IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S 115 OF 1991

BETWEEN	**DAVID SYKES**	**PLAINTIFF**
A N D	**GUARDIAN INSURANCE BROKERS LIMITED**	**1st DEFENDANT**
A N D	**BRIAN M. SELF**	**2ND DEFENDANT**

Mr. R. B. Manderson-Jones for Plaintiff
Mr. E. Delisser and Miss Andrea Walters instructed by Brown, Llewlyn & Walters for Defendants

Heard: **15th-18th June, 23rd June 1998, 14th December, 1998; 7th and 8th January, 1999 and 3rd December 1999**

Clarke, J.

This is an action brought by the plaintiff against both defendants for damages for libel. The plaintiff was at all material times an insurance agent as well as general manager of General Accident Insurance Company Jamaica Limited (whom I shall refer to as "the insurers)". Also, the first defendant was a company carrying on the business of insurance brokerage

and the second defendant was its servant or agent and technical director. It is common ground that:

(a) On 24th May 1985 the defendants, acting as brokers for a Mr. J.A. Pottinger, made a written fire claim on his behalf against the insurers in respect of loss resulting from fire on 16th May 1985 to his building, machinery and baled stocks of paper.

(b) On 24th May, 1985 the insurers received a preliminary report from Thomas Howell Kiewit, loss adjusters, appointed by the plaintiff to investigate the loss.

(c) The parties soon reached an impasse in that "the stock of baled paper" portion of the loss had been denied by the insurers who alleged material non-disclosure of certain facts.

(d) With regard to the "building and machinery" portion of the loss an interim payment was requested on Friday, 28th June, 1985. The request was made by the second defendant to the loss adjusters and not to the insurers or the plaintiff.

(e) The adjusters' interim report recommending an interim payment of $35,000.00 was received by the insurers on the afternoon of Thursday, 4th July, 1985.

(f) At about 10.00 a.m. the following morning, Friday, 5th July, the insurers through the plaintiff told the second defendant that the interim report was incomplete.

(g) The interim payment was made by the insurers on 10th July, 1985 after receiving a letter of clarification from the adjusters earlier that same day.

(h) Two days earlier, the plaintiff received a letter from the defendants dated 8th July, 1985 which the defendants published to the following persons;

1. Mrs. E.W. Taylor,
   Superintendent of Insurance

2. A.D. Blades,
   Chairman of the Insurers

3. J.A. Pottinger, the insured and

4. J. Silvera of Thomas Howell Kiewit, the loss adjusters.

In his action commenced almost six years later on 19th April 1991, the plaintiff alleges that he has been libeled by the defendants in

their letter of 8th July 1985 published to the aforesaid persons.

The letter reads as follows :

"July 8, 1985

David Sykes Esq.
General Manager
General Accident Insurance Company Ja. Ltd.
15 Trinidad Terrace
Kingston 5.

Dear Sir:

Re: Fire Claim 19th May, 1985
Joscelyn Pottinger

On the 24th May, 1985, we sent to your Company completed Claim Form and other documents relating to the above.

Various additional documents, including the Fire Brigade Report were forwarded to your Company on different dates and up to the beginning of June 1985. Your office had appointed Thomas Howell Kiewit, Adjusters to investigate the loss on your behalf and towards the end of May Mr. Ziadie received the Adjusters Preliminary Report. He mentioned (verbally) to me that he would probably deny the Insured's claim for Stocks since these were baled paper items stored in the "open" at 34 Second Street, Newport West and not "30" as stated in the policy.

Mr. Ziadie subsequently confirmed this in his letter dated 30th May, 1985, though he stated this was an 'initial reaction' and that you were 'preceding with the other

items such as Buildings, Plant and Machinery and Stocks contained in the building.'

Your Adjusters proceeded on the basis of the above instructions and almost ten (10) days ago the Insured provided us with copies of various invoices in respect of the Buildings etc. At that time the writer contacted Mr. Slivera of Thomas Howell who advised that the details had not been received but he would give them urgent attention on arrival.

On Friday before last, the writer again contacted Mr. Silvera and informed him that it might be a while before repair/reinstatement was finalised and an InterimReport was, therefore, required. This was prompted by the following:

a) the Insured had already expended monies to have certain work completed.

b) the Insured had been forced to seek Bank funding at high interest rates (N.B. N.C. have a Mortgage interest in the Property)

c) the whole position was aggravated by the situation concerning possible lack of cover on stocks.

d) Debris Removal costs were still to be incurred and a portion of these would be affected by (c) above.

In consequence, Mr. Silvera was asked to check the sums claimed by the Insured for Buildings/Plant etc. Damage and make urgent recommendation to your Company that a portion of these losses be paid on account. This was subsequently done and your Adjusters Interim Report recommending a payment of $35,000 was delivered to your offices early on Thursday afternoon last.

Mr. Ziadie advised that he wold be leaving the office until Tuesday next but that he had informed you of the position and the writer would be able to negotiate cheque drawal with you.

In ringing your office the following morning, the writer was informed by your claims department (Miss West) that the Adjusters Report had not been received! After confirming delivery with the Adjuster. The writer again contacted Miss West who then transferred me to you on your arrival at that time (approx 10.30 a. M.). You confirmed that the Report was in your possession but was incomplete as it contained no details of loss. A promise was given by you that the File with Preliminary Report would be examined and if satisfactory you would arrange the issue and signature of a cheque.

You then rang back the writer at 11.00 a.m. and advised that you believed the loss was <u>not</u> due to a discarded cigarette. The writer whilst agreeing with your views as to the cause of Fire namely arson, pointed out that this did <u>not</u> affect the Insured's settlement rights unless you could establish complicity or fraudulent actions on the Insured's part. Having agreed this contention you then proceeded to relay a story concerning a latter of enquiry written to "someone" – not in this country – whose name was obtained from "somebody else" only contactable by a telephone number – purportedly provided by Mr. Ziadie – and that the reply to this letter written <u>five</u> weeks earlier "might" enable you to deny the entire claim.

Needless to say, you could provide no details as this may enable the Insured to circumvent or influence the reply. You gave no reason why this letter had not been "chased up" nor the reason for whey Mr. Ziadie had not mentioned this aspect in our discussions. Indeed you went on to advise that the Adjusters were not even aware of this aspect, a fact you saw only as indicative of the generally poor level of Adjusting in Jamaica! You concluded by promising to seek verbal response to the

letter but that this would certainly delay settlement for what by your remarks may be an indefinite period.

The writers response, not unnaturally, was that you had provided nothing worthwhile for him to discuss with the Insured, and, in consequence, you would relay the position to Mr. Pottinger directly. Even this you could not do with complete honesty giving the Insured a lame excuse that you had not received an Adjusters Report sufficient to enable settlement of the loss. Not only is this a lie but if reflects badly on the writers own honesty and the Adjusters.

In conclusion, the writer only recourse has been to advise the Insured of all that has transpired (as summarised in this letter) and suggest that he bring the matter to the attention of the Insurance Superintendent – hence a copy of this letter to Mrs. Taylor.

It should be patently clear by the length and detail of this letter that the writer believes the actions of your Company and yourself in particular, to be shoddy and unprofessional. By what can only be described as "act of claims service" you "<u>again</u>" bring justification to the frequent criticisms levelled against our Industry regarding the non-payment of claims.

No one begrudges any Insurer the natural and necessary right to investigate (fully) claims made so as to ensure just and equitable claims settlements. In the same way surely the Insured and/or his Agents (the Broker) has a right to expect promptness and fair dealings from those with whom business is transacted?

In this case, it is the writers belief that our rights have not been observed or even considered and one is forced to raise the following questions:-

1) Why – notwithstanding the expressed urgency relayed to both your Adjusters and your own

Deputy Manager 10+ days ago – was no attempt made (at that time) to seek a response to the letter you have referred to?

2) Why was the existence of this enquiry not mentioned to either your Adjuster or ourselves until Friday last (by you) when we were seeking a cheque?

3) Why is it (from the writers personal experience in dealing with you) that whenever claims reach your desk they are immediately treated with suspicion, subjected to time wasting examination and delay – often over the most inconsequential and irrelevant issues imaginable?

4) Why does your Company (or you) have the most deserved reputation of being one of the slowest – amongst insurers – for claims settlement?

Quite obviously, we as Brokers have a duty to our clients regarding claims and we do not see – in all conscience – how we can recommend placement of business with your Company, if the past and current claims handling service is to be continued.

To this end, a copy of this letter has been addressed to your Chairman, in the hope that he, at least, will not only action this complaint but may realise why his Company does not enjoy an even greater share of the market due to the inefficiencies and delays (particularly in claims settlements) so often created or aggravated (seemingly) by you, his General Manager.

Yours faithfully,
GUARDIAN INSURANCE BROKERS LIMITED

Sgd. Brian M. Self
Technical Director

BMS/re

P.S. As expected, you were again absent from the office when I visited at 3.45 p.m. on Friday and (also as expected) your message relayed to me was that you had been unable to contact the party(ies) who will enable you to settle or deny the Insured's loss!

c.c. 1. Mrs. E. W. Taylor
Superintendent of
Insurance

2. A.D. Blades, Chairman

3. J.A. Pottinger."

3. J. Silvera
Thomas Howell Kiewit

The plaintiff contends that the words contained in paragraph 11 of the letter beginning with "The writer's response" through to the final paragraph ending with "so often created .. by you, his General Manager" are defamatory of him in the way of his office and occupation.

The words complained of clearly refer to the plaintiff and I find that in their natural and ordinary meaning the words bore and were understood to bear the meanings pleaded by the plaintiff, namely that he:

1. Was dishonest;

2. Was a liar;
3. Deliberately lied in order to falsely cast a bad reflection on the second defendant and on the adjusters;
4. Was incompetent and inefficient, and failed to maintain professional standards of the insurance business;
5. Was shoddy and unprofessional'
6. Was guilty of deliberate and unnecessary delay in the settlement of claims;
7. Was not acting in the best interest of his employer in preventing it from enjoying an even greater share of the insurance market.

The words are incontestably capable of being defamatory of the plaintiff in his personal and business reputation. In spite of the defendants' denial I find that the words conveyed to the persons to whom they were published as reasonable readers the imputation that the plaintiff is a dishonest liar and shoddy and unprofessional in causing delay in settlement by his handling of the claim. "The test according to the authorities, is whether under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libelous sense": **Capital & Counties Bank v. Henty**

(1882) 7 App. Cas. 741 cited with approval in **Jones v. Skelton** [1963] All E.R. 952 at 958 E-G (P.C.)

The defences pleaded by the first and second defendants are identical and are as follows:

1. Fair Comment on a matter of public interest
2. Qualified privilege.

Fair Comment

Each defendant has made two pleas of fair comment: (1) the rolled-up plea (paragraph 5 of the defences, and (2) the general plea (paragraph 6 of the defences). The rolled-up plea which appears to roll up justification and fair comment together is really one of fair comment and not of justification: see **Sutherland v Stopes** [1925] A.C. 47. That plea is set forth in paragraph 5 of each defence as follows:

> "In so far as the words contained in the said letter consist of statements of fact, they are true in substance and in fact; and in so far as they consist of expressions of opinion they are fair comment made in good faith and without malice on the said facts which are a matter of public interest".

Where, as here, the rolled-up plea is raised particulars are required in terms of Section 185 of the Judicature (Civil Procedure Code) Act which provides:

> "Where in an action for libel and slander the defendant alleges that, in so far as the words complained of consist

> of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges to be statements of fact and of the facts and matters he relies on in support of the allegation that the words are true." (Emphasis supplied)

So, two sets of particulars are required in respect of the rolled-up plea: (1) particulars stating which of the words complained of the defendants allege to be statements of fact and (2) particulars of the facts and matters on which the defendants rely in support of the allegation that the words are true. While I agree with Dr. Manderson-Jones that the rolled-up plea is defective and cannot be relied on because only the first set of particulars have been furnished, I disagree that the general plea is defective for want of particulars. "Where a general plea of fair comment is raised the defendant must give particulars of the basic facts on which he relies in support of his plea but he is not required to give particulars stating which of the words complained of are statements of fact and which are expressions of comment for [Section 185A of the Judicature (Civil Procedure Code) Act] applies only to the "rolled-up plea", i.e. to a plea appearing to roll-up justification and fair comment together, and does not apply to a general plea of fair comment": see headnote in **Lord v. Sunday Telegraph Ltd.** [1970] 3 All E.R. 504

(C.A.) which correctly states the principle of the decision in that case. In the present case the particulars given under paragraph 5 of the defences satisfy, in my opinion, the requirement that the defendants must give particulars of the basic facts on which they rely in support of their general plea of fair comment. The particulars are as follows:

> "PARTICULARS PURSUANT TO SECTION 185A
> OF THE JUDICATURE (CIVIL) PROCEDURE CODE) LAW

The following words are Statements of facts:-

(a) On the 24th May, 1985 we sent to your Company completed Claim Form and other documents relating to the above.

b) Various additional documents, including the Fire Brigade Report were forwarded to your company on different Dates up to the beginning of June, 1985;

c) Your office had appointed Thomas Howell Kiewit, Adjusters to investigate the loss on your behalf;

d) Towards the end of May Mr. Ziadie received the Adjusters Preliminary Report.

e) He mentioned (verbally) to me that he would probably Deny the Insured's claim for stocks since these were

baled paper items stored in the "Open" at 34 Second Street, Newport West and not "30" as stated in the Policy.

f) Mr. Ziadie subsequently confirmed this in his letter dated 30th May, 1985.

g) ...he stated this was an "initial reaction" and that you were "proceeding with the other items such as Buildings, Plant and Machinery and Stocks contained in the buildings."

h) Your Adjusters proceeded on the basis of the above instructions and almost ten (10) days ago the Insured provided us with copies of various invoices in respect of the Buildings, etc.

i) At that time, the writer contacted Mr. Silvera of Thomas Howell who advised that the details had not been received but he would give them urgent attention on arrival.

j) On Friday before last, the writer again contacted Mr. Silvera and informed him that it might be a while before

repair/reinstatement was finalised and an Interim Report was, therefore required.

k) The Insured had already expended monies to have certain work completed.

l) The Insured had been forced to seek Bank funding at high interest rates.

m) N.C.B have a Mortgage interest in the Property.

n) ...possible lack of cover on stocks.

o) Debris Removal costs were still to be incurred and a portion of these would be affected by (c) above.

p) ...Mr. Silvera was asked to check the sums claimed by the Insured for Buildings/Plant, etc. Damage and make urgent recommendation to your Company that a portion of these losses be paid on account.

q) This was subsequently done.

r) ...Your Adjuster's Interim Report recommending a payment of $35,000 was delivered to your offices early on Thursday afternoon last.

s) Mr. Ziadie advised that he would be leaving the office until Tuesday next but that he had informed you of the

position and the writer would be able to negotiate cheque drawal with you.

t) In ringing your office the following morning, the writer was informed by your claims department (Miss West_ that the Adjuster's Report had not been received.

u) After confirming delivery with the Adjuster, the writer again contacted Miss West who then transferred me to you on your arrival at that time (approx. 10.30 a.m.).

v) You confirmed that the Report was in your possession but was incomplete as it contained no details of loss.

w) A promise was given by you that the File with Preliminary Report would be examined and if satisfactory, you would arrange the issue and signature of a cheque.

x) You then rang back the writer at 11.00 a.m. and advised that you believed the loss was not due to a discarded cigarette.

y) The writer whilst agreeing with your views as to the cause of Fire namely arson, pointed out that this did not affect the Insured' settlement rights unless you could

establish complicity or fraudulent actions on the insured's part.

z) Having agreed this contention, you then proceeded to relay a story concerning a letter of enquiry written to "someone" – not in this country – whose name was obtained from somebody else only contactable by a telephone number – purportedly provided by Mr. Ziadie and that the reply to this letter written five weeks earlier "might" enable you to deny the entire claim.

aa) ...you could provide no details...

bb) You gave no reason why this letter had not been "chased up" nor the reason why Mr. Ziadie had not mentioned this aspect in our discussions.

cc) ...you went on to advise that the Adjusters were not even aware of this aspect, a fact you saw only as indicative of the generally poor level of Adjusting in Jamaica.

dd) You concluded by promising to seek a verbal response to the letter but that this would certainly delay settlement for what, by your remarks, may be an indefinite period.

ee) The writer's response ... was that you had provided nothing worthwhile for him to discuss with the Insured and ... you would relay the position to Mr. Pottinger directly.

ff) ... giving the Insured a ... excuse that you had not received an Adjuster's Report sufficient to enable settlement of the loss.

gg) Not only is this a lie ...

hh) ... the writers ... recourse has been to advise the Insured of all that has transpired (as summarised in this letter) and suggest that he bring the matter to the attention of the Insurance Superintendent ...

ii) ... the expressed urgency relayed to both your Adjusters and your own Deputy Manager 10 + days ago ... no attempt made (at that time) to seek a response to the letter you have referred to.

jj) ... the existence of this enquiry not mentioned to either your Adjuster or ourselves until Friday last (by you) when we were seeking a cheque.

kk) ... a copy of this letter has been addressed to your Chairman.

ll) ... you were again absent from the office when I visited at 3.45 p.m. on Friday and ... message relayed to me was that you had been unable to contact the party (ies) ..."

Nevertheless, Dr. Manderson-Jones submitted correctly, in my view, that there are defamatory facts in the words complained of which are not covered by the particulars and that unless they were published on a privileged occasion without malice, the defendants are liable for them as they are not covered by the general plea. He lists them as follows:

1. That there was a lack of claims service;
2. That by lack of a claims service the plaintiff again brought justification to the frequent criticism levelled against the industry regarding the non-payment of claims;
3. Whenever claims reach the plaintiff's desk they are immediately treated with suspicion, subjected to time wasting examination and delay – often over the most inconsequential and irrelevant issues imaginable;

4. That the plaintiff has the most deserved reputation of being one of the slowest among insurers for claims settlement;
5. That the insurers did not enjoy a greater share of the market due to the inefficiencies and delays (particularly in claims settlement) so often created or aggravated (seemingly) by the plaintiff, the General Manager;
6. "Even if this [relaying the position to Mr. Pottinger directly] you could not do with complete honesty giving the lame excuse that you had not received an Adjuster's Report sufficient to enable settlement of the loss".

The defamatory sting in those unparticularised facts is the allegation of shoddy and unprofessional conduct of the plaintiff including deliberate and unnecessary delay in settlement of claims. That allegation is clearly comment and even if the matters listed from (1) to (6) above are also comment, there are, in my judgment, no facts on which the comments could be based that have been proven or admitted to be true.

The unchallenged evidence before me is that although the defendants filed a claim on 24th May, 1985, it was not until 27th June, 1985 that the insured provided the defendants with any invoices. And these were not

received by the loss adjusters until later. There is no evidence that the contract of insurance provided for interim payment. And the defendants did not request an interim payment until 28th June, 1985. The interim payment was in fact made immediately on receipt of the loss adjuster's letter of clarification on 10th July, 1985. There clearly was no delay.

This is, of course, not to say that the matter on which the defendants were commenting was not a matter of public interest. I accept Mr. Delisser's submission that the defendants have discharged the onus of proving that the matter commented on was of public interest ,namely, the alleged conduct of the plaintiff as an officer of an insurance company registered under the Insurance Act, in dealing with insurance claims submitted to him by a policy holder of the said insurance company. Nevertheless, the defamatory imputation in a matter, albeit of public interest, was, in my opinion, unwarranted by the facts in the sense that a fair minded man could not upon those facts **bona fide** or honestly hold the belief or draw the inference that the plaintiff's actions were shoddy and unprofessional and involved the deliberate and unnecessary delay in the settlement of claims: see **Peter Walker Ltd. v. Hodgson** [1909] 1 K.B. 239 at 253 per Buckley L.J.

So, for the reasons already given the defence of fair comment fails. The defendants are, accordingly, liable for publishing the words complained of, unless they were published to each of the four persons aforesaid on a privileged occasion and without malice.

I therefore now come to the defence of qualified privilege .

Dr. Manderson-Jones submitted that that none of the occasions on which the words were published was one of qualified privilege. He based his submission on the ground that the defendants were under no legal, moral, social or other duty to publish the letter to the persons to whom it was copied and they had no reciprocal or corresponding duty or interest in receiving the publication.

That was, however, not the ground pleaded by the defendants and on which Mr. Delisser based his rival submission. The ground of privilege claimed by the defendants was that they had an interest in publishing the subject matter of the letter to each of the four persons to whom the letter was copied and that, as set out below, each of those persons had a common and corresponding interest in receiving it:

1. Since the Superintendent of Insurance (Mrs. Taylor) was the regulatory body under the Insurance Act the defendants say that she and they had a common and

corresponding interest in the subject matter of the letter, namely, the conduct of the plaintiff as general manager of an insurance company registered under the Insurance Act to carry on insurance business in his dealings with insurance claims submitted to him by the clients of the said insurance company.

2. The Chairman of the insurers and the defendants (in their capacity as brokers who had effected a policy of insurance with the insurers) had a common and corresponding interest in the subject matter of the letter which was published to the Chairman on the basis that he would take some action to expedite the settlement of the claim and would take steps in protection of the business of the insurers to remedy delays in settlement of claims created by the insurers
3. J.A. Pottinger of J. Pottinger Limited, who was the policy Holder with the insurers, also had a common and corresponding interest in being informed of the progress being made in the settlement of the claim and the reasons

why the first defendant was unable to affect a more expeditious settlement of the claim.

4. J. Silvera, the representative of Thomas Howell Keiwit (Jamaica) Ltd., the insurance adjusters who had been appointed by the plaintiff to investigate the loss on behalf of the insurers, also had with the defendants a common and corresponding interest in being informed of the progress being made in the settlement of the claim and of learning of the views expressed by the plaintiff as to the low level of loss adjusting in Jamaica.

I find that in each case there was a reciprocity of interest in the terms alleged, that is to say, I find that the particular interest, as stated, existed in the respective persons to whom the publication was made as well as in the defendants. So, the important issue that remains on the pleadings and the evidence is whether the plea of qualified privilege in each instance has been rebutted by the plaintiff by proof of express malice on the part of the defendants.

The issue of express or actual malice

As has been correctly stated, a plaintiff will succeed in proving the existence of express malice if he can show that the defendant was not using the

occasion honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected with the privilege, i.e. that the publication was actuated by actual spite or ill will: see **Gatley on Libel and Slander, Seventh Edition**, para. 762.

The plaintiff in his reply particularizes his allegations of actual malice as follows: (particulars 1 to 14):

1. The First and Second Defendants as brokers of the insured Mr. J.A. Pottinger, at all material times fully well knew that the insured's policy with the Plaintiff was voidable for non-disclosure of material facts to wit:
   (a) that the paper products insured were being stored outside the buildings;
   (b) that the process being carried on by the insured was merely the sorting and bailing of waste cardboard and paper prior to export, which did not in any way constitute "manufacturing and packaging of recycled cartons" as stated in the proposal form.
2. The Defendants were professionally negligent in allowing

the non-disclosure of material facts to have occured or in failing to discover that there was such non-disclosure and to properly advise the Plaintiff's office as the insurers.

3. The Defendants also well knew that arson was a suspected cause of the fire at the insured's premises and that this was being investigated.
4. The Defendants were anxious to prevent any thorough investigation of the claim by the Plaintiff as General Manager of the insurers lest the result might be a denial of liability by the insurers on the ground of non-disclosure of material fact.
5. The Defendants knew that the Plaintiff's office would not have provided the insurance at the very low rates given had they known the true facts which the Defendants and the insured had failed to disclose.
6. The defendants knew that a previous fire claim by them had been partially turned down by the Plaintiff's office because it was in respect of smuggled goods. The Defendants were upset with the Plaintiff on account of his refusal to accede to their request to condone the illegality and pay the claim in

full, on the ground that this type of illegality was common in Jamaica.

7. The Defendants therefore sought to apply pressure for an interim settlement and requested approval of Mr. Ziadie for one, even though to their knowledge he had no authority to agree to any payment and the matter was being handled by the Plaintiff.

8. The Defendants sought to pressure the Plaintiff into ceasing the investigations and making an interim settlement of the claim by publishing as they did the letter and the words set forth in paragraph 3 of the Statement of Claim, hoping thereby to undermine and bypass the Plaintiff as General Manager in order to achieve their objective.

9. The Defendants wished to damage the reputation of the Plaintiff with the Superintendent of Insurance and his company.

10. The Defendants fully knew that the time involved in handling the claim had not been long or delayed.

11. The Defendants knew that insurers are under no obligation to make interim payments.

12. The widespread publication.

13. The Defendants did not honestly believe the words published by them of the Plaintiff.

14. The language and accusations in the published words were untrue and excessive.

There clearly is evidence of express malice and I find that on the documentary evidence as well as on the **viva voce** evidence **particulars** 1, 3 to 11, 13 and 14 have been proved.

Dr. Anderson-Jones correctly, in my view, pointed to several matters as evidence of malice as follows:

1. Knowledge by the defendants that their letter of 8th July, 1985 was unjust.

It is to be observed that in this connection "[a]ny facts which go to show that the defendants published the comment in the knowledge or belief that it was unjust, or in reckless indifference as to whether it was just or not, will be evidence of dishonesty or malice": **Headley v. Barlow** (1865} F & F 230. The evidence of the second defendant shows that the urgency for the interim payment had arisen because he had advised the insured to carry out repairs before an adjuster's report was prepared and before any authorization was given by the insurers. The defendants failed to disclose those circumstances in their letter of 8th July

copied to the Superintendent of Insurance and others. They also failed to disclose (again as the second defendant's evidence shows) in that letter that the plaintiff had told the second defendant on the telephone at 11.00 a.m. on 5th July, 1985 that:

(a) He, the plaintiff, required certain clarification of the Adjuster's report before he could draw a cheque; and

(b) Had spoken to the adjusters to have them send a Supplemental report;

and,

(c) Felt that this would delay the issue of payment at least until Monday 8th July, the very day on which the defendants wrote their letter.

I find that instead, the defendants preferred to portray in their letter of 5th July, a situation of indefinite delay "and non payment of claims". The defendants were clearly being selective in reporting only a part of what the second defendant admitted in evidence that the plaintiff had told him. Rather incongruously, the second defendant said in evidence that the second reason for writing the letter of 8th July, was "to provide a resume' of the relevant facts and the status of the claim". I also find that the defendants knew that the plaintiff had not caused any delay as he had entered the matter

only two working days before the defendants' letter of 8th July, 1985. I further find that the defendants knew that the insured was not blaming the plaintiff or the insurers but was blaming the defendants.

2. Inclusion of irrelevant material as evidence of malice.

In this regard I find the following dicta instructive:

(a) "... If the defamatory material is quite unconnected with and irrelevant to the main statement which is ex hypothesi privileged, then I think it is more accurate to say that the privilege does not extend thereto than to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory statement is, so to speak, part and parcel of the privileged statement and relevant to the discussion, then I think the first way is the true way to put it, and under it will also range all the cases where the express malice is arguable from the too great severity or redundancy of the expressions used in the privileged document itself": **Adam v. Ward** [1917] A.C. 309 at 326 to 327, per Lord Dunedin (H of L).

(b) "As Lord Dunedin pointed out in **Adam v. Ward [supra]** the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is to treat it as one of the factors to be taken into consideration in deciding whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances it can be inferred that the defendant either did not believe it to be true or though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or some other improper motive. Here, too, judges and juries should be slow to draw this inference":

> **Horrocks v Lowe** (1975) A.C. 135 at 151 F to H, per Lord Diplock (H of L).

Here, despite Lord Diplock's admonition, I accept Dr. Manderson-Jones' submission that the following statements on page 4 of the letter of July 8th 1985 constitute irrelevant defamatory matter which the defendants did not honestly believe to be true, but nevertheless seized the opportunity to drag in to vent his personal spite and frustration:

(a) "Why is it (from the writer's personal experience in dealing with you) that whenever claims reach your desk they are immediately treated with suspicion, subjected to time wasting examination and delay --- often over the most inconsequential and irrelevant issues imaginable?

(b) Why does your Company (or you) have the most deserved reputation

of being one of the slowest amongst insurers for claims settlement?

(c) [The plaintiff] again brought justification to the frequent criticisms leveled against the industry regarding non-payment of claims.

(d) General Accident Insurance Co., Jamaica Ltd., did not enjoy an even greater share of the market due to the

> inefficiencies and delays (particularly in claims settlements) so often created or aggravated (seemingly) by [the plaintiff], the General Manager".

None of these allegations is borne out by the second defendant's evidence. Dr. Manderson-Jones is correct: the second defendant referred to only three dealings with the plaintiff other than the claim by the insured, Pottinger. One was subsequently paid with deduction to reflect unpaid duty, the second was on the defendant's own evidence settled promptly and as to the third, he had no recollection of the insured company or the claim. As far as the Pottinger claim is concerned he admits that he understood the plaintiff's concerns about the Dominican Republic connection "because if proved this would affect the value of Mr. Pottinger's stock and provide a motive for arson". He agrees that the cause of the fire in the Pottinger claim was arson and there were smuggled goods and forgery in two of the other three cases. As counsel for the plaintiff observed, the second defendant made no suggestion that arson, smuggling and forgery were among "the most inconsequential and irrelevant issues imaginable" in settling insurance claims.

3. Lack of honest belief in truth of the allegations, also as evidence of malice

I find that the defendants did not honestly believe that it was a lie that

the plaintiff had not received an adjuster's report sufficient to enable settlement of the loss. The adjuster's report was a recommendation for an interim payment only, not for settlement of the loss. The defendants knew this, as it was the second defendant who requested it from the adjusters. Again, the documentary evidence shows that the second defendant had been informed by the plaintiff that the adjusters' interim report, received by the plaintiff late on the afternoon of 4th July, 1985, was incomplete as it contained no details of loss. What is more, the second defendant admits that he inserted the accusation in his letter that the plaintiff was lying and felt justified in doing so because he felt that what the plaintiff had told the insured was a poor reflection both on himself and on the adjusters. That evidence comes out in examination in chief:

> Q. "Why did you write the letter dated 8th July, 1985
>
> (Exhibition 1)
>
> A. First and foremost, I was extremely upset to receive a telephone call from the isured who had been rung by Mr. Sykes simply saying that the adjuster's report was inadequate. I felt that what the client was telling me was a poor reflection both on myself and on the adjusters and, indeed, it justified to me at the time of

my statement alleging that Mr. Sykes had lied."

I agree that on his own evidence it is perfectly clear, therefore, that the second defendant had been told by the plaintiff that the adjusters' interim report was inadequate or insufficient as a basis for payment without clarification and that the second defendant did not believe that to be a lie. This is, in my judgment, conclusive evidence of malice. Nor, in my judgment, did the defendants honestly believe that the actions of the plaintiff were "shoddy and unprofessional". The second defendant knew that before the plaintiff became involved in the claim, the insured's claim for stocks had already been denied by Mr. Ziadie based on non-disclosure of a material fact. And the defendant have offered no evidence to support any honest belief that that the natural and ordinary meaning of the words, "shoddy and unprofessional" applied to the plaintiff. As Dr. Manderson-Jones submitted, the second defendant merely sought to state his belief in his specially ascribed meaning, that is, of an insurance agent who sought legitimate ways to avoid payment of claims. The evidence clearly shows that he did not believe the plaintiff in the handling of the claim to be shoddy and unprofessional in the natural and ordinary meaning of those words.

Finally, I find that the defendants did not believe that the plaintiff was guilty of delay in settlement of the claim. In this connection here are some

incontrovertible facts. An interim payment was requested for the first time on Friday 28th June, 1985. The request was made by the second defendant to the loss adjusters appointed by the insurers and not to the insurers or the plaintiff. Observe, too, that it was not made in writing. It was made after the second defendant had given a mis-description of the risk and the location in the proposal. This amounted to a non-disclosure of a material fact and so involved the denial of liability for stock The second defendant had been severely taken to task by his client, the insured, for the mis-description as well as for advising him to undertake the repairs and promising payment by noon on Friday 5th July and because nothing had been done substantially by the second defendant. Add to that the fact that the insured informed the second defendant that he would be reporting him to the Superintendent of Insurance and he in fact did so by copying to that officer his letter to the second defendant dated 8th July, 1985, the very day on which the second defendant wrote the letter containing the defamatory words. The adjusters' report had arrived Thursday afternoon 4th July, 1985 just over one working day before the defendants' letter of 8th July, 1985. The report was incomplete or insufficient and required clarification before payment could be made. The interim payment was in fact made on the very same day (10th

July, 1985) that the loss adjusters furnished the remainder of the information to satisfactorily complete their interim report.

I find that there had been no delay in making the interim payment. As the defendants knew the adjusters' interim report was incomplete as it contained no details of loss, they must have also known that it was not sufficient to enable the loss to be settled on receipt of the report on 4th July, 1985. When the defendants wrote their letter of 8th July, 1985 it is plain that they did not honestly believe that the plaintiff was guilty of any delay in the settlement of the claim or, indeed, of shoddy and unprofessional work.

So, as the defamatory statements published on the four privileged occasions were, in my judgment, actuated by actual malice, the defence of qualified privilege must fail. As I have already held that the defence of fair comment can be of no avail, there will be judgment for the plaintiff against both defendants.

Damages

I am mindful that damages must not amount to a windfall, but must be compensatory. At the time the libel was published the plaintiff had been for many years an insurance executive and general manager of an insurance company. He was libeled personally and in the way of his office as general manager of General Accident Insurance Company Limited and as an

executive in the insurance industry. The defamatory sting of the libel is the allegation of shoddy and unprofessional conduct and unnecessary delay in the settlement of claims. After the publication of the libel on 8th July, 1985 he continued to work as general manager of General Accident Insurance Company Ltd., until about the middle of 1986 when his employment with that company terminated as a result of a disagreement with the chairman of that company. He is the proprietor of a guest house in Negril but no longer works in the insurance industry.

In awarding general damages I take into account the gravity of the libel, the scope of the publication and the position and office of the persons to whom the libel was published. One of those persons was then the plaintiff's employer and another was the Superintendent of Insurance invested by statute with supervisory powers over the insurance industry and who might have been called upon to judge the plaintiff's professional competence. On the other hand, almost six years had elapsed before the plaintiff commenced his action. No satisfactory explanation has been given by or on behalf of the plaintiff for the delay in filing suit. That, I must also take into account.

I now turn to the question as to whether the second defendant's letter dated 23rd August, 1985 constitutes an apology as to mitigate the damages and if it does not, whether it aggravates them. The letter is in these terms:

> "Dear David
>
> Re: Fire Claim 19th May, 1985
> Joscelyn Pottinger
>
> We have, I believe, now reached an acceptable settlement of the above claim for which, many thanks.
>
> Following various conversation with you on this matter, I now realise that the situation described in my letter dated 8th July, 1985 was not totally accurate as far as you were concerned, though the writer was unaware of all the background at that time.
>
> In consequence, I trust you will accept this letter as both an unqualified retraction of the comments made and a sincere apology to both yourself and your company for any offence or inconvenience my letter may have caused.
>
> I am sure you will appreciate that in writing the subject letter – in haste, due to the circumstances prevailing at that time – no maliciousness or spite was intended, my only motivation being the frustration of achieving an acceptable settlement for my client.
>
> In the circumstances, I hope this letter – equally copied to those parties who received a copy of the original letter – will conclude matters to all parties satisfaction.

Yours sincerely,
GUARDIAN INSURANCE BROKERS LIMITED

Sgd. Brian M. Self
Technical Director "

Mr.Delisser submitted that the letter taken in its entirety is an unqualified retraction and apology to the plaintiff.

Dr. Manderson-Jones submitted that the letter does not constitute an apology but aggravates the libel because:

(a) It states "...I now realise that the situation described in my letter dated 8th July was not totally accurate as far as you are concerned." That can only mean that the letter of 8th July, 1985 (Exhibit 1) was substantially accurate.

(b) The letter of 23rd August, 1085, does not indicate which parts of the letter of 8th July, 1985, are inaccurate, thereby leaving it open to readers to consider the most offensive and libellous parts completely accurate.

(c) While implying that the letter of 8th July, 1985, was substantially accurate (i.e. "not totally

accurate") the defendant is asking the plaintiff to accept his letter of 23rd August, 1985, as an "unqualified retraction" which manifestly it is not. In fact it has not in terms retracted anything whatsoever from the letter of 8th July, 1985.

(d) The letter of 23rd August, 1985, states that the letter of 8th July, 1985, was written "in haste... no maliciousness or spite was intended". Yet the letter of 8th July, 1985, states in no uncertain terms: "It should be patently clear by the length and detail of this letter that the writer believes that the actions of your company and yourself in particular, to be shoddy and unprofessional..."

(e) The letter of 23rd August, 1985, states that the second defendant's "only motivation" in writing his letter of 8th July, 1985, was the "frustration of achieving an acceptable settlement for my client". This is pouring salt in the plaintiff's wounds.

I accept Dr. Manderson-Jones' submissions on the issue. As has been correctly stated, while a full apology need not be an abject one; it does at least require a complete withdrawal of the imputation and an expression of regret for having made it: see **Winfield and Jolowicz on Tort** Ninth Edition, page 305. The letter does not, in my judgment, constitute an apology but, in the result, serves to aggravate the damages.

Taking all the relevant factors into account I award the sum of $600,000.00 as general damages 25% of which, namely $150,000.00 being the extent to which the damages have been aggravated. There will, therefore, be judgment for the plaintiff against both defendants in the sum of $600,000.00 with interest at 5% per annum from 8th May, 1991, to 3rd December, 1999.

The plaintiff must have his costs which are to be taxed if not agreed.