On ground (5), Mr Frankson submitted that the judge had neither misdirected the jury nor usurped their role in his summing-up. Drawing our attention to what the judge had actually told the jury, Mr Frankson pointed out that the judge had at no time told the jury that there were elements of truth in the article as regards the respondent's

"indiscretion". It was further submitted that section 7 of the Act required the court to look at what the action was about and this was an action for libel in respect of words contained in the last paragraph of the article. As the judge correctly told the jury, there was only one charge in that paragraph and section 7 therefore did not apply in this case.

[58] On ground (6), in which the appellants complained of the judge's description of an aspect of Mr Jackson's evidence as "ridiculous", Mr Frankson submitted that the judge was entitled in law to comment on the evidence at any stage of the proceedings. But, in any event, he pointed out, the judge had retracted his comment on Mr Jackson's evidence and had otherwise made every effort to keep the scales balanced at the trial.

[59] In dismissing ground (7) (verdict unreasonable) as being without merit, Mr Frankson pointed out that it merely retraced the ground already covered on ground (5). And on ground (8) (general damages manifestly excessive) it was submitted that, save for the $10,000,000.00 award for exemplary damages which it was conceded was wrong in principle, the award of the jury was "supportable" and ought not to be disturbed.

The issues

[60] Based on the grounds of appeal and the submissions of counsel on both sides, it appears to me that the matters raised by this appeal can conveniently be grouped into the following broad issues:

(i) Were there irregularities in the conduct of the trial sufficient to vitiate the verdict of the jury? ('The procedural issues')

(ii) Were the judge's directions to the jury on the effect and applicability of the section 7 defence correct? If they were, was it open to the jury on the evidence to reject the section 7 defence? ('The section 7 issue')

(iii) Did the judge's description of an aspect of Mr Jackson's evidence as "ridiculous" amount to a usurpation of the jury's function? ('The usurpation issue')

(iv) Can the jury's award for general damages be supported? ('The damages issue')

Discussion

(i) The procedural issues (grounds (1), (2), (3) and (9))

[61] These were threefold. First, what was the effect of the judge's failure at each adjournment to warn the jury not to discuss the case with anyone? Second, whether the judge ought to have carried out an investigation into the circumstances and nature of the advice which the jury had sought from the clerk. Third, whether the judge obtained answers from the jury to the questions he had left for their determination.

[62] On the first question, I have already indicated that, after warning the jury as part of his opening charge to them "not to discuss the matter and not to be influenced by anything you may have heard outside or anywhere else or read anywhere else and

focus on the evidence which you hear" (see para. [10] above), the judge did not give them any further warning along these lines.

[63] Although it obviously could only have been helpful for the judge to have done so, particularly in relation to the two overnight adjournments during the course of the trial, no authority was cited to support the contention that his failure to do so amounted to an irregularity of some sort. Indeed, it is of interest to observe that, even in relation to a criminal case, Archbold (1992, para. 4-183) puts the requirement no higher than that "the judge should, on the first occasion on which the jury separate, warn them not to talk about the case to anybody who is not one of their number". In the authority cited for this proposition, (***R v Prime*** (1973) 57 Cr App R 632, 637), Lord Widgery CJ went on to observe that, once this has been brought home to the jury, "then it is to be assumed that they will follow the warning and only if it can be shown that they have misbehaved themselves does the opportunity for [an appeal] arise".

[64] Similarly, in this case, the jury having been told plainly by the judge from the beginning of the trial that they should not discuss the case with anyone or be influenced by anything which they heard outside of court, I would consider it safe to assume that that warning would have continued to operate on their minds during the short refreshment and lunch adjournments and the two overnight adjournments. As things go, this was hardly a long trial and, nothing having been even remotely suggested to indicate misbehaviour of any sort on the part of the jury, it seems to me that nothing at all turns on the fact that the judge did not renew the warning at each adjournment.

[65] On the second question, it may be helpful to recall what information there is on the record as to what transpired between the jury and the clerk (see para. [40] above). Upon the jury's return to court after they had retired for the first time, the foreman told the judge that "there was a particular question on which we sought the Clerk's advise [sic]". The judge's immediate response was to tell the foreman that "the Clerk can't give you advice, sir" and that the foreman would have to direct the question to him. There then followed the exchange to which reference has already been made between the judge and the foreman on the distinction between "ordinary general damages", aggravated damages and exemplary or punitive damages. The judge then insisted that the jury retire a second time, despite the foreman indicating that "we have already, based on what you have already told us, we will be willing to give what we have decided".

[66] In my view, the learned judge did everything that could possibly have been expected of him in the circumstances. It is clear from the record that the question on which the clerk's advice had been sought must have been the same question canvassed by the foreman with the judge with regard to the making of an award for exemplary damages. Having immediately disabused the foreman of any thought that the clerk was in a position to give advice on the matter, the judge then proceeded to address the jury's concern himself. The foreman's reference to the jurors having already decided what to give was explicitly based on what the judge himself had told them and not on anything said to them by the clerk. At this point, it seems to me, the matter was

entirely in the open and it is difficult to see what further point would have been served by an investigation by the judge into what had been discussed with the clerk.

[67] The third question can be dealt with more shortly. It will be recalled that the jury were asked (see para. [39] above) to find the meaning of the words complained of; whether those words were defamatory; whether, taking the words in their context, the respondent had been libelled; and, if so, what should be the measure of damages. Their answer (see para. [43] above) was that "the tone of the article suggested a scam which to us means a dishonest practice" and that the respondent was defamed by the words in the context of the entire article. It is in my view clear that, even if the jury's answers did not follow the precise order or terms in which the judge's questions had been asked, they had in fact given a complete answer, after which nothing remained but damages.

[68] I have accordingly come to the conclusion that the procedural issues do not provide a basis for allowing the appeal and that grounds (1), (2) (3) and (9) must therefore fail.

(ii) The section 7 issue (grounds (5) and (7))

[69] Before turning to section 7 itself, it may be helpful to place it in its common law context. At common law, in order to succeed on a plea of justification, a plaintiff "had to justify the whole of the libel" (Gatley on Libel and Slander, 9th edn, para. 11.11). The consequence of justifying a part only of a libellous statement was explained by

Tindal CJ in a well-known statement in the old case of ***Clarke v Taylor*** (1836) 2 Bing NC 654, 664–665, 132 ER 252, 256:

> "There can be no doubt that a defendant may justify part only of the libel containing several distinct charges…But if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has so omitted to justify. The plea in the present instance does not affect to justify the whole of the publication, and we are to see whether the part omitted could, by itself, form a substantive ground of an action for libel."

[70] However, it was also the case, even at common law, that, as Lord Shaw of Dunfermline explained in ***Sutherland v Stopes*** [1925] AC 47, 78-79, the plea of justification "must not be considered in a meticulous sense…[i]t is that the words employed were true in substance or in fact".

[71] In ***Edwards v Bell*** (1824) 1 Bing 403, 130 ER 162, the plaintiff, a nonconformist minister of religion at Marlow, complained of a newspaper article in which it was said that:

> "A serious misunderstanding has recently taken place amongst the independent dissenters of Great Marlow and their pastor, in consequence of some personal invectives publicly thrown from the pulpit by the latter, against a young lady of distinguished merit and spotless reputation. We understand, however, that the matter is being taken up seriously."

[72] The newspaper editor's plea of justification on the basis that the pastor had in fact abused his position in the pulpit by hurling abuse at the young lady in question was

held to be sufficient, although the editor did not attempt to substantiate the statement that differences had arisen between the pastor and the congregation as a result of the incident and that "the matter is being taken up seriously". Gifford CJ said (at page 408) that "the gist of the libel is, the charging the [pastor] with having delivered invectives from the pulpit". Park J observed (at page 409) that "the statement that the matter was to be taken up seriously, though part of the publication complained of, can scarcely be termed libellous". And, in a final word, Burrough J stated (at page 409) that "[a]s much must be justified as meets the sting of the charge, and if any thing be contained in a charge which does not add to the sting of it, that need not be justified".

[73] Mr Frankson drew our attention to the influential judgment of O'Connor LJ in ***Polly Peck (Holdings) plc and others v Trelford and others*** [1986] 2 All ER 84. In that case, the plaintiff complained of part only of an entire publication and the learned judge stated the relevant principles as follows (at page 94):

> "The first principle is that where a plaintiff chooses to complain of part of a whole publication the jury are entitled to see and read the whole publication; this is unchallenged and has been the law for well over 150 years. What use are the jury permitted to make of the material now in evidence?
>
> There is no doubt that they can use it to provide the context to the words complained of when considering whether any, and if so what, defamatory meaning is disclosed. A classic example of the context deciding the meaning of words to be different to their face value meaning is found in *Thompson v Bernard* (1807) 1 Camp 48, 170 ER 872, a slander action where the plaintiff complained that the defendants said of him: 'Thompson is a damned thief; and so was his father before him; and I can prove it.' The evidence was that the defendant added: 'Thompson received the earnings of the ship, and ought to pay the wages.' Lord Ellenborough CJ

> directed a nonsuit on the ground that it was clear from the whole conversation that the words did not impute a felony, but only a mere breach of trust.
>
> What other use can be made of the material depends on its nature and on the defences put forward by the defendant.
>
> The second principle is that where a publication contains two distinct libels, the plaintiff can complain of one and the defendant cannot justify that libel by proving the truth of the other. The difficulty with this apparently self-evident proposition is in deciding whether the two libels are indeed distinct in the sense that the imputation defamatory of the plaintiff's character in the one is different from the other.
>
> The third principle is that it is for the jury to decide what the natural and ordinary meaning of the words complained of is. This simple proposition has become enmeshed in the question how far the plaintiff can, by his pleading, limit the meanings which may be canvassed at the trial.
>
> The fourth principle is that the trial of the action should concern itself with the essential issues and the evidence relevant thereto and that public policy and the interest of the parties requires [sic] that the trial should be kept strictly to the issues necessary for a fair determination of the dispute between the parties."

[74] Expanding on the interplay between the first and second principles, O'Connor LJ went on to add the following (at page 101):

> "In cases where the plaintiff selects words from a publication, pleads that in their natural and ordinary meaning the words are defamatory of him and pleads the meanings which he asserts they bear by way of false innuendo, the defendant is entitled to look at the whole publication in order to aver that in their context the words bear a meaning different to that alleged by the plaintiff. The defendant is entitled to plead that in that meaning the words are true and give particulars of the facts and matters on which he relies in support of his plea as he is required to by Ord 82. It is fortuitous that some or all of those facts and

> matters are culled from parts of the publication of which the plaintiff has not chosen to complain.
>
> Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.
>
> Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is a question of fact and degree in each case. The several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication."

[75] The ***Polly Peck*** principle was applied by the Court of Appeal in interlocutory proceedings in ***Khashoggi v IPC Magazines Ltd and another*** [1986] 3 All ER 577, a case in which a magazine article read as a whole was capable of conveying the meaning that the plaintiff was generally sexually promiscuous. It was held that the defendants could persist in a defence of justification to this effect, even though they were unable to prove the truth of the allegation about the single extra-marital affair in respect of which the plaintiff sued.

[76] Reference may also be made to ***Carlton Communications plc and another v News Group Newspapers Ltd*** [2001] All ER (D) 103 (Nov), where Simon Brown LJ said (at para. 42) that a defendant was permitted to plead, "by way of justification of the allegation complained of, the truth of a second defamatory statement, provided only that the two allegations have a common sting and so are not to be regarded as separate and distinct".

[77] On the other side of the line is ***Cruise v Express Newspapers plc and Another*** [1999] QB 931, in which the plaintiffs complained of an article which made serious allegations about their private life and included defamatory statements about their adherence to the Church of Scientology. The defendants sought to justify the allegations relating to the Church of Scientology, even though they were no part of the plaintiffs' complaint. The Court of Appeal upheld the judge's order striking out the defence insofar as it sought to justify the allegations in relation to the Church of Scientology.

[78] Delivering a judgment with which the other members of the court agreed, Brooke LJ considered that the sting of which the plaintiffs complained was totally distinct from the sting of the allegations surrounding their adherence to the Church of Scientology. He accordingly concluded (at page 955) that:

> "The judge was in my judgment correct to hold that this libel action should not be permitted to get out of control by allowing the defendant to justify or plead fair comment in respect of a quite separate and distinct sting, if indeed it be a sting at all, of which the plaintiffs make no complaint."

[79] Against this backdrop, I come now to section 7 (which I have already set out at para. [9] above). This section, which is in terms identical to section 5 of the English Defamation Act, 1952, "may in limited circumstances, allow a complete defence even if only part of the libel is proved true" (Gatley, para. 11.11). To this extent, "[t]he position at common law of a defendant faced with justifying several distinct charges is ameliorated by [the section]" (Carter-Ruck on Libel and Slander, 5th edn, page 97).

[80] As O'Connor LJ observed of section 5 in ***Polly Peck*** (at page 103), the section "plainly requires the distinct charges against the plaintiff to be founded on separate words, and these must be contained in the passages of which the plaintiff complains". As an example of the operation of this rule, Gatley instances the following (at para. 11.13):

> "If, therefore, the article alleges that the plaintiff (a) committed murder, (b) committed adultery and (c) on one occasion falsified his expenses and the plaintiff sues only in respect of imputation (c), then the section has no application."

[81] Making the same point, Carter-Ruck observes (at page 98) that -

> "… the ambit of this defence is limited because, it seems, its applicability is dependent upon which parts of a publication the plaintiff chooses to sue on. A defendant will only be allowed to prove and rely upon one or more distinct charges made by the words contained in the parts chosen by the plaintiff. In establishing the complete defence under section 5, a defendant apparently cannot seek to prove distinct charges made elsewhere in the publication, albeit that, were any of those charges true, the plaintiff's reputation would not have been materially injured by the charges contained in those parts of the publication selected by the plaintiff."

[82] It seems to me that the following principles emerge from this brief summary of some of the relevant authorities:

(i) Where a number of distinct charges are made against him, the decision as to which to sue on is the claimant's. In such a case, the defendant cannot

justify the libel contained in the charge or charges in respect of which he has been sued by proving the truth of any of the others.

(ii) But for the purposes of a plea of justification, the jury is nevertheless entitled to have regard to the entire article in which the words complained of appear, as the entire context may have a bearing on the meaning to be attributed to the words complained of.

(iii) Whether a defamatory statement is separate and distinct from other defamatory statements in the publication is a question of fact and degree in each case. If in fact the several defamatory allegations have a common sting, it may be possible for the defendant to justify the libel by reference to the common sting.

(iv) Section 7 affords the defendant a defence only where there are two or more distinct charges contained in the words of which the claimant complains. In such a case, the defendant may successfully rely on the section even if the truth of every charge is not proved, provided that the words not proved to be true do not materially injure the claimant's reputation, having regard to the truth of the remaining charges.

(See also Halsbury's, para. 11.12.)

[83] Turning finally to the words complained of by the respondent in this case, it is clear from the authorities that nothing at all turns on the fact that he opted to sue in respect of the final paragraph of the article: the choice was entirely his.

[84] Nor does anything turn, in my view, on the fact that the respondent, on his own evidence, admitted that he was guilty of irregular or wrongful conduct in the performance of his duties as manager of the branch. An allegation that a branch manager of a bank has breached his employer's internal credit reporting regulations for the purpose of enhancing his own reputation and prospects is, it seems to me, of an entirely different kind and gravity from an imputation that he has derived a personal – and probably unlawful - financial benefit from the same activity. Though obviously related, these are distinct charges in respect of which the authorities plainly establish that the appellants were not entitled to justify the latter by proof of the former.

[85] Looked at in terms of the 'sting of the libel' analysis, it is clear from the foreman's choice of language when informing the judge of the jury's verdict ("the tone of the article suggested a scam which to us means a dishonest practice") that the jury discerned the sting of the article as being in its clear implication that the respondent, by means of his participation in a multi-million dollar "scam", a dishonest practice, had placed himself in a position to acquire land in Westmoreland. It is also clear that this must have been the sense in which the article as a whole was interpreted by the respondent's neighbour and his mother, both of whom would later refer to him as "a thief".

[86] This then brings me directly to the appellants' section 7 defence. The authorities establish that the defence is only available in cases in which there are at least two charges in the part of the publication in respect of which the claimant has chosen to sue. So for this purpose, it is necessary to direct attention, not to the entire article, but

to the final paragraph identified by the respondent at paragraph 5 of the statement of claim. For convenience, I will set it out again:

> "Sources say that Scotiabank is also investigating the recent acquisition of land in Westmoreland by Wright, and to establish if there is a connection with the 'indiscretion' at the branch."

[87] In my view, despite the, apparently disjunctive, use of the word 'and' almost at the middle of the sentence, this passage in fact contains but a single 'charge' of possible dishonesty by the respondent, which had resulted in the then recent acquisition of land by him being investigated. Taken by itself, a statement that someone has recently acquired land can hardly be regarded as a charge of any kind: the acquisition of land of some description is, after all, generally regarded as a desired outcome of a person's working life. The charge of dishonesty emerges from the coupling of the so-called 'facts' of the respondent's recent acquisition of land in Westmoreland with an investigation by the bank to establish a connection between the former and the respondent's "indiscretion" (itself hardly a neutral term) at the bank.

[88] If I am correct in thinking that the paragraph of the article of which the respondent complained contained a single charge only, then, as a matter of law, there was a clear difficulty in the path of the appellants' reliance on the section 7 defence. But, even if it is possible to discern more than one charge in the paragraph, it must be kept in mind that (i) the appellants made no attempt to justify the factual assertion that the respondent had recently acquired land in Westmoreland; and (ii) there was no

admissible evidence (see para [97] below) that the bank had undertaken an investigation to determine whether he had done so.

[89] So, even if it was proved by the respondent's admissions that there had been some "indiscretion" at the branch, as the appellants maintained, it might nevertheless have been difficult to persuade the jury that, as section 7 requires as a further condition of its applicability, "the words not proved to be true [did] not materially injure the plaintiff's reputation having regard to the truth of the remaining charges".

[90] Bearing these considerations in mind, I can therefore come back to Anderson J's directions to the jury. The appellants' complaint in ground (5), which is based on what the foreman of the jury told the judge when the verdict was being announced in court (see para [43] above), was that the learned judge –

> "…misdirected the jurors and/or usurped their functions on a vital aspect of the case…leading them to accept as understood and so stated by them that 'The fact that there might have been elements of truth in [the article] **as regards to his** indiscretion as an officer of the Bank, **which you** [referring to the judge] **pointed out to us was not an issue**." (Emphasis in the original.)

[91] But it is necessary to consider, as Mr Frankson submitted, what the judge actually said. First, in reminding them of their task, the jury were told that the case was not about "whether there were overdrafts, overruns concerning accounts maintained by customers" at the branch. Indeed, the judge pointed out, the only "direct evidence of overruns" came from the respondent's own admissions. Rather, the judge said, the case was about "specific words which [the respondent] complains are defamatory to him and

he said what he believed them to mean or intended [sic] to mean". In so saying, the learned judge was doing no more than focussing the jury's mind, correctly in my respectful view, on the true nature of the case which the respondent had placed before them for their consideration.

[92] Second, referring specifically to section 7, the judge said this:

> "As a matter of law, this section of the Act refers to where there are two distinct charges in a claim. In this case there is only one charge, a charge that is in the last paragraph of the defence article is libellous [sic]. It is not clear to me therefore, that the defendant could rely on this, but you would still have to consider whether you accept that the general tender [sic] of the article is true and make your determination according to the questions I shall ask you.
>
> Since you have to look at the entire context, you will find that some words are defamatory while others are not, so you have to look at the entire set of words and you have the article and the context, because it may be taken as a whole, the balance comes out on one side or the other. You have the role of trying to determine whether there are some words which are defamatory or some which are complimentary when taken as a whole, the meaning to be used."

[93] As I have attempted to demonstrate, the view that "in this case there is only one charge" was one which was clearly open to the judge on the evidence. But he nevertheless left it to the jury, as he was obliged to do, to consider whether the general "tender" (clearly a miswriting for 'tenor') of the article was true and to make their own determination. Further, the jury were plainly told that it was for them to determine which parts of the article were defamatory and which were not.

[94] These were, in my view, unexceptionable directions. It is against this background, that the foreman's statement right at the end of the case that the jury was of the opinion that the whole article was defamatory of Mr Wright's character, "[n]otwithstanding the fact that there might have been elements of truth in it as regards his indiscretions as an officer of the Bank; which you pointed out to us was not an issue", falls to be considered. It is clear that (i) the statement that "there might have been elements of truth in it as regards his indiscretions as an Officer of the Bank" must have been the foreman's report of how the jurors saw the case, since the judge had himself used no such language in his directions; and (ii) the words "which you pointed out to us was not an issue" plainly referred to the words "his indiscretions as an officer of the Bank", which immediately preceded them. In other words, the foreman was doing no more than summarising the findings of the jury, having taken into account the judge's directions.

[95] For these reasons, I have come to the conclusion that ground (5), in which the appellants complain that the judge misdirected the jury and/or usurped their function cannot succeed. As regards the contention in ground (7) that the verdict of the jury was manifestly unreasonable having regard to the evidence, the appellants based themselves primarily on their section 7 argument, upon which I have already expressed a view. Beyond that, no basis has been shown, in my view, to impugn the jury's conclusion on a matter which it was entirely for them to decide; that is, whether, the paragraph of the article in respect of which the respondent had sued was defamatory of him. It follows from this that ground (7) must necessarily fail as well.

(iii) The usurpation issue (ground (6))

[96] The circumstances in which the learned judge described an aspect of Mr Jackson's evidence as "ridiculous" have already been described (see para. [29] above). Mr Jackson had been describing to the court the telephone conversation which had taken place between his source in New Kingston and a fellow banker in Montego Bay, during which the respondent was heard on the line as a result of the party in Montego Bay placing a telephone call to him and turning on the speaker phone. The specific piece of the evidence which drew the judge's incredulous comment was Mr Jackson's assertion that he was able to identify the respondent as the person on the line with the colleague in Montego Bay:

> "You are in New Kingston with somebody who called somebody else in Montego Bay who called somebody else in Montego Bay and you know who that person is on the line?"
>
> No, man, that is ridiculous."

[97] There can plainly be no question that the judge's comment was unnecessary and unfortunate, since Mr Jackson's evidence was what it was and its credibility was entirely a matter for the jury to determine. But it is equally clear, in my view, that Mr Jackson's evidence that the respondent was a party to the conference call, without any indication being given as to how he was able to identify the respondent (who was not known to him) over the telephone, could only have been based on what he was told by either the source in New Kingston or the source's colleague at the other end of the line in

Montego Bay. Accordingly, it seems to me, Mr Jackson's assertion that the respondent was on the line was pure hearsay.

[98] So, while it is clear from the judge's immediate attempt to retract the comment (with the explanation that he had made it "in an effort to caution the witness" - see para. [30] above) that he recognised that he had gone too far by making it, it appears to me that it would have been open to the jury to take an equally jaded view of the value of Mr Jackson's evidence of this conversation. In any event, it further seems to me, Mr Jackson's evidence of the steps he took to authenticate his information as to what had taken place at the branch, of which the three-way telephone link was supposedly a part, was really of no significance to the real issues in the case. For, as the judge told the jury – obviously correctly, no defence of qualified privilege having been pleaded – "this case is not about whether the author of the article acted in compliance with the professional approach of a good journalist" (see para. [36] above).

[99] In these circumstances, I am unable to attribute any particular significance to the judge's comment in the overall context of the case. It certainly cannot be said, in my view, to have been so serious a usurpation or improper interference with the jury's function as to vitiate their conclusion.

(iv) The damages issue (ground (8))

[100] I now turn to the question of the jury's award for general damages, which, the appellants contend, was manifestly excesssive. Mr Piper very helpfully referred us to a

number of decisions in which the proper approach on appeal to the verdict of a jury in a case of libel was considered.

[101] ***Bray v Ford*** [1896] AC 44 was a case in which, in an action for libel, the trial judge misdirected the jury in favour of the plaintiff on a material part of the libel and the jury gave a verdict for substantial damages. On appeal, the question was whether a "substantial wrong or miscarriage" had been occasioned by the misdirection, sufficient to justify a new trial (under the provisions of the then Ord. 39, r. 6). The House of Lords held that, since the assessment of damages is the peculiar province of the jury in a libel action, and since the jury had not had the defendant's real case submitted to them and might, in assessing the damages, have been influenced by the misdirection, there had been a substantial wrong or miscarriage and a retrial was therefore necessary. Lord Halsbury LC concluded (at page 48) that "[i]t is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant". And Lord Watson observed (at page 49) that "[e]very party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal".

[102] In ***Blackshaw v Lord and Another*** [1983] 3 WLR 283, the defendants, who were respectively the author and the publisher of the alleged libel, appealed against, among other things, the quantum of the jury's award for damages. Dismissing the appeal, the Court of Appeal held that, although the award of damages was high, it was the function of the jury to assess the damages and the court could only reduce the

award if it could be shown that the damages were so high that no reasonable jury could have awarded them or unless the jury were misled or took into account matters that they should not have considered. In establishing this on appeal, Stephenson LJ observed (at page 303), "[a] defendant challenging a jury's award of damages for defamation has an uphill task". In language which emphasised that the views of individual judges on appeal are not necessarily the decisive factor, Dunn LJ agreed (at page 313):

> "Speaking for myself I think that the award of £45,000.00 was much too high even for this serious libel, especially if one compares it with awards for pain and suffering and loss of amenity which are currently awarded for personal injuries. But that is not the test. A series of decisions which are binding on us show that this court must not interfere with such an award unless the damages are so large that no reasonably jury could have given them, or unless the jury were misled."

[103] Although there was no explicit discussion along these lines in any of the judgments in ***Gleaner Company Ltd and Dudley Stokes v Eric Anthony Abrahams*** (SCCA No 70/1996, judgment delivered 31 July 2000), that was clearly a case in which this court considered the damages awarded by the jury to be "so large that no reasonable jury could have given them". In that case, the plaintiff was a former minister of government, a member of parliament and a tourism consultant with an established national and international reputation. He was libelled in a newspaper article published by the defendant, which spoke to suspicion that, during his time as Minister

of Tourism, he had received kick-backs in exchange for lucrative tourism promotion contracts. He was awarded $80,700,000.00 for general damages by the jury.

[104] On appeal to this court, the award was reduced to $35,000,000.00 (which the Privy Council subsequently declined to disturb – see ***Gleaner Company Ltd and Another v Abrahams*** [2003] UKPC 55, [2004] AC 628). Despite the fact that the court concluded that the nature of the libel and the circumstances of the case justified a substantial award of damages in order to vindicate the plaintiff's reputation, the damages awarded by the jury were considered to be "phenomenal and...multiple times any award ever granted in Jamaica in these types of cases" (per Forte P at page 38), "excessive" (per Harrison JA at page 63) and "more than what is reasonably required to protect [the plaintiff's] reputation" (per Langrin JA at page 96).

[105] In ***CVM Television v Fabian Tewarie*** (SCCA No 46/2003, judgment delivered 8 November 2006), the jury accepted that the claimant, a sergeant of police, had been libelled by a television news report which implicated him in the murder by shooting of a member of the public. The jury's award of $20,000,000.00 for general damages (made on 3 June 2003) was set aside and reduced by this court on appeal to $3,500,000.00.

[106] Panton JA (as he then was) distinguished ***Gleaner Company Ltd v Abrahams***, as one in which "Abrahams had to live with the consequences [of the libel] for several years…[while in] the instant situation, the result of the libel was not devastating" (page 10). For her part, McCalla JA (as she then was) said this:

> "The question to be answered is whether a reasonable jury could have thought that the award in the instant case was necessary to compensate the respondent and to re-establish his reputation. An award that exceeds that requirement is subject to interference by this Court. In the case at bar I am not unmindful that the libellous publication related to the offence of murder or involvement with murder by an officer of the Jamaica Constabulary Force. I am however in agreement with the appellant's Counsel that having regard to the matters alluded to under this ground and the circumstances of the case the award made by the jury is manifestly excessive. It exceeds the amount that is reasonable and necessarily required for the protection of the respondent's reputation and his hurt feelings."

[107] The clear principle that emerges from these cases is that the award of damages for libel is the peculiar domain of the jury and the Court of Appeal will only interfere with the jury's award in cases in which it considers that the damages awarded by the jury are so high that no reasonable jury could have made such an award, or unless the jury were misled. The ultimate test to be applied in such cases is whether the jury's award is more than is reasonably required to protect and vindicate the claimant's reputation.

[108] There can be no doubt that the libel to which the jury found that the respondent was subjected by the appellants in this case was a grave one. As in ***Gleaner Company Ltd v Abrahams***, there was evidence of the seriously negative impact that it had had on the respondent's reputation, both in the eyes of the general public and, no doubt giving rise to his even greater anguish, in the judgment of his mother. There was also the respondent's evidence, which was substantially unaffected by searching cross-examination, that his immediate prospects in the job market had

suffered as a result of the libel. There was also the absence of an apology of any kind from the appellants: as Harrison JA pointed out in ***Gleaner Company Ltd v Abrahams*** (at page 57), "Lack of an apology or an inadequate apology is evidence of malice which may aggravate damages."

[109] But it is equally clear, I think, that the consequences of the libel in this case did not approach the level of personal devastation which the libel in ***Gleaner Company Ltd v Abrahams*** had visited on the plaintiff in that case. Here, unlike in that case, there was no evidence of psychological trauma, nor was there any detailed evidence of substantial economic losses suffered by the respondent. And, despite the respondent's loss of the society of some of his friends, it is clear from Mr Bancroft's evidence that some aspects of this had been mitigated by time. In short, this was not a case, it seems to me, of "many aggravating features that extended over a period of several years" (per McCalla JA in ***CVM Television v Tewarie***, page 35, in reference to the situation of the plaintiff in ***Gleaner Company Ltd v Abrahams***).

[110] Because of these differences, ***Gleaner Company Ltd v Abrahams*** cannot, in my view, provide a ready comparison to this case for the purposes of damages. Closer to the mark may be ***CVM Television v Tewarie*** in which the claimant's evidence was that, when he heard the news broadcast of which he complained and the role he was alleged to have played in the fatal shooting, he felt as if someone had hit him in the head with something heavy. He subsequently had to seek medical help for persistent headaches and stress. He ceased visiting the community in which the shooting had

taken place, due to fear for his safety. However, since the broadcast, the claimant continued to receive his remuneration and, although he had not been promoted, he had lost no status in the police force and received commendations for his work on a regular basis. Nor had he lost his friends as a result of the publication.

[111] Perhaps it may be said that, on balance, the respondent suffered greater damage as a result of the libel than did the claimant in ***CVM Television v Tewarie***. On the other hand, when the libellous statements in the two cases are compared - in the one, that the claimant, a sergeant of police, had participated in the unlawful killing of a member of the public, and in the other that the respondent, a bank manager, was involved in a "scam", from which he had derived a corrupt benefit - the former might naturally be regarded as more serious because it involved the loss of a life. But it seems to me that on an overall comparison of the medium to long term consequences of the libels in the two cases, there may not be too much between them. (For the purposes of this exercise, I have not taken into account this court's decision in ***Edward Seaga v Leslie Harper***, SCCA No 29/2004, judgment delivered 20 December 2005. In that case, the learned trial judge's 22 December 2003 award of $3,500,000.00 for general damages for slander was reduced on appeal to $1,500,000.00. But this was primarily because (i) although neither pleaded nor particularised, the judge had included an element of aggravated damages in his award; and (ii) the claimant had not claimed to have suffered in his post of Deputy Commissioner of Police and, as the judge himself had remarked, had produced little evidence in proof of injury to his reputation. The

reduced award of $1,500,000.00 was confirmed by the subsequent decision of the Privy Council – see ***Edward Seaga v Leslie Harper*** [2008] 1 All ER 965, para. [16].)

[112] If this is a fair assessment, then the award of $3,500,000.00 in ***CVM Television v Tewarie*** would, in my judgment, provide a reasonable starting point in the determination of an appropriate award in this case. I think that it must also follow from this that, even allowing for the gap in time between the juries' awards in the two cases (2003-2008), the award of $20,000,000.00 for general damages to the respondent in this case was manifestly excessive. Put another way, the award is so high that no reasonable jury could have made it and far exceeds any amount which might reasonably be required to protect and vindicate the respondent's reputation.

[113] So what then would have been a fair award to the respondent in all the circumstances of this case? Using the Consumer Price Index, the sum of $3,500,000.00, which this court substituted for the jury's award made on 3 June 2003 in ***CVM Television v Tewarie***, would have been worth approximately $6,500,000.00 on 22 May 2008, the date of the jury's award in the instant case. I would accordingly consider an award in this amount to be fair compensation to the respondent in this case.

Interest

[114] On the basis of the jury's verdict, as has been seen, the learned judge pronounced judgment for the respondent in the total sum of $30,000,000.00, "with interest of 3 percent until the date of payment". Although the appellants have taken no point as to the form of the award of interest, a question arises as to whether it was in

fact in accordance with the power given to the court by section 3 of the Law Reform (Miscellaneous Provisions) Act ('the LRMPA'):

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage **for the whole or any part of the period between the date when the cause of action arose and the date of the judgment**:
>
> Provided that nothing in this section –
>
> (a) shall authorize the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange." (Emphasis supplied)

[115] In authorising the making of an order for the payment of interest on an award of damages, section 3 of the LRMPA therefore gives to the court a clear discretion as regards the rate of interest to be paid on the sum awarded; whether interest is to be paid on the whole or part of that sum; and the period for which interest is to be paid, which may be for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. In this case, in the light of the judge's order, unchallenged in this respect, having (i) failed to specify a starting date for the payment of interest on the jury's award of damages and (ii) specified that interest should be paid "until the date of payment", the court thought it best to invite

supplemental submissions from counsel on both sides on whether the order was in conformity with the power given by section 3.

[116] In their admirable supplemental submissions, produced at very short notice, both Mr Piper and Mr Frankson essentially validated the court's concerns as to the form of the judge's order for interest. While no issue was taken as to the rate of interest prescribed by the judge, both counsel were agreed that he went beyond the power given by section 3, by ordering interest to be paid to a date beyond the date of judgment. And although Mr Frankson did not appear to concede that the judge had also erred by not having fixed a starting point for the payment of interest, I think it is also clear, as Mr Piper submitted, that the judge's order for interest was equally deficient in this regard. Mr Piper's additional complaint that the judge ought to have called upon counsel for submissions on the matter of interest before making his order is obviously unexceptionable in principle. But it seems to me to be of little significance in the context of this case, since it was clearly open to counsel, had they wished to do so, to indicate a contrary view to the judge, either immediately after he announced the order in their presence in court or at anytime before the judgment was perfected.

[117] On the question of what effect, if any, the judge's lapse should have on the outcome of the appeal, Mr Piper first submitted that, the judge's failure to act in keeping with section 3 of the LRMPA, "constitutes another basis on which the Judgment ought not to be upheld". Then in a further submission, Mr Piper made the additional (and perhaps more far-reaching) point that, as a matter of general principle, no interest

should be awarded on damages in defamation actions prior to judgment, "because the judge or jury assesses the loss to the Claimant up to the date of the award and is assumed to have taken into account all factors, including the statutory discretion to award interest".

[118] Mr Frankson, on the other hand, invited the court to exercise its powers under rule 2.15 of the Court of Appeal Rules 2002 ('the CAR') and to make an order for interest at the rate of 3% on the judgment sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[119] Mr Piper based himself principally on ***McPhilemey v Times Newspapers Ltd (No 2)*** [2001] EWCA Civ 933, [2002] 1 WLR 934, in which the court was concerned with the power to award interest under rule 36.21 of the English Civil Procedure Rules 2002, in cases where a claimant has, in the result, "beaten" the defendant's offer to settle (see rule 35.15 of the CPR for equivalent, if not identical, provisions). In this context, Chadwick LJ made reference (at para. 17) to "the established practice in defamation cases for the court to refuse to direct payment of interest, in respect of any period prior to the date of the award, on the amount of the jury's award". The justification for the practice was stated to be "that the amount of the jury's award takes account of everything down to the date of the award, including, in particular, the strain and distress caused to the claimant by the conduct of the trial and the fact that the claimant has had to wait for payment of the compensation to which he has ultimately been held to be entitled". Simon Brown LJ (at para. 28) also took it as given "that in a

defamation action it would generally be unjust to award interest on the damages" (see also, to similar effect, ***Jones v Associated Newspapers Ltd*** [2007] EWHC 1489 (QB), para. 13, in which Eady J stated that it would "generally be inappropriate to award interest on libel damages").

[120] Although the point does not appear to have been discussed in any of the decisions of this court to which we were referred in this appeal, it may not be irrelevant to note that no order for interest was included in the final judgment entered as a result of the verdict of the jury in either ***Gleaner Company Ltd v Abrahams*** or ***CVM Television v Tewarie***. Nor was any such order included in the final judgment entered by the trial judge sitting without a jury in ***Edward Seaga v Leslie Harper***. It certainly seems to me that, in a libel case, there is some force in the consideration that, to the extent that the jury's (or judge's) award may be taken to reflect the court's view of what constitutes appropriate compensation to the claimant up to the time of the award, an order for the payment of interest in addition to damages may involve an element of double compensation.

[121] But, in this case, I think that it is important to keep in mind the route by which the point has come to attention. It was not argued before the judge and, as I have already pointed out, there is no appeal from the judge's award of interest. There is no question that an order for the payment of interest was one which was, subject to the limits established by section 3 of the LRMPA, entirely within the judge's discretion. It is also clear that, even if there had been an appeal on the point, the manner of the judge's exercise of that discretion would not ordinarily attract this court's attention,

since, to adopt Chadwick LJ's helpful restatement in ***McPhilemey v Times Newspapers Ltd (No 2)*** (at para. 7) of the well established principle, "[t]he court must resist the temptation to substitute its own view for that of the judge unless satisfied that his discretion has been exercised on a basis which is wrong in law, or that the conclusion which he has reached is so plainly wrong that his exercise of the discretion entrusted to him must be regarded as flawed". In the absence of a ground of appeal challenging the judge's decision to include an order for payment of interest in his judgment in this case, therefore, I do not think it would be right for this court to second-guess the exercise of his discretion of its own motion.

[122] Mr Frankson referred us to rule 2.15 (b) of the CAR, which empowers this court, in relation to a civil appeal, to (a) "affirm, set aside or vary any judgment made or given by the court below" and (b) "give any judgment or make any order which, in its opinion, ought to have been made by the court below". In the light of this rule, and in all the circumstances of this case, it seems to me that the fair outcome would be to vary the judge's order for interest, to make it clear that the interest, at the rate ordered by him, should run from 27 March 1998, the date on which the respondent's cause of action arose, to 22 May 2008, the date of judgment.

[123] As to the judge's choice of the rate of interest of 3%, it is clear, as Mr Piper quite properly accepted, that this was fully in accordance with the decision of this court in ***Central Soya of Jamaica Ltd v Freeman*** (1985) 22 JLR 152 (endorsed in ***Attorney General of Jamaica v Arthur Baugh***, SCCA No 101/06, judgment delivered 24 June 2008), by which it was determined that general damages should bear

interest at one half of the rate applicable to judgment debts. At the time of the judge's order, the applicable rate was 6%, as prescribed by The Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006. Prior to this order, which came into effect on 13 June 2006, the applicable rate had in fact been 12%, in accordance with The Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 1999, which had come into force from 1 July 1999. So the judge would have based his order on the lower rate, which had in fact come into effect almost at the end of the relevant period (1998-2008).

Disposal

[124] I would therefore allow the appeal in part, by (i) setting aside the judgment for $30,000,000.00 with interest of 3% until the date of payment; and (ii) substituting in its place judgment for the respondent in the sum of $6,500,000.00, with interest thereon at 3% per annum, from 27 March 1998 to 22 May 2008. The costs of the trial must be, as the judge had ordered, the respondent's to be agreed or taxed.

[125] In relation to the costs of the appeal, I propose that (i) the parties be invited to make written submissions on costs within 28 days of the court's order on the appeal; and (ii) within a further period of 28 days thereafter, the court will make a determination as to the costs in writing.

An apology

[126] This judgment, with which I understand my learned sister and brother to be in agreement, has been long outstanding by any standard. On behalf of the court, I wish to tender profuse apologies to the parties and their counsel. They have our assurance that, had this delay been a matter over which the court had full control, it would not have occurred.

McINTOSH JA

[127] I have read in draft the judgment of my brother Morrison JA. I agree with his reasoning and conclusion and have nothing further to add.

BROOKS JA

[128] I too have read the draft judgment of Morrison JA and agree with his reasoning and conclusion. I have nothing to add.

MORRISON JA

ORDER

Appeal allowed in part. Judgment of $30,000,000.00 set aside and the sum of $6,500,000.00 substituted in its place, with interest thereon at 3% per annum, from 27 March 1998 to 22 May 2008. Costs of the trial to the respondent to be agreed or taxed. The parties are to make written submissions on the costs of the appeal within 28 days of the date of this judgment. The court will make a determination as to the costs of the appeal within a further period of 28 days.