[2019] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 81/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**JAMAICA OBSERVER LIMITED**	**APPELLANT**
AND	**JOSEPH MATALON**	**RESPONDENT**

Vincent Chen and Miss Nicole Fullerton instructed by Chen Green & Co for the appellant

Gordon Robinson instructed by Mrs Winsome Marsh for the respondent

4, 5 and 6 May 2016 and 18 November 2019

MORRISON P

Introduction

[1] The appellant, Jamaica Observer Limited ('JOL'), is the publisher of one of the two leading daily newspapers in Jamaica[1]. JOL also publishes a periodic pull-out business magazine known as the Caribbean Business Report ('the CBR').

[1]The Daily Observer

[2] The respondent is a leading member of the Matalon family, a well-known Jamaican family of businesspersons. Just as the trial judge did, I will refer to the respondent as 'Joseph M' and to the family collectively as 'the Matalons'.

[3] Joseph M and his late father, the Honourable Mayer Matalon, OJ ('MM'), brought action against JOL in the court below to recover damages for allegedly libellous statements published of them in the CBR. But MM unfortunately died before the matter came on for trial and the matter proceeded with Joseph M as the sole claimant.

[4] In a judgment given on 14 August 2014, Sykes J (as he then was) ('the judge') found for Joseph M. As a result, the judge awarded Joseph M damages in the sum of $4,379,310.34, with costs to be taxed if not agreed.

[5] The allegedly libellous statements were contained in an article published by JOL in the CBR on 3 October 2008 entitled: '**The trouble with toxic bonds**: **How Mechala bond holders lost out**'[2] ('the article'). A photograph of Joseph M appeared prominently on the front page of the magazine and a second appeared in the body of the article itself. The author of the article was Mr Al Edwards, an employee of JOL and the then editor of the CBR.

[2] Emphasis as in the original

[6] Mechala Group Jamaica Limited Ltd ('Mechala')[3] is a holding company beneficially owned by the Matalons[4]. Mechala has limited assets of its own and conducts substantially all of its business through various subsidiaries, which are in turn all companies owned and operated by the Matalon family. Joseph M was employed to Mechala in various positions up until September 1997, when he left the company. He re-joined the company in late 1999 and became its chairman in 2000. Immediately prior to that, the president and chief executive officer of the company was Joseph M's cousin, Mr Joseph A Matalon ('Joseph A').

[7] The article purported to be an account of, firstly, the circumstances in which Mechala floated two United States dollar-denominated bonds ('the bonds') on the international bond market in late 1996 and early 1997 ('the bond issue'); and, secondly, the sequel to the bond issue, which saw the buy-back of the bonds by Mechala as issuer at a greater than 50% discount in 2000.

[8] Joseph M complained that the words of the article, by their natural and ordinary meaning and taken in their full context, suggested that, in relation to the bond issue and its sequel, he was, as the judge put it[5], "part and parcel of a plot to (a) take money from investors under false pretences; (b) lie to investors by misstating the true financial

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[3] Originally incorporated as Mechala Investments Limited in 1995, the company subsequently changed its name to Mechala Group Jamaica Limited with the approval of the Registrar of Companies – see Witness Statement of Mayer M Matalon dated 4 February 2014, para. 5

[4] The evidence was that the shares in the company were owned directly by a company called Mediterranean St Lucia Limited, the shares in which were directly owned by members of the Matalon family – see Joseph M's evidence under cross-examination on 6 March 2013, Core Bundle II(a), pages 123-124

[5] Judgment, para. [3]

position of the company raising the money; (c) use that money to capitalise the family companies; [and] (d) use the money for the personal benefit of the family".

[9] In its defence, JOL (i) admitted publication of the article; (ii) denied that the words complained of in the article could in their natural and ordinary meanings convey any imputations defamatory of Joseph M; and (iii) pleaded that the article was fair comment on a matter of public interest, and that it was published on an occasion of qualified privilege.

[10] The judge found that the article was indeed defamatory of Joseph M: by characterising the Mechala bonds as "toxic bonds", the article suggested that Joseph M, as chairman of the Mechala Group, had taken the lead on behalf of the Matalon family in issuing or causing to be issued bonds which were "toxic", or poisoned, and therefore inherently worthless. The defences of fair comment and qualified privilege were rejected by the judge. As regards fair comment, the defence failed primarily because of the judge's finding that the article not only contained significant inaccuracies, but also omitted "material facts concerning the bonds [which] would have changed the tenor of the article had those facts been referred to"[6]. And as regards qualified privilege, the defence failed because of the judge's finding that, in writing and publishing the article, JOL had fallen short of the standards of responsible journalism.

[6] Judgment, para. [82]

[11] JOL has appealed against the judgment[7]. It contends that the judge erred in attributing meanings to the words used in the article, particularly the phrase "toxic bonds", which were "plainly and simply wrong"[8]. JOL also contends that the judge erred in rejecting the defences of fair comment and qualified privilege.

[12] For his part, Joseph M has filed a counter-notice of appeal[9]. He contends that the judge's award failed to take into account the grave effects of the libel, and that the judge erred in not including an award for aggravated and/or exemplary damages in the amount awarded to him for damages.

[13] In this judgment, I will (i) set out the article in its entirety; (ii) summarise the background to its publication; (iii) summarise Joseph M's complaints about the article and JOL's defence to the action; (iv) summarise the judge's judgment; (v) summarise JOL's and Joseph M's complaints against the judgment; (vi) discuss the issues arising on the appeal and the cross-appeal; and (vii) state my conclusions.

[14] For the reasons which follow, my conclusions are that (i) the appeal should be dismissed and the judge's decision on liability affirmed; (ii) the cross-appeal should be allowed and the judge's award of $4,379,310.34 for general damages set aside; and (iii) an award of general damages of $10,200,000.00 should be made in its stead.

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[7] Notice and Grounds of Appeal dated and filed 23 September 2014
[8] Appellant's Submissions and Authorities filed 17 February 2016, para. 25
[9] Counter-Notice of Appeal dated 30 September and filed on 1 October 2014

The article

[15] As I have noted, the article appeared in the issue of the CBR published on 3 October 2008. The front page of the magazine foreshadowed what was to come on the inside with the headline, '**THE MATALONS – A story of family bonds**'. The full text of the article was as follows:

> "**THE TROUBLE WITH TOXIC BONDS**
>
> **How Mechala bond holders lost out**
>
> The crisis of the United States financial system meltdown has drawn comparisons with the Jamaican landscape of the 90s and more particularly the failings of some of its leading indigenous financial institutions. A look back at the Mechala bond offering by the Matalons is both apt and instructive at this time.
>
> **Fictitious capital**
>
> The reason many of Wall Street's leading institutions are experiencing difficulties is because of a liquidity problem transmuting into an insolvency problem. Why? Because many of them are going broke, thus leading to a banking crisis.
>
> There are those who surmise the crisis is not as a result of insufficient money flows making their way throughout the financial system. Many of the citadels of Wall Street – Bear Stearns, Lehman Brothers, Wachovia – held billions in depreciated mortgage backed securities that nobody wanted to buy whether they were called Collateralised Debt Obligations (CDOs) or Asset Backed Commercial Paper. What is happening is that these instruments are now worth far less than their original price and as a result, these toxic instruments are written down; those who invested in them have to settle for far less and as a consequence end up having to bite the bullet. The premise of these so-called assets is that you are buying not into actual wealth, but future wealth that is not yet generated.

By the mid-nineties the Matalon family had a huge debt obligation, which threatened the viability of the family run business empire which at one time had 32 subsidiaries which stretched from banking, construction, dairy operations, pharmaceuticals sales and a host of other businesses. In 1995, the Mechala Group was incorporated as the operating holding company for all the Matalon subsidiaries.

The Matalon family took the decision to rationalise its operations and change its management structure with Joseph A Matalon (Big Joe) making way for Joseph M Matalon (Little Joe) as president and CEO of the family empire.

The new vehicle for the Matalon family business interests would be called Industrial Commercial Developments (ICD) with the Matalons offloading many of its interests and focusing on core activities. 'We will now focus primarily on seeking investment opportunities for further growth and development of the ICD group while still providing broad-based policy direction and legal services for the subsidiaries', said Joseph M Matalon back in 2000.

What is very clear is that the Matalon group of companies, which was established way back in 1962, had by the mid-nineties become desperately short of capital and had to reconfigure its balance sheet. It would have to acknowledge that it was no longer the corporate force it once was, and find a way of increasing its equity stake in companies that once were synonymous with corporate Jamaica run by the first family of Jamaica.

Turning to the International Capital Market

With a debt of almost US$70 million in a high interest rate regime, the Matalons turned to the international capital market in an effort to rescue a business dynasty. The bonds were predicated on the reputation of the Matalon family, and its position in corporate Jamaica. As the US firm Donaldson, Lufkin & Jenrette Securities who later served as the Matalons' financial advisor put it: 'Mechala is one of the largest companies in Jamaica. It is a diversified business enterprise engaged in three principal lines of business: development and construction; manufacturing and trading; and financial services.

'Mechala and its subsidiaries are together Jamaica's largest developer of housing and related social and commercial infrastructure; a major distributor of foods, hardware, pharmaceutical, personal care and other consumer products; and a major provider of insurance investment management and other financial products and services.'

This is how investors would be hooked, and it would be a sovereign bond that would put Jamaica on the map with other companies expected to follow in the footsteps of the Matalons.

The Matalons raised US$100 million which allowed them to address their debt and clean up the balance sheet, but the bond offering was an abject failure. The Matalon companies failed to perform and the trading of the bonds became illiquid. It sullied the reputation of Jamaica on the international capital market and other leading Jamaican players could no longer go this route. The Matalons saw their credit rating downgraded and the value of the bonds depreciated fast. Those who bought into the bonds were badly burnt with the Matalons unable to pay out what they should have.

Bear in mind that a bond is a debt security in which the authorised issuer owes the holders a debt and is obliged to repay the principal and interest (the coupon) at a later date, termed maturity. The Matalons in effect used other people's money to capitalise their businesses, eradicate debt and because of the poor performances of their companies were unable to make good. It was an embarrassment of humungous proportions.

Matalon bondholders got burnt

A bondholder who was traumatised by the experience said: 'Looking back, there are a number of us that felt disgruntled and unhappy with the bond issue. One of the problems with that bond offering was that the Matalon group of companies are [sic] private, not listed, so no one really knew what was going on. We had to take their word for it and the picture they painted was rosier than really was the case.'

Merrill Lynch was the lead institution of the Matalon bonds, which was [sic] subscribed by mainly overseas investors. It touted US$75 million in senior notes, which were set to

mature at the end of 1999 and another US$25 million in senior notes due to mature in December 2002.

Many Jamaicans were not inordinately impressed with the Matalon bonds and so the family went on a road show to sell them in the Eastern Caribbean.

With the bonds proving to be a damp squib and investors losing out big time, the Matalons, with US$100 million in their pockets, paid bondholders a paltry 47 cents on the dollar to buy back the bonds.

The Bank of Nova Scotia, Jamaica's leading commercial bank, where Mayer Matalon played an integral role, rode to the family's rescue. In July 1999, the Mechala Group announced that it had obtained a preliminary commitment from the Bank of Nova Scotia group for US$20 million of the US$35 million required to complete the purchase of the two tranches of its senior notes, which were the subject of its tender offer. Coupled with the commitment of US$10 million from an investor group led by Joseph M Matalon, Mechala had available funding for US$30 million of the US$35 million necessary to fund the purchase under the tender offer if all of the senior notes were tendered.

At the time Joseph M Matalon said: 'Our family has decided to use US$5 million of the funds which it would have received under the tender offer to maintain total amount available under the tender offer at US$35 million, as contemplated by the tender offer at the time it was commenced. Under the circumstances, Matalon family members note holders believe that we should take this step in order to maintain the price level in the tender offer.'

The Mechala Tender Offer was to purchase all of Mechala's US$75 million 12¾% senior notes due 1999 at US$351.57 per US$1,000 principal amount (including all accrued and unpaid interest through the expiration date) and all of its outstanding US$25 million 12% Senior Notes due 2002 at US$345.28 per US$1,000 principal amount, subject to the terms and conditions set forth in the Offer to Purchase dated June 24, 1999.

By this time Donaldson, Lufkin & Jenrette were brought on to act as financial advisor to Mechala in connection with the Offer and Consent Solicitation, and related matters.

In short, Matalon bondholders were paid a reduced sum in lieu of their investment in bonds valued at US$100 million. Feeling aggrieved and hard done by the Matalons, three US mutual funds, Federated Strategic Income Fund, Federated International High Income Fund and Strategic Income Fund who had invested US$5 million in the Matalon bonds sued to recover more money and sought to obtain 70 cents on the dollar from the subsidiaries of the Mechala Group.

Rocked by heavy losses and indebtedness, the Mechala Group decided to offload its holdings in Facey Commodity Merchandise, excluding the assets and business of the pharmaceutical and hardware divisions, selling it to the Desmond Blades-controlled Musson Jamaica Ltd. The Matalons would later sell Shoppers Fair Supermarkets to Progressive Grocers and its life insurance portfolio to the Guardian group.

Matalons restructure again

Come 2005, the Matalons underwent yet another restructuring exercise. Now called Industrial Commercial Developments Limited, and after selling its merchant bank Manufacturers Sigma to Pan Caribbean Financial Services, the once mighty business empire that comprised 32 subsidiaries was reduced to its construction arm WIHCON, WIHCON Properties; its general insurance firm BCIC, and its insurance brokerage IIB/CGM.

Peter Melhado was appointed president and COO of ICD with Joseph M Matalon serving in the role as both Chairman and CEO.

The running of these four Matalon entities was outsourced to Hyperion Capital Limited, headquartered on downtown Kingston's Harbour Street. The idea was for Hyperion – run by the Matalons – to seek investment opportunities for the growth and development of ICD.

Back in July 1999, the late eminent columnist Morris Cargill, commenting on the changing fortunes of the once mighty

> Matalon family, wrote: 'On the subject of misfortunes I see that Mechala is teetering on the edge of collapse. This really worries me even more than the usual spate of business failures. I have always regarded the Matalons as exceptionally able and exceptionally rich. If they are now in trouble then all of us are. However, I am intrigued by the latest proposal of Mechala.
>
> 'It sold bonds in its businesses to various people. As the profitability of Mechala declined the value of those bonds also declined, and it seems they are worth on the market about one-third of what they were worth before. In consequence, Mechala is proposing to buy back these bonds at about one-third of the price at which they were originally sold.
>
> 'This will neatly cancel two-thirds of their original debt. This is a smart piece of financing, entirely legal and entirely within the rules of the games which people like that play.
>
> 'I have never played according to those rules. The consequences have been, not unexpectedly, that I am relatively poor, nevertheless I thank the Lord Buddha that I have been spared these activities. I sleep well at night and do not have to indulge in situations which made me want to go outside and throw up.'"

Joseph M and MM immediately protest about the contents of the article

[16] Through his attorney-at-law, Mrs Winsome Marsh, the publication of the article elicited virtually immediate protest from Joseph M. In her letter dated 7 November 2008 to JOL, Mrs Marsh described the article as defamatory of Joseph M; rehearsed the history of the bond issue in some detail; pointed out that the facts were "easily available to your reporter had he wanted to know the truth"; and asserted that the reporter had instead "rushed to print with a series of falsehoods, innuendoes and modifications of the historical sequence in order to paint [Joseph M] and other members of his family as pirates". The

letter ended with an invitation to JOL to publish an apology and retraction and to enter into negotiations, "with a view to settling the claim for damages against you".

[17] In a further letter to JOL dated 4 December 2008, Mrs Marsh contended that MM had also been libelled by the article and gave notice of a claim on his behalf as well.

[18] Inconclusive correspondence between Mrs Marsh and JOL's attorney-at-law then ended in a letter from the latter dated 19 December 2008 rejecting the claim. However, "in the interest of free speech", JOL offered[10] to "make the pages of [JOL] available for [Joseph M and MM] to publish [their] perspective on the issues raised in your letter". This offer was not accepted and Joseph M and MM proceeded to file action against JOL.

The pleadings

[19] In their particulars of claim filed on 12 January 2009[11], Joseph M and MM ascribed the following as the natural and ordinary meanings of the words of the article:

> "10. The words in their natural and ordinary meaning taken in the context of the entire article including the headlines meant and were understood to mean that: -
>
> (a) there was a disagreement between the elder and younger Matalons regarding the way forward including the plan to raise funds on the international capital market;
>
> (b) the disagreement was resolved by a coup resulting in [Joseph M] taking over control of the Group from [Joseph A] and thereafter [Joseph M] led the decision making process resulting in the bond issue of 1996;

[10] Letter dated 19 December 2008, JOL to Mrs Marsh
[11] At para. 10

(c) the bond issue was an insincere and disingenuous plot by [Joseph M and MM] or, alternatively, [Joseph M] to obtain money from investors under false pretences and to use that money: -

(i) to increase the value of [Joseph M's] own shares and those of his family members;

(ii) for [Joseph M and MM's] or alternatively [Joseph M's] personal benefit; and

(iii) for the personal benefit of other members of the Matalon family.

(d) As a part of this plot, the bonds were issued to unsuspecting Jamaican individuals through a private, unlisted group of companies based on an unregulated prospectus in which [Joseph M and MM] were able to say whatever they liked and did in fact seek to mislead the public by describing the bond offer in more favourable terms than were actually and factually the case;

(e) [Joseph M and MM] lied to prospective bondholders and to the public at large, especially to Jamaican investors, in order to encourage them to invest in the bond issue;

(f) When the lies, misrepresentations and other schemes did not attract Jamaican investors, [Joseph M and MM] repeated the strategy in the Eastern Caribbean in a further insincere attempt to get individuals to take up the bond offer;

(g) The actions of [Joseph M and MM] in hatching and implementing this said plot had the direct result and consequences of traumatizing bond holders;

(h) the plot was successful; that [Joseph M and MM] and their family members were able to put US$100 million in their pockets; to capitalise their businesses, eradicate debt and to successfully use other people's money for these illicit purposes as a result of which those other people were badly burnt by losing their money to the benefit of

[Joseph M and MM] and their family members as was pre-planned by [Joseph M and MM];

(i) [MM] abused his position and power as a Director of the Bank of Nova Scotia to seek a benefit for his family to which they would not otherwise have been entitled."

[20] Further, Joseph M and MM averred that[12]:

"14. The said words were calculated to disparage [Joseph M and MM] as Businessmen, Bankers and Financiers and were intended to cause and did cause them damage as such.

15. [JOL], in publishing the said words, acted out of improper motives and the publication was high-handed and contumelious. [JOL] made no attempt to contact [Joseph M and MM] or any of them for comment on the allegations before the words were published either with full knowledge that they were libellous of [Joseph M and MM] or with a reckless disregard as to whether they were libelous and with the expectation that the salacious nature of the Article would help to increase the circulation of [JOL's] newspaper and, accordingly, its sales and profits in excess of any amount that could be awarded to [Joseph M and MM] in a simple suit for damages."

[21] In its defence filed on 26 February 2009, JOL (i) denied[13] that "the words used in the article in their natural and ordinary meaning are capable of the meanings attributed to them [in paragraph 10 of the particulars of claim]"; (ii) averred[14] that "the article is fair comment on a matter of public interest and that the said publication was not

[12] At paras 14-15
[13] Defence, para. 3(i)
[14] Ibid, at para. 6

defamatory or intended to defame [Joseph M and MM]"; and (iii) stated[15] that the article was "objectively written in good faith … on a matter involving the public interest on an occasion of qualified privilege". JOL provided copious particulars in support of the pleas of qualified privilege and fair comment, emphasising the importance of the interest of the Jamaican public in the bond issue and its relationship to the then still unfolding collapse of several significant players in the United States ('US') economy.

[22] In addition, JOL signalled[16] its intention to rely on section 8 of the Defamation Act as far as applicable. As is well known, in a proper case, section 8 protects a defence of fair comment from failing "… by reason only that the truth of every allegation of fact is not proved …".

[23] In a reply dated 10 March 2009, Joseph M and MM challenged JOL's right to rely on the defences of qualified privilege and fair comment. As regards the former, they denied that the article was published on an occasion of qualified privilege, averring[17], among other things, that it was in any event "a result of irresponsible journalism including that neither [Joseph M nor MM] was approached or offered an opportunity to comment". And, in relation to the latter, they pleaded that, in publishing the article, JOL was actuated by express malice.

[15] Ibid, at para. 12
[16] Ibid, at para. 18
[17] Reply to Defence, para. 6(c)

A summary of the evidence

[24] In addition to Joseph M himself, both Mr Stephen Bornstein, an attorney-at-law who was at that time general counsel of Bear Sterns Asset Management Inc ('BSAM'), which controlled a substantial portion of the bonds; and Mr Hanworth, an experienced accountant with professional qualifications in England and Wales, and the US, who was employed by the company in December 1998 in the capacity of Chief Financial Officer ('CFO'), gave evidence in support of the claim. Further, a witness statement dated 4 February 2011 and signed by the late MM was admitted into evidence pursuant to an order made at a pre-trial review[18]. The author of the article, Mr Edwards, was JOL's sole witness. For the purposes of this summary, I have relied on those aspects of the evidence of the witnesses which are not in controversy. I have also relied on the judge's account, again to the extent that, so far as the facts are concerned, it is not seriously challenged in this appeal.

[25] In describing the overall context, the judge observed[19] that "[i]t is well known that Jamaica underwent a period of exceptionally high interest rates (at times over 50%)". By the mid-1990s, as Joseph M explained[20], the companies in the Mechala Group "were caught up in the prevailing high interest rate regime and its debt stock had become unsustainable". In these circumstances, the company sought advice from financial[21] and

[18] Order of P Williams J (as she then was) made at third pre-trial review on 11 October 2012
[19] Judgment, para. [11]
[20] Witness Statement of Joseph M Matalon dated 4 February 2011, para. 10
[21] Price Waterhouse Jamaica, Price Waterhouse New York and Merrill Lynch

legal[22] advisors in Jamaica, the Cayman Islands and New York as to the most effective means of mitigating the deleterious impact of the debt burden.

[26] Based on the advice it received, Mechala's original intention was to put together an Initial Public Offering ('IPO') with a view to raising equity financing for the company. Much preparatory work was in fact done in relation to the IPO option during 1996. However, again based on advice and taking into account the potential viability of an IPO in the Jamaican market at the time, it was finally decided to go the route of an International Bond Issue. Mechala was advised to make offers to qualified institutional buyers on the international scene only, and the intention was that no offer was to be made to any person or entity in Jamaica.

[27] Based on two indentures between Mechala and The Bank of New York, dated 24 December 1996 and 26 February 1997 respectively, Mechala issued Notes for (i) US$75,000,000.00, due on 31 December 1999 ('the 1999 Notes'); and (ii) US$25,000,000.00, due on 31 December 2002 ('the 2002 Notes').

[28] The bond issue was subject to the laws of the state of New York and had to be registered with the US Securities and Exchange Commission ('SEC'). Accordingly, it had to be compliant with all of the SEC's regulatory requirements. These included filing an Offering Memorandum and restating Mechala's accounts in accordance with US General Accounting Procedures ('GAP'). They also included periodic filings of both its unaudited

[22] Myers Fletcher & Gordon and Baker & McKenzie

and audited financial statements[23]. Although it does not appear that there was in fact any single document or group of documents bearing the title, the copious documentation which Mechala was obliged to file in order to satisfy the SEC requirements was compendiously referred to in the evidence and by the judge as 'the prospectus' or 'the prospectuses'.

[29] This is how Mr Hanworth described the process[24]:

> "… the prospectuses issued in relation to the bond offer were filed **and approved by** the SEC. Those prospectuses contained a significant amount of historical information on all of the group's activities and, critically, a detailed list of all risk factors warning potential investors of the various risks which could have caused the Group to be unable to repay the bonds at maturity. Additionally, every foreign issuer of SEC registered securities is required to file with the SEC an annual return (known as a 20-F) and a half yearly return (known as a 6-K). The 20-F in particular requires a significant level of commentary on the issuing company or group's activities, a comprehensive Management Discussion and Analysis, and audited financial statements. The Groups went to the original investors with a detailed prospectus, the entire issue was the subject of an SEC filing and SEC regulations, the Group consistently met its filing requirements on a timely basis, and as such information was available to anyone who chose to read it." (Emphasis as in the original)

[30] And this is the judge's summary of the principal features of the documentation[25]:

> "[13] The documentation stated explicitly that there was a risk involved with purchasing the bonds that were to be issued by Mechala. The SEC took the decision that the bonds should

[23] Witness Statement of Paul Hanworth dated 10 February 2011, para. 14
[24] Ibid, para. 9
[25] Judgment, paras [13]-[20]

be issued only to qualified institutional investors. It is common ground in this case that all the relevant prospectus document [sic] was available on the SEC's website. Mr Edwards admitted that he saw the prospectus on the website.

[14] The SEC required all the risks to be specifically identified. This was done. In order to give a flavor of the risk [sic] identified, a few will be stated. In the Offering memorandum in respect of the US$75,000,000.00 12¾% Senior Notes due 1999, under the heading 'Risk Factors' it was stated that Mechala had limited assets of its own and that the ability of Mechala to pay interest on notes or repay the notes on maturity or otherwise would be dependent on cash of the subsidiaries and payment of funds by those subsidiaries to Mechala. It was also stated that Mechala was highly indebted. It was noted that Mechala collected substantially all of its revenue in Jamaican dollars in a context where the company was raising money in United States currency and the Jamaican dollar has experienced significant depreciation against the United States dollar.

[15] The document indicated that there was no market for the bonds; that there was no assurance that any secondary market would develop and even if such a market developed the prices at which the notes would be traded could not be stated with any degree of certainty.

[16] Investors were specifically told that Mechala would not be required to file reports with the SEC but that the company would, so long as the bonds remain outstanding, provide information to the holders and to securities analysts and prospective investors on request.

[17] Under the heading country risks, it was stated that virtually all the group's operations are located in Jamaica where the dollar depreciated significantly against the United States currency. It was noted that there were high levels of inflation.

[18] Under the heading risks related to the company. The offering memorandum noted that there were net losses of US$5.3m (1994), US$0.3m (1995) and US$5.2m (first half of 1996).

> [19] In the section headed 'Notice to Investors' it was specifically stated that the notes were not registered under the Securities Act and are not to be sold in the United States of America. Later on in that section, it was stated that each purchaser will be deemed to be purchasing the note for his own account or on account of his or her sole investment discretion.
>
> [20] The documentation put it beyond doubt that any issuing or selling or dealing with the bonds in breach of the SEC's requirements would be visited with serious consequences, including but not limited to criminal sanctions."

[31] Both bond offerings were successful, raising over 100% of the required funding. So the bond issue was in fact over-subscribed[26], with the bonds all being taken up by qualified institutional buyers, mainly investment banks. The net proceeds realised from the 1999 Notes were approximately US$70,800,000.00, US$56,500,000.00 of which was used to refinance Mechala's existing Jamaican dollar denominated debt. The balance was used to complete Mechala's acquisition of the of Bank of Nova Scotia Jamaica Limited's 50% shareholding in Industrial Finance Holding Limited ('IFH'), a purchase to which Mechala was already committed. The net proceeds from the 2002 Notes were approximately US$24,000,000.00, all of which was used to refinance Mechala's existing Jamaican dollar denominated debt.

[32] In accordance with the SEC requirements, the bonds were only offered to qualified institutional buyers and none was offered to any individual in Jamaica or the rest of the Caribbean. While it might have been the case that individual investors subsequently

[26] Witness Statement of Paul Hanworth, para. 8

purchased the bonds on the secondary and tertiary markets at discounted rates in the expectation of making profits, there was no evidence that either Mechala or any member of the Matalon family had anything to do with that activity.

[33] Despite the success of the bond issue, Mechala's fortunes failed to improve significantly; or, as the judge put it[27], "things did not go according to plan". The company was adversely affected by a protracted decline in the Jamaican economy during 1997 and 1998, and it failed to meet interest payments due on the 1999 and 2002 Notes on 30 June 1999 and 15 August 1999 respectively. In late 1998, Mechala was advised that it would in all probability be unable to repay the 1999 Notes when they became due on 31 December 1999. In these circumstances, a new Chief Financial Officer, Mr Hanworth, to whom I have already referred, was employed by the company to assist in the formulation of an appropriate strategy. As part of this effort, the US-based firm of Donaldson, Lufkin & Jenrette Securities ('DLJ') was also engaged as Mechala's Group Financial Advisors.

[34] After much discussion and negotiation, in which Joseph M played a leading role on behalf of the company, Mechala offered US$0.35 on the dollar to buy back the bonds from the bond holders. This offer was not accepted by the bondholders, who were being advised by a well-established and respected global investment firm[28]. So Mechala increased the offer to US$0.47 on the dollar, which is the price that was finally agreed.

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[27] Judgment, para. [21]
[28] Houlihan, Lokey, Howard & Zukin - Witness Statement of Paul Hanworth, para. 17

[35] The final negotiations leading up to the buy-back agreement were conducted between Mr Bornstein for the bondholder group and a representative of DLJ acting on behalf of Mechala. Mr Bornstein also served as chairman of the creditors' committee which had been formed to represent the bondholders in connection with Mechala's tender offer.[29] All of the costs incurred by this committee in securing independent legal and financial advice in connection with the tender offer were borne by Mechala[30].

[36] The increased offer of US$0.47 was only made possible by the injection of additional funds by the Matalon family, including US$20,000,000.00 contributed by Joseph M personally. In addition, both Joseph M and MM assumed personal liabilities to Bank of Nova Scotia Jamaica Limited ('BNS') by way of personal guarantees to help secure funding for the buy-back of the bonds[31]. In Mr Borstein's assessment, "[t]he Creditors Committee viewed the willingness on the part of the Matalons to come out-of-pocket to consummate the tender offer as further testimony to their integrity and decency as businessmen vis-à-vis their creditors and to their sense of responsibility to the Jamaican business community as a whole"[32].

[37] In the result, each bondholder ended up suffering a loss of just over 50% on the original investment. This is how the judge described what had happened[33]:

> "[23] This plan saw Joseph M, on behalf of the owners of the family, putting up some JA$20m[34] of their private money. It

[29] Witness Statement of Stephen Bornstein dated 3 February 2011, paras 5 and 13
[30] Witness Statement of Paul Hanworth, para. 17
[31] Ibid, para. 21
[32] Witness Statement of Stephen Bornstein dated 3 February 2011, para. 14
[33] Judgment, para. [23]
[34] It is common ground that this figure was in fact US$20 million

> took the form of additional equity into the company and giving up their bonds without compensation, that is to say, those members of the family who held bonds put them into the pool without getting the US$0.47 per dollar to which they would be lawfully entitled. This contribution by the Matalons enabled the investors (other than the Matalons) to get an increased payout from US$0.35 per dollar to US$0.47 per dollar. In short, they too suffered like the other bond holders. There is no evidence to suggest that the Matalon family bond holders came out better than the other investors. They were in fact worse off because they put up additional money and lost the value of their bonds. This process was completed by 2000/2001. The article appeared in November 2008."

[38] The agreement was in due course given formal effect by a scheme of arrangement under the Companies Act. The scheme was accepted by "an overwhelming majority of the bondholders"[35], and ultimately approved in proceedings in the Supreme Court and later on appeal to this court.

[39] Joseph M described the article's comparison of the troubles that had assailed Mechala in 1996-2000 with the financial meltdown in the United States which had triggered a worldwide recession in 2008, as a "patently false" and "disingenuous excuse" to disparage him and his family. He complained that the article had deliberately confused the chronology of the events which led to the change in leadership of the family business from Joseph A to Joseph M in 2000: by juxtaposing the change in leadership with events which had in fact taken place in 1995, the article made it appear that Joseph M had been the driving force behind the bond issue in 1995. According to Joseph M[36], this was

[35] Witness Statement of Paul Hanworth, para. 19
[36] Witness Statement of Joseph Matalon, para. 24

"another signal to me that the motivation behind the article was to discredit me personally at a time when, in my capacity [as] Chairman of Ackendown, I was leading a company in a commercial dispute with a company led by Gordon 'Butch' Stewart whose ownership interest in [JOL] is notorious".

[40] (Ackendown New Town Development Company Ltd ('Ackendown') was a publicly owned company of which Joseph M was the chairman. I will come back to the relevance which Joseph M contends that it has to the case in due course.[37])

[41] Finally, Joseph M said this[38]:

> "30. The allegation that the Matalons ended up with '$100 million in their pockets' is false and egregiously so since the Observer ought to know that this is not the usual destination of funds raised by international bond issues. Furthermore, as a result of the regular SEC filings that were required and in fact made, it would have been a simple task for the Observer to find out where these funds actually went, were that newspaper interested in publishing the truth instead of salacious libel. Again, the obvious motive is to damage my personal reputation in the eyes of the public at a time when a company led by me was in a commercial dispute with a company led by Gordon 'Butch' Stewart. The Observer's allegation that the money was also used to capitalize the companies is also false and internally contradictory of the Observer's own allegations. So anxious was the Observer to paint me and my family as pirates that it alleged that we put '$100 million', the entire amount raised by the bond issue, directly into our pockets in the same article that it was alleged that the funds were used to capitalize the companies and to pay down debt.

[37] See paras [176]-[178] below
[38] Witness Statement of Joseph Matalon, paras 30-31

> 31. I was stunned when I read the article in the Caribbean Business Report section of the Observer's publication on the morning of October 3, 2008. Shortly thereafter I started to receive phone calls from family friends and business associates which, together with my own conclusions, convinced me that I needed to take immediate steps to have the many falsehoods and inaccuracies throughout the article corrected by a retraction and offer of amends from the Observer."

[42] As already noted, Mr Edwards was JOL's sole witness at trial. He was at pains to point out that before writing the article, he had done "a considerable amount of research and … relied on facts which were in the public domain and which had been widely discussed in the media"[39]. With a view to explaining his objectives in writing the article, Mr Edwards said this[40]:

> "3. In paragraph 1 of the article I intend to set the tone and make a comparison between the financial crisis in the United States and the financial crisis in Jamaica in the 1990s.
>
> 4. The article expresses my conclusion drawn from the material available to me in the public domain in newspaper articles and my own investigations that bonds or investment instruments that are created to raise capital that then dramatically lose their value largely due to inadequate performances, an overestimation of potential earnings or indeed a failure to fully discern the company or institution's true worth leave a trail of disenchantment and unhappy investors with a lack of confidence reposed in financial institutions and their leaders. The Mechala bonds were a case in point and draws interesting parallels with the US financial crisis in 2008 which I considered to be

[39] Witness Statement of Al Edwards dated 15 February 2011, para. 2
[40] Ibid, paras 3-5

worthy of consideration and I considered this to be a matter in the public interest.

5. Nowhere in the introductory paragraph or in any other part of the article do I state or even suggest that the Mechala bond issue either affected or had an impact upon the global financial crisis. Paragraph 2 reasons that many institutions on Wall Street had a liquidity problem that turned into an insolvency problem."

[43] Mr Edwards then went on to undertake a paragraph by paragraph analysis of the article, stating his objectives in making the statements he made in it and identifying the source or sources of his information. With regard to the extent of the indebtedness of the Mechala Group in the mid-1990s, for instance, he referred[41] to an article which appeared in the Daily Gleaner newspaper of 11 May 2005[42]; with regard to the management changes which led to Joseph M's taking over leadership of Mechala from Joseph A, he referred[43] to articles in the Weekend Observer of 13 March 1998[44], the Financial Gleaner of 15 November 1996[45] and the Financial Gleaner of 26 May 2000[46]; and, with regard to the depreciation of the bonds and the downgrade of Mechala's credit rating, he referred[47] to the Moody's Report, November 2007, Latin American Corporate Default and Recovery Rates, 1990-H1 2007.

[41] Ibid, para. 7
[42] 'ICD Group Restructures Once More'
[43] Witness Statement of Al Edwards, para 8
[44] 'Changes at the top to Mechala'
[45] 'Restructuring of the family business'
[46] 'Back from the Brink'
[47] Witness Statement of Al Edwards, para. 14

[44] In relation to the statement in the article[48] that "[m]any Jamaicans were not inordinately impressed with the Matalon bonds and so the family went on a road show to sell them in the Eastern Caribbean", Mr Edwards described it[49] as a "known fact that the bonds were touted in the Eastern Caribbean in an effort to sell them in that jurisdiction". But in any event, he maintained, "[n]owhere in this paragraph or anywhere else in the article do I suggest nor do I intend to imply that there were deliberate lies, misrepresentations and other schemes on the part of the Matalons designed to attract Jamaican investors and that when this failed they repeated the strategy in the Eastern Caribbean".

[45] At several other points in his witness statement, Mr Edwards repeated this disavowal of any intention to imply or suggest any disingenuousness on the part of the Matalons in relation to the bond issue and its sequel.

[46] And finally, in answer to the complaint that he had taken no steps to secure comments from Joseph M, MM or any other member of the Matalon family in preparing to write the article, Mr Edwards said this[50]:

> "25. I did not contact [Joseph M or MM] since the facts on which the article is [sic] based were well known from my extensive research. Further, the facts in issue were the subject of statements and assertions made directly by representatives of Mechala including [Joseph M]".
>
> 26. I had no improper motive in writing this article and all expressions of my opinion were based on my honest

[48] Para. [15] above
[49] Witness Statement of Al Edwards, para. 17
[50] Ibid, paras 25-26

> and sincere belief in the facts which existed at the time and which were well known."

How the judge saw the case

[47] As regards the phrase 'toxic bonds' used in the title of the article, the judge accepted[51] Joseph M's contention that, "the phrase is associated with bonds which the issuers knew from the outset were totally worthless as distinct from a bond issued in good faith that runs into difficulty because of poor performance by the bond issuer". Accordingly, the judge considered[52] that an honest, [and not] unduly suspicious reader[53] would have concluded from reading the article that "Joseph M was associated with selling bonds known to Joseph M to be dodgy but he sold them nonetheless". Further[54], taking the article as a whole, "[t]he title and subtitle … are indeed capable of suggesting that Joseph M, took a lead role in the Matalon family and issued or caused to be issued or was very instrumental [in] having sold bonds which were 'toxic' and therefore inherently worthless".

[48] The judge rejected the defence of fair comment because, in his view, the article contained, firstly, a number of significant inaccuracies; and secondly, omitted material information, such as the fact that all risks associated with the purchase of the bonds were fully disclosed to prospective purchasers in the prospectus. In these circumstances, the

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[51] Judgment, para. [80]
[52] Judgment, para. [93]
[53] The actual words as they appear at para. [93] of the judgment are "an honest, unduly suspicious reader", but it is clear from the context that the word "not" was inadvertently omitted from the sentence.
[54] Judgment, para. [80]

judge considered[55] that, "[w]hile the law tolerates minor inaccuracies, omissions and juxtapositioning which have the effect of conveying misleading facts is not acceptable".

[49] On the question of damages, the judge took the view[56] that, despite the seriousness of the libellous allegations which the article made in respect of him, "from all indications Joseph M is none the worse". In this regard, the judge had in mind Joseph M's own evidence which, according to the judge[57], suggested that "no loss of reputation seemed to have ensued". Accordingly, despite the fact that Joseph M's counsel contended for damages in the region of JA$50,000,000.00, the judge treated this case as being "at the low end of defamation awards" and awarded general damages of JA$4,379,310.34.

The grounds of the appeal and the cross-appeal

[50] JOL filed a total of 25 grounds of appeal[58]. But Mr Chen happily made it unnecessary to set them out in full in this judgment by very helpfully subsuming the grounds under the following broad areas of complaint:

1. The judge accepted a meaning of the words "toxic bonds" which was plainly and simply wrong, because the words, applying the standard of the ordinary reader, carried no imputation of dishonesty.[59]

[55] Ibid, para. [82]
[56] Ibid, para. [99]
[57] Ibid, para. [95]
[58] See Appendix A for the full text of the grounds of appeal
[59] Grounds (i)-(iv) and (vi)

2. The judge mistakenly laid too much emphasis on the fact that the Mechala prospectus for the bond issue included warnings and identified the risks of the investment.[60]

3. By failing to appreciate the difference between the initial sale of the bonds on the New York market and later sales of the bonds on the secondary market, the judge erroneously rejected the evidence that the Matalons took the bonds into the Eastern Caribbean. Alternatively, even if it was in fact untrue that the Matalons took the bonds to the Eastern Caribbean, this was a minor error of fact that entitled JOL to the protection of section 8 of the Defamation Act.[61]

4. The judge erred in attributing defamatory meanings to several parts of the article that did not and could not possibly have that effect.[62]

5. Even if the words used in the article could be given a defamatory meaning, the judge erred in rejecting the defences of fair comment and qualified privilege. Further, even if the words were capable of bearing the meanings attributed to them by the judge, they were

[60] Ground (vii)
[61] Grounds (xiii)-(xvi)
[62] Grounds (xvii)-(xxi)

at least ambiguous and the defence of fair comment should therefore have succeeded.[63]

6. Even if this court were to find that the article was defamatory, then any award of damages to Joseph M should be purely nominal. In any event, the cross-appeal should be dismissed.[64]

[51] In the cross-appeal, Joseph M complained that the sum which the judge awarded him for general damage was far too low. In this regard, it was submitted that the judge erred, by failing (i) to take into account the egregious nature of the defamation and JOL's persistently aggravating behaviour in, among other things, refusing to offer an apology; (ii) to appreciate the effect that the libel had had on Joseph M; and (iii) to award any sum for aggravated or exemplary damages.

[52] I will deal with the issues which arise in the appeal under the following headings and in the following order:

1. The allegedly defamatory words/the meaning of the phrase "toxic bonds"

2. The Eastern Caribbean "road show"

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[63] Grounds (v), (xi), (xxii) and (xxiv)
[64] Ground (xxv)

3. The defence of fair comment and the effect of the Mechala prospectus

4. The section 8 point

5. The defence of qualified privilege

6. Damages

1. The allegedly defamatory words/the meaning of the phrase "toxic bonds"

[53] The law of defamation is concerned with the protection of reputation[65]. As Lord Nicholls observed in the landmark case of **Reynolds v Times Newspapers Ltd and Others ('Reynolds')**[66], "[r]eputation is an integral and important part of the dignity of the individual". Over the years there have been many attempts at a definition of what might amount to a defamatory statement. Among the best known of the older ones is that put forward by Parke B in **Parmiter v Coupland**[67], which is whether the words complained of would expose a person to "hatred, contempt or ridicule". In **Sim v Stretch**[68], after canvassing a number of earlier authorities, Lord Atkin proposed the simple test which has since gained wide acceptance: "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?"

[54] The starting point in any libel case must therefore be to ascertain whether the words complained of were in fact defamatory of the claimant in any of the senses

[65] See generally Carter-Ruck on Libel and Privacy, 6th edn, para. 2.1
[66] [1999] 4 All ER 609, 622
[67] (1840) 6 M & W 105,108
[68] [1936] 2 All ER 1237, 1250

mentioned above. It may therefore be helpful at the outset to say something briefly about the approach to the ascertainment of meaning in such cases.

[55] Happily, there is no controversy on this aspect of the matter. Mr Chen very helpfully referred us to the judgment of Sir Anthony Clarke MR in **Jeynes v News Magazines Ltd & Another**[69], where the leading modern authorities are conveniently summarised as follows:

> "14. The legal principles relevant to meaning have been summarized many times and are not in dispute ... They are derived from a number of cases including, notably, **Skuse v Granada Television Limited** [1996] EMLR 278, per Sir Thomas Bingham MR at 285-7. They may be summarized in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any 'bane and antidote' taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…' (see Eady J in **Gillick v Brook Advisory Centres** approved by this court [2001] EWCA Civ 1263 at paragraph 7 and Gatley on Libel and Slander (10th edition), paragraph 30.6). (8) It follows that 'it is not enough to say that by some person or another the words *might* be understood in a

[69] [2008] EWCA Civ 130

> defamatory sense.' **Neville v Fine Arts Company** [1897] AC 68 per Lord Halsbury LC at 73.
>
> 15. Those are the principles applicable to the determination of meaning at a trial and thus in a jury trial by the jury. …"

[56] To this summary, I would only add two points. First, as Lord Halsbury LC observed in the leading older case of **Lord William Nevill v The Fine Art and General Insurance Company, Limited**[70], "it is necessary to take into consideration, not only the actual words used, but the context of the words, and the persons to whom the communications were made". And second, as Lord Nicholls reminded us in **Bonnick v Morris & Others**[71], a decision on appeal from this court, "[a]n appellate court should not disturb the trial judge's conclusion unless satisfied [that] he was wrong".

[57] There can therefore be no complaint (and Mr Chen made none) about the judge's approach to the question of meaning, which was along essentially similar lines[72]:

> "[65] The reasonable, ordinary reader must be one in Jamaica who is familiar with the social context of the publication and how words and phrases are understood in the particular social milieu. So too, the judge, in order to carry out his role … must be aware of his society and how the reasonable, ordinary reader would understand the words in the context in which they are used. It is not the judge's subjective opinion that matters.
>
> [66] The judge then, should try to look at the matter in the round, without being unduly technical, without being hostile to the press while being informed by the ordinary, reasonable reader in the context of the constitutional right to free speech

[70] [1897] AC 68, 72
[71] [2002] UKPC 31, para. 9
[72] Judgment, paras [65]-[66]

> and having due regard to the right of the individual not to have untruths told about him."

[58] JOL's principal complaint on appeal relates to the meaning which the judge attributed to the phrase "toxic bonds". As I have indicated, the judge accepted Joseph M's evidence that, "the phrase is associated with bonds which the issuers knew from the outset were totally worthless as distinct from a bond issued in good faith that runs into difficulty because of poor performance by the bond issuer". Mr Chen submitted that the judge's finding on this point was "simply wrong", and was a fundamental error which completely eroded the basis of the judge's decision. As he had done below, Mr Chen maintained that a bond issued in good faith that runs into difficulties because of poor performance by the bond issuer is also a toxic bond: the expression simply means that the bonds have become toxic (that is, harmful) to their holders. So, far from being defamatory, the phrase was a perfectly appropriate characterisation of what had taken place. It gave rise to no connotation or implication of dishonesty in relation to the bond issue.

[59] Mr Robinson submitted that the judge's decision as to the meaning of the phrase "toxic bonds" was amply supported by the evidence, common sense and the context in which they were used in the article. With regard to the evidence, Mr Robinson placed particular reliance on the largely uncontradicted testimony of Messrs Hanworth and Bornstein.

[60] The question is therefore how would the ordinary reader have interpreted the phrase "toxic bond", as used in the title to the article and taken in the context of the article as a whole. Would he or she consider, as the judge found, that in its natural and ordinary meaning, the phrase described bonds which were poisoned from the outset; or, as Mr Chen maintained, to bonds which, though unimpaired at their inception, became poisonous over time due to the poor performance on the part of the underlying security?

[61] Taken by themselves, the dictionary meanings of 'toxic' are not particularly helpful. According to the editors of Chambers[73], to cite but one, the word can either mean "poisonous" or "poisoned". But, with specific reference to a financial asset, the same entry also includes, "liable to cause a loss". In similar vein, Mr Hanworth testified[74] that, in accounting circles, the phrase 'toxic bonds' "clearly implies that a poor level of due diligence had been done before the bonds were issued, and/or that the credit (the debtor) was inherently faulty".

[62] In search of further clues to the meaning to be ascribed to the phrase as it appears in the title, I make note, firstly, of the subtitle, "How Mechala bond holders lost out", which appear immediately after the words, "The trouble with toxic bonds". Read together, I agree with the judge[75] that the title and the sub-title indicate that the Mechala bonds were in fact being characterised as "toxic bonds".

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[73] The Chambers Dictionary, 12th edn, page 1651
[74] Witness Statement, para. 6
[75] Judgment, para. [24]

[63] Next, I come to the article itself. It commences with a reference to then current "crisis of the United States financial system meltdown [which] has drawn comparisons with the Jamaican landscape of the 90s and more particularly the failings of some of its leading indigenous financial institutions". It is on this basis that the reader was accordingly invited to take a look back at "the Mechala bond offering by the Matalons".

[64] Reference is next made to the various venerable Wall Street financial institutions which were, at the time of writing of the article, experiencing liquidity problems and going broke as a result. The article then segues seamlessly – albeit back in time - to the mid-nineties and the "huge debt obligation, which threatened the viability of [the Matalon] business empire which at one time had 32 subsidiaries which stretched from banking, construction, dairy operations, pharmaceuticals sales and a host of other businesses". It is against this background that, "[w]ith a debt of almost US$70 million in a high interest rate regime, the Matalons turned to the international capital market in an effort to rescue a business dynasty". Then, after citing DLJ's description of Mechala as "one of the largest companies in Jamaica … a diversified business enterprise engaged in three principal lines of business: development and construction, manufacturing and trading, and financial services …", the article goes on to state that, "[t]his is how investors would be hooked … The Matalons raised US$100 million which allowed them to address their debt and clean up the balance sheet, but the bond offering was an abject failure". The article then makes the assertion that the Matalons "in effect used other people's money to capitalise their businesses, eradicate debt and because of the poor performances of their companies were unable to make good".

[65] Next, under the rubric "Matalon bondholders got burnt", the article goes on to report the views of "a bondholder who was traumatised by the experience". Specific reference is made to the bondholder's comment that, "[o]ne of the problems with that bond offering was that the Matalon group of companies are private, not listed, so no one really knew what was going on. We had to take their word for it and the picture they painted was rosier than really was the case".

[66] Next, the article states that the Matalon family "went on a road show to sell [the bonds] in the Eastern Caribbean".

[67] Then the article asserts that, "[w]ith the bonds proving to be a damp squib and investors losing out big time, the Matalons, with US$100 million in their pockets, paid bondholders a paltry 47 cents on the dollar to buy back the bonds".

[68] In the light of the evidence in the case, most of it uncontroverted, there are a number of observations that can be made about those parts of the article which I have mentioned in paragraphs [62]-[67] above. First, there is the distinctly dubious analogy between, on the one hand, the debt problem faced by the Matalon enterprises in the 1990s, which, on the evidence, came about as a result of massive operational debt in a high interest rate regime; and, on the other hand, the US financial meltdown of the late 2000s, which came about because of the fact that, as the article itself stated, the various institutions "held billions in depreciated mortgage-backed securities that nobody wanted to buy …". As Mr Bornstein observed without contradiction from his vantage point as a

30 year veteran of the financial services industry[76], "the former simply reflected the financial difficulties suffered by a single business entity (which happens every day of the week) while the latter was attributable to a widespread housing bubble induced by imprudent lending practices, financial wizardry, excessive leverage and perverted compensation incentives at numerous commercial, investment and mortgage banks throughout the world".

[69] Second, there is the praying in aid of a statement made by DLJ in the context of an account of the background to the bond issue in 1995. DLJ, as the evidence showed, played no part in the bond issue in 1995-1996, and only came on board as a Mechala advisor for the purpose of the buy-back in 2000. It is in fact in that context that the statement attributed to the firm in the article was actually made.

[70] Third, there is the reference to investors being "hooked". Taken by itself, the verb 'to hook' is, of course, one that is apt to convey several perfectly innocuous meanings. But it may also mean to "ensnare" or "trap"[77]. Read in the context of the article as a whole, it seems to me that it was clearly apt to denote some kind of deliberate contrivance.

[71] Fourth, there is the description of the bond offering as "an abject failure": this was a patently inaccurate statement, given the clear evidence that the bond issue was in fact over-subscribed.

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[76] Witness Statement, para. 16
[77] Chambers, op cit, page 733

[72] Fifth, there is the statement attributed to the traumatised bondholder that "no one really knew what was going on [with Mechala]", so potential investors "had to take their word for it and the picture they painted was rosier than really was the case": this was, again, a completely inaccurate statement since, as has been seen from the judge's summary of the disclosure given in the prospectus[78], the risks of purchasing the Mechala bonds were explicitly identified. These risks included the high level of indebtedness of the Mechala Group, against the background of significant past losses; the foreign exchange risk inherent in a borrowing transaction denoted in United States dollars, given Mechala's status as a Jamaican dollar earner in a high inflation environment with a history of significant currency depreciation; and the absence of any market for the bonds. As the judge observed[79], "[e]ven the most obtuse could not fail to appreciate the risks involved".

[73] Sixth, there is the reference to the alleged Eastern Caribbean road show: the evidence, which the judge accepted, was that no member of the Matalon family went or participated in any such road show to offer bonds for sale. As this finding is the subject of separate and specific complaint, to which I will have to return[80], I will say nothing further about it for the moment.

[74] Seventh, and finally, there is the article's conclusion that, "[w]ith the bonds proving to be a damp squib and investors losing out big time, the Matalons, with US$100 million in their pockets, paid bondholders a paltry 47 cents on the dollar to buy back the bonds".

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[78] Para. [30] above
[79] At para. [24]
[80] See para. [79] below

In one sense, this statement could be seen as no more than a gross over-simplification – and misrepresentation - of what had happened. But, even more significantly for present purposes, it seems to me that it carried the clear implication that, at the end of the day, against the backdrop of all that had gone before, in exchange for "a paltry 47 cents on the dollar" returned to investors who had been "burnt" as a result of the deliberate withholding of important information which could have influenced their decision to invest in the first place, the Matalon family walked away with US$100 million of investors' money "in their pockets". As the judge explained[81] – in my view correctly – "the expression 'in their pockets' often times has a negative connotation in Jamaica"; and, taken in the context in which it appeared in the article, "clearly suggests or implies that some sort of sleight of hand was afoot".

[75] By incorrectly placing him at the helm of Mechala at the outset of the bond issue in the middle of the 1990s, Joseph M contended that the ordinary reader of the article would inevitably conclude that he was the mastermind, the driving force behind the issue of these "toxic bonds".

[76] As it seems to me, the ordinary reasonable man or woman reading the article as a whole would inevitably have been led to conclude that the phrase "toxic bonds" referred to the Mechala bonds. Further, that its use as part of the article's title was intended to convey that those bonds were, to the knowledge of Joseph M and his family, poisoned, that is, fatally impaired, from the very outset of the bond offering. In this regard, I have

[81] Judgment, para. [77]

in mind in particular, though not exclusively, the references in the article to (i) investors being "hooked"; (ii) the Matalons painting a picture of the viability of the bond offering that "was rosier than really was the case"; (iii) the Matalons, having tried unsuccessfully (contrary to the express prohibition in the prospectus) to attract investors in Jamaica, going on a road show to the Eastern Caribbean to market the Mechala bonds; (iv) the Matalons walking away at the end of the day "with US$100 million [of investors' money] in their pockets"; and (v) the Matalons – led by Joseph M - deliberately orchestrating a chain of events which, though entirely legal, was of such a nature as to cause an eminent newspaper columnist to "want to go outside and throw up".

[77] I therefore agree with the judge that the phrase "toxic bonds" used in the sub-title to the article, when read together with the article as a whole, would have been associated by the ordinary reader "... with bonds which the issuers knew from the outset were totally worthless as distinct from a bond issued in good faith that runs into difficulty because of poor performance by the bond issuer"[82]. And further, in a comment with which I also agree[83], that:

> "[89] Matters were not helped by the reference to toxic bonds which has come to mean, according to the evidence, bonds which the issuers knew from the outset were deeply flawed, based on unsound lending practices and that information was concealed. It must be said that having regard to the disclosures in the Mechala prospectus it was indeed unfortunate to link the Mechala bonds to the expression toxic in the light of the meaning which it acquired over time. In other words there is a world of difference between a toxic bond and a bond issued in good faith with full, complete and

[82] Ibid, para. [80]
[83] Ibid, para. [89]

> honest disclosure. The former is a crooked scheme from the beginning; the latter is an honest scheme that has failed to perform."

[78] In my view, the judge's conclusion that, when taken as a whole, beginning with its characterisation of the Mechala bonds as toxic, the article was defamatory of Joseph M, the (falsely) alleged mastermind behind the bond issue, cannot be faulted.

2. The Eastern Caribbean "road show"

[79] The article stated that, "[m]any Jamaicans were not inordinately impressed with the Matalon bonds and so the family went on a road show to sell them in the Eastern Caribbean". Joseph M denied that any such thing had taken place. Mr Edwards maintained[84] that it was a "known fact that the bonds were touted in the Eastern Caribbean in an effort to sell them in that jurisdiction". The judge roundly rejected Mr Edwards' evidence on the point[85]:

> "[76] … the reference to many Jamaicans not being impressed with the bonds and so the family took the issue on the road to the Eastern Caribbean was not true. None of the bonds was offered in Jamaica and none was offered in the Eastern Caribbean by the Matalons or anyone at their behest. No evidence was called by [JOL] to prove this allegation. Not only was it not a fact it would have been contrary to terms of the prospectus which expressly stated that '[t]he notes will not be offered or sold in Jamaica' meaning that Mechala itself would not offer any of these bonds for sale or be part of offering them for sale in Jamaica. The article gave the distinct impression that the Matalons did offer them and when that did not work out then went to the Eastern Caribbean. Interestingly, Mr Edwards asserted in his examination in chief

[84] Witness Statement, para. 17
[85] Judgment, para. [76]

> that it 'is a fact that the bonds were pitched in the Eastern Caribbean to prospective investors.' This assertion was not proved by reliable and admissible evidence. Mr Edwards never claimed to be an eyewitness to this salesmanship and neither did the defendant offer any evidence other than the naked, unsupported and unsubstantiated statement that the bonds were so offered. This type of evidence amounts to what some call proof by assertion. It is one thing to make an assertion and hope it is not challenged but when challenged then the person making the assertion ought to be able to back it up by some kind of admissible evidence. Mr Edwards was unable to do this."

[80] In his written submissions[86], Mr Chen contended that the judge wrongly rejected the evidence that the Matalons took the bonds into the Eastern Caribbean. In doing so, he failed to understand the difference between the initial sale on the New York market to the Qualified Institutional Bidders ('QIBs') and later sales in the secondary market, after the QIBs had commenced to trade in them. The reference in the article to the period after the initial issue of the bonds was to a period when they were being traded on the secondary market, when they had depreciated and were therefore not impressive. The bonds could not have been depreciated at the initial offering as they were oversubscribed by the QIBs. In any event, there was nothing either defamatory or disparaging of the Matalons in the statement about the Eastern Caribbean road show. Further still, even if as a matter of fact no member of the Matalon family went on a road show to market the bonds in the Eastern Caribbean, this was a minor error of fact which entitled JOL to claim the protection of section 8.

[86] Paras 34-37

[81] Mr Robinson submitted that the totality of the evidence fully supported the judge's finding on this point. He further observed that in any event, Mr Edwards' evidence did not seek to say that any member of the Matalon family had been on the road show, but rather that the bonds were sold in the Eastern Caribbean on the secondary market. Finally, as regards the section 8 point, Mr Robinson submitted that the section had no applicability in this context, since the real reason why JOL's defence of fair comment failed was because the fact base of the alleged "comment" was untrue.

[82] The standard of review by an appellate court of findings of fact by a judge after a trial is well settled. The well-known decision of the House of Lords in **Watt or Thomas v Thomas**[87], which is often cited in this regard, is authority for the proposition that, where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court will generally not interfere with the judge's findings unless it is satisfied that the judge has arrived at a conclusion that is plainly wrong. As Lord Neuberger explained in **In re B (A Child) (Care Proceedings: Threshold Criteria)**[88] –

> "… where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. …"

[87] [1947] AC 484, esp. per Lord Thankerton at 487-488
[88] [2013] 1 WLR 1911, para. 53

[83] More recently, these principles were fully reviewed and approved by the Privy Council in an appeal from the Court of Appeal of Trinidad and Tobago in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**[89]. They have also been applied by this court repeatedly[90].

[84] At the end of the day in this case, Mr Edwards, who could not say from his own personal knowledge that Joseph M or any other member of the Matalon family participated in a road show to the Eastern Caribbean, was driven to assert it as a "known fact". In the face of Joseph M's complete denial that this was so, and in the absence of any evidence of any kind to suggest otherwise, the judge was, in my view, entirely entitled to find against JOL on this point and absolutely no basis has been shown on appeal to disturb that conclusion.

[85] As to the distinction between the original bond issue and subsequent sales in the secondary market which Mr Chen now invites us to say that the judge failed to appreciate, it seems to me that this was a point which really ought to have been made by Mr Edwards in the article. Instead, having (i) referred to the number of persons who were "disgruntled and unhappy with the bond issue"; (ii) identified one of the problems with it as being that "the picture they [the Matalons] painted was rosier than really was the case"; and (iii) stated that the bond issue "touted US$75 million in senior notes, which were set to mature at the end of 1999 and another US$25 million in senior notes due to mature in December

[89] [2014] UKPC 21, per Lord Hodge at paras [11]-[18]
[90] See, for two relatively recent examples, **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 and **Herbert Cockings v Grace Gertrude Cockings** [2018] JMCA Civ 17

2002", the article moved directly into the assertion that "[m]any Jamaicans were not inordinately impressed with the Matalon bonds and so the family went on a road show to sell them in the Eastern Caribbean". In my view, given this sequence, the ordinary reader would in all likelihood have concluded that the alleged Eastern Caribbean road show was in furtherance of the Matalon family's disingenuous strategy of marketing impaired bonds to a wider audience.

3. The defence of fair comment/the effect of the Mechala prospectus

[86] I have already summarised the basis of the judge's decision to reject the defence of fair comment[91]. With regard to the parameters of the defence of fair comment (which he preferred to describe as honest comment), the judge said the following[92]:

> "[44] … [The defendant] must state the facts on which his comment is based. He need not give every chapter, verse, jot or tittle but must nevertheless give, generally, the facts on which the comment is based. What is necessary is that the facts are substantially true. The law tolerates a few minor errors of unimportant minutiae. The comment must be comment and not imputation of fact. The defence does not apply to defamatory statements of fact.
>
> [45] It is here that the undercurrent of truth makes its effect felt despite the absence of a plea of justification. If the facts on which the comment is based are untrue then the defence fails even if the view is honestly held by the commentator. Therefore, it is vital for the defendant, if challenged by a defamation claim, to show that the facts on which the comment is based are true if the defence is to succeed. In other words, there is no such defence as honest comment based on an untrue set of facts. An honest belief that the facts were true is of no avail …

[91] See para. [48] above
[92] Judgment, paras [44]-[48]

> [46] …
>
> [47] Not only must the facts be true but they must be truly stated. What this means is that a defendant cannot state facts which are true and omit other true facts if those omitted facts would have given a different impression had they been stated. As stated by Eady J, when giving an example of omitting important facts from an otherwise accurate statement of fact, in **Branson v Bower** [2002] QB 737 at [37], it is not honest comment if the defendant speaks about a person charged with a sexual offence and suggests he is unfit to hold his job without also pointing out, if that is the case at the time of the comment, that the person was either acquitted or proceedings against him dropped because the case against him was shown to be unreliable or worse, totally false. In such a case the basis for thinking that the person may be guilty of serious impropriety would have been eroded.
>
> [48] The test, regarding whether the facts are true or the whole relevant facts were presented is an objective test. The honest belief of the defendant that the facts are true is wholly irrelevant to this aspect of the case. Thus the starting point for an assessment of the defence of honest comment is whether facts stated are true, whether the facts are truly stated and where the circumstances raised the issue of omitted facts, then the assessment is whether the omitted facts would have altered the complexion of the true facts already stated. If this test is not passed then the defence must necessarily fail. If the defendant has cleared this then the next stage is whether any fair-minded person could have honestly held the opinion in [sic] expressed. If the answer to that is yes, then the next stage is whether the defendant in fact held that view honestly. This last stage is linked with the malice in that even if the first two criteria are met but there is evidence of malice then the comment would not be one honestly held. Malice here means spiteful or vengeful. The defence is not a medium for spewing invective over the reputation of the claimant."

[87] It is against this backdrop of principle that the judge rejected JOL's reliance on fair comment in this case, taking into account what he considered to be seriously inaccurate

statements in the article and some egregious omissions. Among the matters in the first category were the statements that (i) Mechala used the proceeds of the bond issue to capitalise the company; (ii) information regarding the bond issue was not made available to the public, which was therefore obliged to take Mechala's word concerning the state of the company; (iii) because many Jamaicans were not impressed by the bonds, the Matalon family took the bond issue on a road show to the Eastern Caribbean; (iv) the Matalon family put US$100 million in their pockets and then paid bondholders "a paltry 47 cents on the dollar to buy back the bonds"; and (v) Joseph M spearheaded all of the above through his ascension to the leadership of Mechala in the mid-1990s and was in that role instrumental in issuing bonds "which were 'toxic' and inherently worthless".

[88] The question of the prospectus also played a role in the judge's rejection of the defence of fair comment. After recounting Joseph M's evidence that "the Mechala bonds were fully described and all the risks associated with them were spelt out in clear and unmistakeable language", the judge observed[93] that,

> "… having read the prospectus, this was an understatement. Even the most obtuse could not fail to appreciate the risks involved. The prospectus used largely accessible English and such jargon as there was did not detract from a clear identification [of] the risks involved."

[89] The judge returned to the role of the prospectus at several points in his analysis. Without purporting to be exhaustive, the principal references are as follows. Firstly, as

[93] Judgment, para. [24]

regards the alleged Eastern Caribbean road show undertaken by the Matalons, the judge said[94] that the allegation was "not true … [n]ot only was it not a fact it would have been contrary to [the] terms of the prospectus which expressly stated that '[t]he notes will not be offered or sold in Jamaica' meaning that Mechala itself would not offer any of these bonds for sale or be part of offering them for sale in Jamaica".

[90] Secondly, in relation to the alleged lack of information on the bond issue and the associated risks, the judge's comment[95] was that "… the omission to mention that there was in fact full disclosure in the relevant documents which were available to investors was a significant omission".

[91] Thirdly, again with regard to the alleged omission of material facts concerning the bonds, the judge pointed out[96] that "… the writer need not reproduce the entire prospectus … [o]ne sentence to say that the risk of dishonouring the bonds was fully disclosed and highlighted over nine pages [in the prospectus] would not have lengthened the article unreasonably".

[92] Fourthly, in considering whether the criterion of responsible journalism had been satisfied in relation to the publication of the article, the judge referred[97] to the fact that "Mr Edwards admitted that he saw the prospectus on the SEC's website … [T]his was a reflective piece being written about an event that took place a decade ago".

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[94] Judgment, para. [76]
[95] Ibid, para. [78]
[96] Ibid, para. [82]
[97] Ibid, para. [84]

[93] Fifthly, as regards Mechala's ability to repay the debt created by the bonds, the judge commented[98] on the fact that this danger was specifically dealt with in the prospectus.

[94] And sixthly, in a final comment on the absence from the article of any reference to the prospectus, the judge said this[99]:

> "[86] The court is not saying that Mr Edwards should have quoted chapter and verse from the prospectus but rather that it is misleading to print the assertion that there was a lack of information regarding the bonds when that was not true. It was also inaccurate to create the impression that investors were not aware of the risks when the true position was that the prospectus went into exceptional detail regarding the risks. The prospectus pointed [sic] that in certain circumstances the [sic] Mechala may be forced to operate in circumstances where 'the holders of the Notes could experience increased credit risk and could experience a decrease in the market value of their investment'.
>
> [87] To continue with the incorrect factual suggestion that information was withheld and having failed to sell the bond in Jamaica, the bond was taken by the Matalons to the Eastern Caribbean was plainly wrong. There is no evidence that Joseph M or any Matalon was part of this activity. Not only that, one of the conditions of sale was that Mechala would not offer the bonds in Jamaica. In effect, the article suggested that Joseph M by taking such [sic] prominent role having taken over from Joseph A was part and parcel of conduct that was contrary to the promises they made in their prospectus. In effect, he was promising not to sell the bonds in Jamaica in the document [sic] was actually doing the very thing he was saying the company would not do. In business as in other spheres in life reputations are important.
>
> [88] Had Joseph M been engaged in or supporting any sale of bonds in Jamaica or the Eastern Caribbean it would be a

[98] Ibid, para. [85]
[99] Ibid, paras [86]-[88]

> fundamental breach of their word as given in the prospectus. In effect, they would be engaged in stifling the possibility of the institutional investors developing a secondary market. In the world of finance this would be a very significant ethical breach with also the possibility of real sanctions from the SEC. In other words, having promised the QIBs that the Matalons and Joseph M would not engage in secondary sales and thus leaving the way clear for the QIBs to develop a secondary market, the Matalons and Joseph M were actively engaged in stymieing those efforts."

[95] Mr Chen submitted that the judge fell into error by failing to recognise that the entire article was in fact no more than a comment on past events. Mr Edwards did not misstate any substantial underlying fact and, contrary to the judge's view, "the history of events made it manifestly obvious that Mechala had overestimated its potential earnings ... [and] … did not generate the anticipated wealth to enable them to perform as intended"[100]. Such inaccuracies as there might have been in the article were minor, given that the underlying facts which it spoke to were substantially agreed. In these circumstances, Mr Edwards was plainly entitled to publish the widely held opinion about the unfavourable outcome of the bond issue and the defence of fair comment ought to have succeeded.

[96] Turning to the prospectus, Mr Chen pointed out[101] that there was no allegation in the article that Joseph M, Mechala or the Matalons generally had failed to comply with the various regulatory obligations associated with the bond issue. In these circumstances, Mr Chen's major complaint was that the judge had mistakenly laid great emphasis on the

[100] Written submissions, para. 14
[101] Appellant's Written Submissions, paras 30-31

fact that the Mechala prospectus included warnings and identified the risks of the investment. The judge thus made this the principal basis for his decision, when this was not an issue in the case at all. In oral argument before us, Mr Chen added that the structure of the article as a whole also made it clear that the "bondholder" to whom it referred must have been someone who purchased the bonds on the secondary market.

[97] On the issue of fair comment, Mr Robinson submitted that the judge was right to have rejected the defence. For, as the judge found, while Mr Edwards was entitled to his honest opinion, much of what was alleged to be opinion in the article actually amounted to statements of fact, and "[h]onest opinion could not be based on 'facts' that were false"[102].

[98] And, as regards the prospectus, Mr Robinson brought our attention to those parts of his cross-examination of Mr Edwards at the trial from which it emerged that, among other things, Mr Edwards (i) was aware of and had seen the Mechala prospectus on the SEC website[103]; (ii) had read what he described as "a brief summary of it"[104]; (iii) was aware from the prospectus that, as of June 1996, Mechala had approximately US$87,500,000.00 in short and long-term debt[105]; and (iv) agreed that the prospectus disclosed a number of 'risk factors' relating to the bond issue, including the overall level of outstanding debt, exposure to exchange rate fluctuation and the lack of a public market

[102] Respondent's Written Submissions, para. 46
[103] Notes of Evidence, Core Bundle, Volume II(c), page 749
[104] Ibid, page 697
[105] Ibid, page 731

for the notes[106]. Mr Robinson submitted that it was clear from this evidence that Mr Edwards was fully aware of all that was in the prospectus but, rather than referring to the material in it, chose instead to include a quote from an anonymous bondholder complaining of lack of information.

[99] Before considering these submissions, I must first say something about the nature and limits of the defence of fair comment. Carter-Ruck states the position as follows[107]:

> "It is a defence to an action for defamation that the words complained of are fair comment on a matter of public interest. The defence gives legal recognition to 'the right of the citizen honestly to express his genuine opinion on a subject of public interest, however wrong or exaggerated or prejudiced that opinion may be': a man is not only entitled to hold his own opinion but, provided that it is his honest opinion based upon true facts and related to a matter of public concern, he is entitled to express it to others even though it reflects unfavourably upon some other person. Fair comment is a defence that protects defamatory criticism or expressions of opinion; it does not protect defamatory statements of fact."

[100] As this extract makes plain, fair comment in the law of libel must not only be on a matter of public interest, but it must represent the honest opinion of the author, "based upon true facts". In other words, as Kennedy J explained in **Joynt v Cycle Trade**

[106] Ibid, pages 731-738
[107] Op cit, para. 10.1

Publishing Co[108], "[t]he comment must … not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated …"[109]

[101] In this case, therefore, notwithstanding the absence of a plea of justification, it was necessary for JOL, in seeking to mount the defence of fair comment successfully, to demonstrate that the facts on which the comments in the article were based was substantially true.

[102] As will be recalled, under the rubric, "Matalon bondholders got burnt", the article referred to a bondholder who had been traumatised by the experience (presumably of purchasing Mechala bonds). The article reported him or her as lamenting the fact that, because the Matalon group of companies was private and not publicly listed, "no one really knew what was going on ... [w]e had to take their word for it and the picture they painted was rosier than really was the case". The complaint which Joseph M made about this part of the article in his particulars of claim was that, by its natural and ordinary meaning, it was capable of conveying that, among other things, "the bonds were issued to unsuspecting Jamaican individuals through a private, unlisted group of companies based on an unregulated prospectus in which [Joseph M and MM] were able to say whatever they liked and did in fact seek to mislead the public by describing the bond offer in more favourable terms than were actually and factually the case".

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[108] [1904] 2 QB 292, 294

[109] See also **Silkin v Beaverbrook Newspapers Ltd and Another** [1958] 1 WLR 743, 746, in which Diplock J (as he then was) told the jury that: "The first point … is that you should not misstate the material facts on which you are commenting."

[103] It seems to me that the clear implication arising from this part of the article is indeed that potential investors, such as the traumatised bondholder, were deliberately misled by Mechala's failure to disclose either fully or in part financial or other information relevant to the risk of the investment. As such, standing by itself, it was, as I have already concluded, plainly defamatory of Joseph M, as the alleged mastermind behind the bond issue. In its defence to Joseph M's claim, JOL did not set up justification. In other words, it made no claim that anything said by the alleged traumatised bondholder was true. But, as the judge held, the general rule is that the defence of fair comment upon which JOL relied cannot succeed unless the defendant proves that the facts upon which the comment was based were substantially true.

[104] In my view, as the judge found, the implication that the Mechala bond issue was premised on insufficient or misleading information put forward by the company as to the risks involved was decisively falsified by the contents of the prospectus. It is clear from the six extracts from the judgment set out above[110] that this was the importance which the judge attached to the prospectus and I consider that he was plainly right to do so in all the circumstances of this case.

[105] As regards Mr Chen's subsidiary point that it was clear from the structure of the article as a whole that the "bondholder" to whom it referred must have been someone who purchased the bonds on the secondary market, that, as it seems to me, is a point which only arises in hindsight. In my view, it would not at all have been clear to the

[110] At paras [89]-[94]

reasonable reader of the article standing by itself that the reference by the traumatised bondholder to the number of persons who "felt disgruntled and unhappy with the bond issue" was to persons who bought the bonds on the secondary market only. Indeed, the complaint that, given that the Matalon group of companies was not a listed company, "no one really knew what was going on", was clearly broad enough to cover any category of prospective investor.

4. The section 8 point

[106] The full text of section 8 of the Defamation Act as it stood at the date on which the article was published is as follows:

> "In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

[107] I note in passing that, although not in identical language, the substance of section 8 is now to captured in section 21(1) of the Defamation Act, 2013.

[108] At the trial, JOL relied on section 8 to say that the defence of fair comment ought not to fail by reason only that it had failed to prove every allegation of fact in the article, given that the expression of opinion which it contained was fair comment in all the

circumstances. In his general discussion on the ambit of the defence of fair comment, the judge commented on the scope of section 8 in the following terms[111]:

> "… That section prevents the defence of honest comment from failing if the only reason the defence would fail is if the defendant fails to prove the truth of 'every single allegation of fact'. However, this section only applies if the publication consists 'partly of allegations of fact and partly of expressions of opinion'."

[109] However, the judge does not appear to have addressed the section 8 point again in resolving the case. I nevertheless think that it is fair to infer from what the judge said about the factual inaccuracies which, in his view, defeated the defence of fair comment that, had he dealt with it directly, he would have rejected the section 8 point as well.

[110] Before us, Mr Chen submitted[112] that, "if and in so far as Mr. Edwards may have mis-stated any underlying facts, or was found to have done so (e.g. with regard to the Eastern Caribbean or the date of [Joseph M's] taking over as Chairman of Mechala), then [JOL] is entitled to rely on section 8 of the Defamation Act".

[111] Mr Robinson submitted[113] that section 8 is irrelevant in the circumstances of this case, in which fair comment failed because the article consisted of allegations of fact rather than comment. He submitted that the defence also failed in this case, "because

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[111] Ibid, para. [51]
[112] Appellant's Written Submissions, para. 66
[113] Respondent's Written Submissions, para. 38

the fact base of any comment was untrue (not that [JOL] was unable to prove its truth) and the [judge] found specifically that 'honest opinion' can't be based on falsehood".

[112] The learning on the effect of section 8, which is the identical equivalent of section 6 of the now repealed United Kingdom Defamation Act 1952, is relatively sparse[114]. Indeed, neither Mr Chen nor Mr Robinson referred us to any authority on the point. But I have found the summary of the position provided by the learned editors of Carter-Ruck on Libel and Privacy[115] helpful:

> "Where … s 6 does apply, its effect is that failure to prove the truth of every allegation of fact on which the comment is based will not defeat the defence of fair comment provided that the expression of opinion is fair having regard to such facts as are proved. Where therefore the defendant has got an immaterial fact wrong, for example the date or place where an incident was said to have occurred, but in all other respects the facts said to justify the comment are true, the defence will not fail. **Section 6 does not, however, change the common law if the facts on which the comment is based are themselves defamatory**."[116] (My emphasis)

[113] In **Broadway Approvals Ltd and another v Odhams Press Ltd and another**[117], to which Carter-Ruck makes reference, Sellers LJ expressly approved the analysis of the Court of Appeal of New Zealand in **Truth (NZ) Ltd v Avery**[118], in which, discussing the equivalent section in the New Zealand Act, that court held that (i) fair

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[114] Especially now that section 6 has now been repealed in the UK by the Defamation Act, 2013.
[115] Op cit, para. 10.36
[116] Clerk & Lindsell on Torts, 19th edn, para. 23-170 makes the same point: "Where the facts are themselves defamatory they must be justified."
[117] [1965] 2 All ER 523. See also the decision at first instance ([1964] 2 QB 683, 686), where the point is more fully considered by Lawton J.
[118] [1959] NZLR 274

comment is a defence to comment only and not to defamatory statements of fact; (ii) section 6 has not altered the law in this respect; and (iii) where there is any defamatory sting in any of the facts on which the comment is based, these defamatory statements of fact can only be defended by a successful plea of justification.

[114] I accept this analysis. It accordingly seems to me that section 8 permits a defendant to rely on the defence of fair comment, notwithstanding the failure to prove every single statement of fact, provided that those facts which have been misstated, whether positively or by material omission, are not themselves defamatory and the comment is otherwise generally fair.

[115] In this case, as Mr Robinson reminded us at several points in his written and oral submissions, JOL did not plead justification. Nor has it sought seriously to defend several of the factual allegations in the article upon which such comment as it contained was based. Mr Chen's very submission on the effect of section 8 proceeds on the basis that at least two of the so called underlying facts (the Matalon participation in the Eastern Caribbean road show and the date when Joseph M took over as Chairman of Mechala) were misstated[119]. And, as the judge found, there were several others, hardly least of all the suggestion that the Matalons, led by Joseph M, misled the investing public by failing to disclose relevant information in relation to bonds which were intrinsically worthless.

[119] See para. [110] above

[116] In my view, the judge was fully entitled to reject the section 8 point on the basis that such comment was unfair because of the several failures to establish the truth of the underlying facts, some of which were themselves defamatory.

5. The defence of qualified privilege

[117] The judge treated JOL's claim to privilege as one falling within the ambit of '*Reynolds privilege'*, that species of privilege which takes its name from the decision of the House of Lords in **Reynolds**.

[118] The law of defamation has traditionally accorded qualified privilege to statements which, although defamatory, were made pursuant to a public or private interest or duty (whether legal, social or moral) to give certain kinds of information to a person who has a corresponding interest or duty to receive such information[120]. The privilege is qualified because, in a proper case, it can be defeated by proof of malice. Classic instances of statements in this category which have traditionally attracted qualified privilege include information given by a former employer to a prospective employer and complaints made or information given to the police or appropriate authorities regarding suspected crimes[121].

[119] However, the law did not recognise any generic privilege extending to publications in the press on matters of public interest. A strong attempt to change that position failed in **Reynolds**, but the case was a landmark because it extended the scope of qualified

[120] See generally, Street on Torts, 12th edn, pages 555-562
[121] **Reynolds**, per Lord Nicholls at page 616

privilege by recognising that publication of information on a matter of genuine public interest may in a proper case attract the privilege, providing that the publisher acts responsibly. Delivering the leading judgment in the case, Lord Nicholls set out[122] a non-exhaustive list of the various matters which might be taken into account in assessing the question whether the standard of responsible journalism has been met. Among the questions for consideration are (i) the seriousness of the allegation; (ii) the nature of the information, and the extent to which the subject-matter is a matter of public concern; (iii) the source of the information; (iv) the steps taken to verify the information; (v) the status of the information; (vi) the urgency of the matter; (vii) whether comment was sought from the claimant; (viii) whether the article contained the gist of the claimant's side of the story; (ix) the tone of the article; and (x) the circumstances of the publication, including the timing.

[120] But Lord Nicholls was careful to observe that this list is not exhaustive and that the weight to be given to the factors set out in it and any other relevant factors would vary from case to case.

[121] Returning to the question in **Bonnick v Morris & Others**[123] (in a passage to which the judge also referred), Lord Nicholls explained that the notion of responsible journalism lies at the heart of *Reynolds privilege*:

> "Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is

[122] At page 626
[123] At para. 23

> the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of the standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care."

[122] In this case, the judge considered that the defence of qualified privilege failed because, when viewed in the light of the several inaccuracies, omissions and mis-descriptions (such as the characterisation of the bonds as "toxic bonds"), the article as a whole fell short of the standard of responsible journalism which might have been expected of a journalist of Mr Edwards' experience.

[123] Mr Chen submitted that the judge fell into "fundamental error" in concluding that *Reynolds privilege* could not avail JOL in this case. He complained that the judge had taken an unduly restrictive view of the ambit of the privilege and that this was contrary to established authority, including the decision of the House of Lords in **Jameel and others v Wall Street Journal Europe sprl**[124] **('Jameel')**. He also complained that the judge had confused the question whether *Reynolds privilege* was available with the question whether the article was defamatory: the proper approach was to determine, in the first place, whether the words are defamatory, and then, if they are, to turn to the availability of the privilege.

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[124] [2006] UKHL 44

[124] Mr Robinson was content to submit that the judge was right for the reasons he gave. He also invited the court to "deter the unchecked use of journalistic power" which JOL's conduct in this case revealed.

[125] **Jameel** makes it clear that the development of *Reynolds privilege* did not involve a rejection of the traditional duty/interest approach in determining whether an occasion of qualified privilege has arisen. As Lord Bingham explained[125], "Lord Nicholls [in **Reynolds**] considered that matters relating to the nature and source of the information were matters to be taken into account in determining whether the duty-interest test was satisfied or, as he preferred to say 'in a simpler and more direct way, whether the public was entitled to know the particular information' ".

[126] But, as Lord Hoffmann also pointed out[126], the classic duty/interest test might no longer need to be applied in the traditional way, given the development of the *Reynolds privilege*:

> "… The *Reynolds* defence was developed from the traditional form of privilege by a generalisation that in matters of public interest, there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House having made this generalisation, it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist. …"

[125] At para. 30
[126] At para. 50

[127] To generally similar effect, Baroness Hale added this[127]:

> "It should by now be entirely clear that the *Reynolds* defence is a 'different jurisprudential creature' from the law of privilege, although it is a natural development of that law. It springs from the general obligation of the press, media and other publishers to communicate important information upon matters of general public interest and the general right of the public to receive such information. It is not helpful to analyse the particular case in terms of a specific duty and a specific right to know. That can, as experience since *Reynolds* has shown, very easily lead to a narrow and rigid approach which defeats its object. In truth, it is a defence of publication in the public interest."

[128] It is because of these explanations of the revised role of the traditional duty/interest approach to the existence of qualified privilege that Mr Chen complained that the judge took too restrictive a view of *Reynolds privilege* when he said this[128]:

> "[83] The court will analyse the privilege claimed as Reynolds privilege. **The preconditions for traditional privilege are not present. There was no occasion between the newspaper and any narrow class of persons that warranted publication. There was no duty existing between the newspaper and anyone which demanded that discussion**." (My emphasis)

[129] In the light of the dicta in **Jameel** which I have referred to above, I accept that it is not entirely clear what the judge had in mind in this passage. But it seems to me that,

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[127] At para. 146
[128] Judgment, para. [83]

given the judge's next step in his analysis, this is essentially a non-point, a mere quibble over language. For the judge then went on to say this[129]:

> "[84] To get directly to the heart of the matter, the question is, was this responsible journalism? This court does not form the view that it was responsible to publish an [sic] quotation from an alleged bondholder who was complaining about lack of information and it was difficult to get accurate information about the bond thereby creating the impression that somehow important information was kept away from the bondholders when that was not the case. Mr Edwards admitted that he saw the prospectus on the SEC's website. There was no time pressure since this was a reflective piece being written about an event that took place a decade before."

[130] So the judge obviously approached the case on the footing that *Reynolds privilege* could apply and, having considered the requirements of responsible journalism, concluded that JOL was not entitled to claim the privilege.

[131] In determining whether the judge's overall conclusion on this point was correct, I must first consider whether the subject matter of the article gave rise to matters of public interest. While I am rather inclined to doubt that the issues involved were, as JOL pleaded in its defence, "of the highest levels of significance nationally and globally", I am prepared to accept that matters discussed in the article were matters of public interest, in particular to readers with an interest in financial affairs.

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[129] At para. [84]

[132] But the fact is that, as the judge pointed out, there was absolutely no time pressure driving the release of the article in order to meet a deadline in the face of fast-breaking news. Had it been otherwise, it would obviously have been necessary to keep in mind Lord Nicholls' comment in **Reynolds**[130] that, "[n]ews is often a perishable commodity". In this case, to the contrary, the events which the article set out to describe were already several years old. In these circumstances, it is impossible to see why greater care was not taken to get right the various facts which the judge found to have been misstated, particularly since there were more than one source from which an accurate account of the events surrounding the bond issue and its sequel might have been obtained.

[133] The confident assertion by Mr Edwards in his witness statement[131] (mirroring what was stated in the defence[132]) that he did not contact either Joseph M or MM for comment before publishing the article, "since the facts on which [JOL's] article is [sic] based were well known from extensive research by [JOL]", was plainly misplaced in the light of the several inaccuracies which JOL was unable – indeed did not seek - to justify in this litigation. This could well explain why Mr Edwards resiled from this seemingly unequivocal position under extensive cross-examination by Mr Robinson at the trial. He now said[133] that he tried "many times" without success to contact Joseph M for a comment before the article was published. Despite the fact that Mr Edwards' revised position was a clear departure from JOL's pleaded case and his witness statement, which was written at a

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[130] Page 626
[131] See para. [22] above
[132] At para. 8
[133] Notes of Evidence, Core Bundle, Volume II(c), page 673

time when the events were presumably fresher in his mind, the judge made no specific finding on the point. But, however this may be, the fact is that the article went to press without Joseph M/Mechala's side of the story being told.

[134] As the judge pointed out, much of the relevant information was readily available from the Mechala prospectus. Mr Edwards saw the prospectus on the SEC website, though, as he said in cross-examination[134], he read no more than "a brief summary" of it. I have already set out[135] the judge's comments on the significance of the prospectus in the context of this case and there is no need to repeat it here. In common with the judge, I do not suggest "that Mr Edwards should have quoted chapter and verse from the prospectus". But it seems to me that achieving a fair balance must be one of the important aims of responsible journalism. For, as Lord Hobhouse observed in his brief but powerful concurring speech in **Reynolds**[136], although the liberty to communicate and receive information "is of fundamental importance to a free society … it is the communication of information, not misinformation, which is the subject of [that liberty]". Accordingly, in a context in which adverse comment was being made on the inability of prospective purchasers of the Mechala bonds to obtain relevant information on the company's financial health, it seems to me that adherence to the tenets of responsible journalism must necessarily have required that the various cautionary notes sounded in the prospectus be also mentioned. In saying this, I have not lost sight of Mr Chen's contention that the traumatised bondholder referred to in the article was a purchaser in

[134] Notes of Evidence, Core Bundle, Volume II(c), page 697
[135] See para. [94] above
[136] At page 657

the secondary market. The article itself did not say this, of course. But, even if this were so, it would in my view have been helpful – and fair - to make it known to readers that the original bond issue targeted buyers on the primary market, to whom all the relevant information had in fact been fully disclosed in the prospectus.

[135] In considering this matter, like the judge, I have not found it necessary to undertake a point-by-point assessment of how the article matched up against Lord Nicholls' list of indicia of responsible journalism. As Lord Bingham observed in **Jameel**[137], "[Lord Nicholls] intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege". A similar caution was expressed by Lord Hoffmann, who said[138] that Lord Nicholls' "well-known non-exhaustive list of ten matters which should in suitable cases be taken into account ... are not tests which the publication has to pass". To the contrary, as Lord Hope suggested[139], it is the particular publication as a whole which must be looked at, keeping in mind "the whole context".

[136] Looked at that way, I am quite satisfied that the judge was fully entitled to conclude that the article as a whole fell well short of the standards of responsible journalism. But, in any event, even if it were necessary to complete a **Reynolds** scoresheet for the purposes of this assessment, I am quite satisfied from a consideration

[137] At para. 33
[138] At para. 56
[139] At para. 108

of at the very least (i) the seriousness and nature of the allegation; (ii) the source of the information; (iii) the steps taken to verify the information; (iv) the status of the information; (v) the urgency of the matter; (vi) whether comment was sought from Joseph M; (vii) whether the article contained the gist of Joseph M's side of the story; and (viii) the tone of the article, that, as Lord Nicholls put it in **Bonnick v Morris & Others**[140], "the price journalists pay in return for the privilege" was not met in this case.

6. Damages

[137] As has been seen, neither party was happy with the judge's award of $4,379,310.34 for general damages. For its part, JOL contends that if, contrary to its primary case, the article was defamatory, the award of damages ought to have been a purely nominal sum[141]. On the other hand, Joseph M contends that, because the judge failed to take into account the extreme aggravating circumstances and the undisputed malice that motivated publication of the article, the award should be increased to not less than $100,000,000.00.

[138] I cannot avoid setting out in full the judge's discussion on the quantum of damages[142]:

> "[95] The evidence of Joseph M suggests that no loss of reputation seemed to have ensued. There is none of the expected fall out that one would expect to see in this type of case. Mr Chen was able to establish, through cross examination, that in 2000, Joseph M was appointed Chairman of the family company ICD [sic] was still the Chairman at the

[140] At para. 23
[141] Ground (xxv)
[142] Judgment, paras [95]-[99]

time of trial. It was also established that in 2010, two years after the article, Joseph M was conferred with an Order of Distinction, Commander Class for contribution to the private sector and public sector. With [sic] six months of the article, Joseph M was elevated to the presidency of the Private Sector Organisation of Jamaica, an extremely powerful lobby group in Jamaica. In the year before the article was published, that is 2007, Joseph M was appointed to the board of the Development Bank of Jamaica and was still a member of that board.

[96] Joseph M founded St Patrick's Foundation and is now its Honorary Chairman. He is a director of Multicare Foundation which assists the less fortunate. He is also chairman of the Board of Governors of Hillel Academy, a distinguished private school in Jamaica. Two years after the article, 2010, he was appointed to the Board of the International Youth Foundation based in Baltimore in the United States of America.

[97] There was no specific evidence coming [sic] Joseph M indicating how he has shunned or suffered as a result of the article. Nothing has been produced to say that in business circles Joseph M has suffered loss of prestige. This case is unlike that of **Gleaner Company Ltd v Abrahams** (2003) 63 WIR 197 [sic] the jury award of JA$80,700,000.00 was reduced to JA$35,000,000.00. Even this reduced figure was very high by Jamaican standards. It was high then and still high now. Mr Abrahams in that case was universally treated with hostility and contempt. Everyone knew him, so there was nowhere he could go. He was openly called a thief by a shopper in the supermarket and taunted in public. Social invitations ceased. No-one would do business with him. He became depressed, withdrawn and prone to weep. Only a handful of people believed he was innocent' (**[16]**). There is no such equivalent circumstance in the present case. The witnesses who testified on behalf of Joseph M did not say that they lost any respect for him. Mr Bornstein stated that he regarded Joseph M then and now as [an] honest man.

[98] Indeed the objective evidence is that Joseph M as [sic] not lost any board membership since the article. Indeed he has received a national honour and secured the presidency of an important private sector organisation. There is nothing to

> say that even within his family business there has been any loss of face. There is no evidence of loss of stature.
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> [99] Mr Robinson has suggested that this case should attract on award of JA$50m. This case is at the low end of defamation awards. The allegations were serious but from all indications Joseph M is none the worse. The court will use the case of **Seaga v Harper** (2008) 72 WIR 323 because the circumstances there are closer to the present case than those cited by counsel. In that case the award was JA$3,500,000.00 at trial which was reduced on appeal to JA$1,500,000.00. The Consumer Price Index (CPI) at date of Supreme Court Award was 73.95. The latest CPI available is June 2014 which is 215.9. Updating that award to today's value gives JA$4,379,310.34. This is the sum that is awarded. Costs to Joseph M to be agreed or taxed. The second claimant died before the case began. His claim is no longer before the court."

[139] On the appeal, Mr Chen submitted that there was no basis for a substantial award of damages to Joseph M, given that there was no evidence that he had suffered any loss of reputation in consequence of the publication of the article. In these circumstances, Mr Chen repeated the submission that he had made to the judge, which is that a finding on liability in favour of Joseph M should attract no more than nominal damages. In relation to Joseph M's cross-appeal, Mr Chen submitted that the judge had rightly rejected the submission of Joseph M's counsel that damages in the sum of $50,000,000.00 should be awarded.

[140] For his part, Mr Robinson submitted that the judge should have awarded damages in a far more substantial amount. The claim was for defamation of character, not for loss of reputation. The fact that Joseph M may have lost little or no stature was not a bar to damages. Joseph M did in fact suffer some loss of reputation. In addition, the pain and

anguish which the publication of the article had caused him, MM and the Matalon family were also factors to be taken into account. The judge failed to take into account the aggravating factors of JOL's behaviour before and during the litigation, including its refusal to offer either an apology or to make amends. And, as regards the conduct of the litigation, Mr Robinson took us through the various stages of the action, to make the point that JOL's defence of the matter was "disingenuous and insincere" and by that means aggravated the damages.

[141] Mr Robinson's further submission was that the judge also failed to take into account Joseph M's undisputed evidence[143] that the root cause of JOL's conduct was the role played by Joseph M as a director of Ackendown, which was at the time involved in a commercial dispute with Gorstew Ltd, a company connected to JOL. On this basis, Mr Robinson's submission was that, as Joseph M had testified[144], "[JOL's] obvious motive [was] to damage my personal reputation in the eyes of the public …". Taken all together, the factors of[145] "egregious malice and deliberate, perverse and persistent aggravation brings [sic] this case squarely within the category of cases best exemplified by the seminal decision of **Gleaner Co Ltd v Anthony Abrahams**[146] …". In all the circumstances, Mr Robinson submitted, the award for general damages should be at least $100,000,000.00.

[143] Witness Statement of Joseph Matalon, paras 7 and 24
[144] Claimant/Respondent's Skeleton Submissions dated 16 November 2015, para 57
[145] Ibid para 60
[146] [2004] 1 AC 628

[142] In support of his submissions, Mr Robinson cited a number of authorities which I will mention briefly.

[143] In **Rantzen v Mirror Group Newspapers (1986) Ltd and Others**[147], the plaintiff was a well-known television presenter. She was also chairman of a charitable service for sexually abused children. She sued for libel arising out of a newspaper publication which suggested that she had protected from exposure a male teacher at a boys' school, who was himself a sexual abuser, thereby putting the children at the school at risk. The newspaper's defences of justification and fair comment failed and the jury awarded the plaintiff damages in the sum of £250,000.00. On appeal, while considering that the circumstances of the case justified a "very substantial award", the Court of Appeal of England and Wales reduced the jury's award to £110,000.00, on the ground that the sum awarded by the jury was excessive in that it was not proportionate to the damage suffered by the plaintiff. The court considered that, despite the ordeal suffered by the plaintiff as a result of the libellous publication and its aftermath, she continued to enjoy "an extremely successful career as a television presenter … [was] a distinguished and highly respected figure in the world of broadcasting ... [whose] work in combating child abuse has achieved wide acclaim"[148].

[144] However, Mr Robinson also relied on two additional points which emerged from the judgment. First, that in a proper case, the absence of any apology can be taken into

[147] [1994] QB 670
[148] Per Neill LJ at page 696

account in aggravation of damages[149]. And second, that "damages for defamation are intended at least in part as a vindication of the plaintiff to the public"[150].

[145] As the judge's account demonstrates, **The Gleaner Company Ltd and Another v Eric Anthony Abrahams** ('**Abrahams**')[151] was a case in which a substantial award of damages was held to be justified by the nature of the libellous statements complained of and their impact on the claimant. In that case, the defendant newspaper published articles suggesting that, during his time as Minister of Tourism for Jamaica, the claimant had taken bribes from American public relations and advertising agencies in return for awarding them lucrative contracts for promoting tourism in Jamaica. The claimant's action for libel was met by pleas of justification and qualified privilege, but in due course, both defences fell away completely and the matter came down to an assessment of damages.

[146] At some point after it had become clear that there was, as the Board put it[152], "no way of avoiding the assessment", the defendant published an apology, which it would later describe as "full and ample". But, for reasons which it is not now necessary to explore, the trial judge told the jury, without criticism from either this court or the Privy Council, that they were entitled to regard the apology as insincere in all the circumstances.

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[149] At page 683
[150] At page 695
[151] [2003] UKPC 55
[152] At para. 30

[147] The evidence relating to the effect of the libel on the claimant was summarised by Lord Hoffmann in the judgment of the Privy Council in the following way[153]:

> "16. Mr Abrahams was universally treated with hostility and contempt. Everyone knew him, so there was nowhere he could go. He was openly called a thief by a shopper in the supermarket and taunted in public. Social invitations ceased. No one would do business with him. He became depressed, withdrawn and prone to weep. Only a handful of people believed that he was innocent."

[148] Further[154]:

> "32. Mr Abrahams pleaded no special damage, such as loss of particular earnings, but gave evidence in support of an award of general damages which took loss of earnings into account. He said that in 1987 his business as a tourism consultant was prospering and seemed about to take off. He hoped to make real money. Instead, for five years he earned nothing and then had to take up a different occupation.
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> 33. In addition, Mr Abrahams called medical evidence about the effect on him of the ostracism and humiliation he had suffered. He had, for example, been thrown out of the offices of a potential client and searched by his security officers. At one stage he felt unwilling to go out of doors. An eminent psychiatrist deposed that he had suffered both physiological and mental damage; the aggravation of asthma and diabetes, development of obesity through inertia; damage to his self-esteem. …"

[149] After a trial before FA Smith J (as he then was) and a jury, the claimant was awarded general damages of $80,700,000.00 for libel. However, this court considered

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[153] At para. 16
[154] At paras 32 and 33

that this award was excessive and reduced it to $35,000,000.00. The Privy Council took the view that this court was in the best position to determine the right figure required to compensate the claimant in the circumstances of this case and declined to further reduce the award.

[150] In **Percival James Patterson v Cliff Hughes and Nationwide News Network Ltd** ('**Patterson**')[155], the claimant, a former Prime Minister of Jamaica, sued for damages for libel allegedly contained in a radio broadcast. The claim arose out of a news report that the claimant and others had arrived at the Norman Manley International Airport in a private jet in which a sum of approximately US$500,000.00 was found in a diplomatic pouch. Among the things said in the report was that "the authorities were concerned about the source of this money and its intended use and they were acting under the Proceeds of Crime Act". The report also stated or strongly implied that the claimant, despite his retirement as Prime Minister, may still have been in possession of a diplomatic passport. Accordingly, among other things, he complained that the report suggested that he had used his diplomatic privileges in an attempt to shroud his criminal activity. The information conveyed by the report ultimately proved to be erroneous. A purported apology tendered to the claimant by the defendants a few days later was considered by the court to be inappropriate in the circumstances of the case.

[151] In a notable judgment at first instance, P Williams J (as she then was) held that the defence of qualified privilege failed because the report, which she held to be

[155] [2014] JMSC Civ 167

defamatory, fell short of the standards of responsible journalism. On the issue of damages, there was evidence of the high reputation which the claimant had enjoyed in Jamaica, the region and the wider world. The witnesses who testified in his favour spoke to their shock and disbelief at hearing the news report, but confirmed that he continued to be held by them in great esteem nonetheless. There was also evidence that the claimant had received, as P Williams J put it[156], "… awards, recognition and appointments of distinction after the words were published". This led the defendants to submit that any award of damages to the claimant should be accordingly modest. For the claimant on the other hand, in reliance on **Rantzen v Mirror Group Newspapers Ltd**, it was submitted that, notwithstanding the fact that he continued to enjoy a good reputation, a substantial award should still be made, taking into account his status as esteemed public servant, lawyer, political representative and statesman. The claimant also sought an award of aggravated and/or exemplary damages.

[152] P Williams J ruled that no case for either aggravated or exemplary damages was made out, given the criteria laid down by the House of Lords in **Rookes v Barnard and Others** ('**Rookes v Barnard**')[157]. In reliance on **Abrahams**, the claimant submitted, using the $35,000,000.00 awarded by this court and affirmed by the Privy Council in that case as a base, that general damages in the amount of $180,000,000.00 should be awarded. The defendants relied on the decision of this court in **Edward Seaga v Leslie**

[156] At para. 120
[157] [1964] AC 1129

Harper[158] **('Seaga v Harper')**, which was a case in which a Deputy Commissioner of Police was libelled but was able to show very little evidence of any lasting injury to his reputation. The trial judge's award of $3,500,000.00 for general damages was reduced by this court to $1,500,000.00.

[153] In resolving these contrasting positions, P Williams J found value in the following dictum of Panton P in **The Jamaica Observer Ltd v Orville Mattis**[159]:

> "It takes years to build a good name and reputation. On the other hand, it takes only a few reckless lines in a newspaper to destroy or seriously damage that name or reputation. The damage usually remains for a good while. Section 22 of the Constitution gives a right to free speech, but it does not permit defamation of one's good character. When such damage has been proven adequate compensation should follow. …"

[154] With this in mind, P Williams J awarded the claimant general damages in the sum of $12,000,000.00, giving the following as her reasons[160]:

> "In the circumstances I find from the evidence that the damage to the reputation of the claimant was not such as to warrant an award in the nature of the amount awarded in the Abraham's case [sic]. The award suggested by [the defendants] of $250,000.00 is however not sufficient to meet the damage done to the claimant in this case; his persona must be taken into account. The evidence indicated that any damage done faded soon thereafter although the defendants persisted in making remarks and adopted a position which some may view as perpetuating the falsehood of the story for longer than they should. I also must bear in mind that although now considered inappropriate an attempt to

[158] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2004, judgment delivered 20 December 2005
[159] [2011] JMCA Civ 13, para. 17
[160] At para. 135

> apologize was made days later. I find that given the nature of the damage proven, an adequate compensation that should follow is twelve million dollars ($12,000,000.00)."

[155] And finally in relation to the cases cited by Mr Robinson, I will mention the decision of the Court of Appeal of Grenada in **Keith Mitchell v Steve Fassihi and Others**[161]. In that case the publisher of the newspaper 'Grenada Today' reprinted a 'petition' sent by the first-named respondent to Her Majesty, the Queen. As Gordon JA stated in his judgment[162], the 'petition' accused the appellant, at the time of publication the sitting Prime Minister of Grenada, "of using his office to harbour criminals, assist in money laundering, of having his election campaign financed by criminals, of using public monies to set up private family businesses, of appointing known criminals as Honorary Councils [sic] and Ambassadors at large and other defamatory matters".

[156] No defence was filed to the action brought by the appellant, nor was any apology given or retraction made. After judgment in default of defence was entered in favour of the appellant, damages were assessed by the Master, who awarded the appellant general damages of EC$100,000.00, including aggravated damages, but declined to award exemplary damages. With regard to exemplary damages, the Master took the view that the claimant had failed to bring the case within the criteria laid down in **Rookes v Barnard**.

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[161] (unreported), Court of Appeal, Grenada, Supreme Court Civil Appeal No 22/ 2003, judgment delivered 22 November 2004

[162] At para. [2]

[157] The claimant appealed against the Master's decision on the grounds that (i) the award for general damages was insufficient, and (ii) the Master ought to have awarded exemplary damages in the circumstances of the case. The appeal failed on the first ground, but succeeded on the second. I am bound to say, with respect, that the basis of the decision on the exemplary damages point is not entirely clear from the judgment of Gordon JA (with whom Redhead and Archibald JJA (Ag) both agreed). But it appears that the court took the view that it was possible to bring the case within the second category of case identified in **Rookes v Barnard** as fit for an award of exemplary damages, that is, cases in which 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.

[158] A number of points may be taken away from this brief survey of Mr Robinson's authorities. First, loss of reputation has a value which, in an appropriate case, can and should be compensated by, if warranted by the circumstances, a substantial award of damages. Second, it is always necessary to consider the impact that the libellous statement has had on the claimant's life, since, save in cases where an award of exemplary damages is found to be justified, the damages awarded must be proportionate to the damage suffered by the claimant. Third, the outcome in each case will therefore depend on the actual circumstances of the case and the nature of the evidence put forward in support of the claim for damages. Fourth, the absence of an apology, or at any rate a genuine apology, is a relevant factor which may be taken into account as an aggravating feature in assessing damages. Fifth, damages for defamation are to an extent intended to operate as a vindication of the claimant to the public.

[159] To these points, I would add a sixth, which is this. In considering whether the judge's award should be disturbed, I must bear in mind that, although an appellate court may interfere with an award of damages if the trial judge acted on some erroneous principle of law, took into account irrelevant factors, or omitted to take into account relevant factors in arriving at his or her conclusion, the court will generally be cautious before doing so. This court will therefore ordinarily defer to a trial judge's reasoned determination of damages once this can be shown to be, as Buxton LJ put it in **Gur v Avrupa Newspapers Ltd and Another**[163], "… well within the ambit of her [or his] proper judgement, looking at all the factors in [the] case". I note, however, the observation by Harrison JA (as he then was) in **Seaga v Harper**[164] that this court will "more readily" disturb an award made after a trial by judge alone than it would an award made after a trial by jury.

[160] Mr Chen submitted that there was no evidence that Joseph M suffered any serious loss of reputation as a result of the libel. And it is clear from the judge's unchallenged findings on the point that this was so. However, there can be no doubt that Joseph M was seriously libelled in the article. Particularly egregious, in my view, was the implication that Joseph M, his father and the rest of his family, having deliberately omitted to make full and fair disclosure of the risks associated with investing in the bonds (which were "toxic"), walked away with "US$100m in their pockets", paying bondholders "a paltry 47 cents on the dollar to buy back the bonds". This was, as the judge found, a serious

[163] [2008] EWCA Civ 594, para. [38]
[164] At page 33

misrepresentation of the facts, especially since, as the evidence showed, in addition to the fact that all the risks were fully disclosed, the proceeds of the bond issue were substantially used to replace Mechala's high cost debt: of the total net proceeds of the bond issue of US$94,800,000.00, some US$80,500,000.00 (or approximately 85%) was applied to this purpose[165].

[161] But JOL, finding itself completely unable to justify the libellous statements in the article, proffered no apology of any kind at any point in the proceedings. Indeed, its first response to the intimation of a claim from Joseph M was to reject it out of hand and to offer space in its newspaper to allow him "to publish his perspective" on the matter. That was, as Joseph M obviously considered it to be, too little too late. Thereafter, JOL defended the claim vigorously, giving, as the arguments put forward in this appeal have demonstrated, absolutely no quarter at any stage.

[162] I therefore think that the idea of an award of nominal damages floated by Mr Chen is absolutely out of the question.

[163] On the cross-appeal, Mr Robinson complains that the judge's award of $4,379,310.34 was way too low. He argued that, at the very minimum, the award of $12,000,000.00 in **Patterson**, in which the defendants had also submitted that the claimant had suffered no loss of reputation as a result of the libel, should now be taken as the "low end" for libel awards. But this case, Mr Robinson submitted, taking the

[165] See para. [31] above

$35,000,000.00 awarded in **Abrahams** as the starting point, should have attracted an award of not less than $100,000,000.00.

[164] On this aspect of the matter, hardly surprisingly, Mr Chen submitted that the judge's award of $4,379,310.34 ought not to be disturbed, on the basis that there was nothing to indicate that he had erred in assessing damages in this case at the lower end of the scale.

[165] As the judge found, there was no evidence in this case of any permanent impairment to Joseph M's reputation as a result of the libellous statements in the article. Indeed, as the evidence summarised by the judge amply demonstrated, his stature as a well-respected business leader continued to grow and, by the time of the trial, he had attained a level of eminence in the business and wider community which very few persons might expect to approach in any lifetime. Further afield, Mr Bornstein, as the judge also pointed out, who had been on the opposite side from Joseph M/Mechala in the buy-back negotiations, continued to regard Joseph M as an honest man[166]. Indeed, in answer to Mr Chen under cross-examination, Mr Bornstein, although careful to point out that he did not live in Jamaica, stated[167] his impression that the Matalons were regarded as "well respected business people in Jamaica", both at the time of the publication of the article and at trial.

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[166] Judgment, para. [97]
[167] Notes of Evidence, Core Bundle II(b), page 344

[166] Nor was there any evidence of anything remotely approaching the kind of personal devastation, from either a health or financial point of view, which the claimant suffered in **Abrahams**. I therefore agree with the judge that **Abrahams** is readily distinguishable. As P Williams J put it in **Patterson**, distinguishing **Abrahams** on the same basis, "the evidence [of] the damage to the reputation of the claimant was not such as to warrant an award in the nature of the amount awarded in the [**Abrahams**] case".

[167] In arriving at the figure of $4,379,310.34, the judge treated the award of $1,500,000.00 in **Seaga v Harper** as a suitable comparator. The claimant in that case was a Deputy Commissioner of Police and at the material time the defendant was a Member of Parliament and the Leader of the Opposition. The defendant suggested in a public speech that the claimant was unable to perform his duties as a senior police officer with impartiality, was motivated by political bias and partisanship and was therefore unfit to hold the high office of Commissioner of Police, in which a vacancy was shortly to arise. So this was also a case of a serious, even egregious libel, which the defendant did not seek to justify at any stage. The defence of qualified privilege failed at the trial and the claimant's evidence[168] was that he found the defendant's allegation "wounding", and that it caused him "severe embarrassment and distress". But there was no evidence that the claimant suffered in any way in his position as a Deputy Commissioner of Police. To this extent, therefore, the case was obviously comparable to this case.

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[168] **Leslie Harper v Edward Seaga**, (unreported), Supreme Court, Jamaica, Suit No CLH 138/1996, judgment delivered 11 December 2003, page 30

[168] The trial judge in **Harper v Seaga**[169] awarded $3,500,000.00 for general damages. In arriving at this amount, the trial judge explicitly took into account as an aggravating factor, which he included as part of the award, "the publicity given to the speech, as well as the way in which the defence was conducted"[170]. But this court reduced the award to $1,500,000.00, on the sole basis that the judge's award included an element of aggravated damages which the claimant had neither pleaded nor particularised. Harrison JA also observed[171] that "[t]he aspect of 'the conduct of the defence in the case' considered by the learned trial judge would not have been evident when pleading".

[169] In this case, Joseph M expressly asked for aggravated damages in the particulars of claim. Although no particulars were provided, the pre-trial memorandum[172], the skeletal opening submissions[173] and the skeletal closing submissions[174] filed on Joseph M's behalf maintained his stance that he was entitled to aggravated damages.

[170] So there can be no doubt that the question of Joseph M's entitlement to aggravated damages was a live issue in the case. But as will have been seen from the extract from the judgment dealing with damages reproduced above, the judge made no mention of aggravated damages at all. Rather, he dealt with the issue of damages purely on the footing of whether Joseph M had suffered any loss of reputation as a result of the publication of the libel. In my respectful view, this amounted to a failure by the court to

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[169] Brooks J, as he then was
[170] At page 34
[171] At page 34
[172] Claimant's Pre-Trial Memorandum dated and filed 9 October 2012
[173] Claimant's Skeletal Opening Submissions dated and filed 20 December 2012
[174] Claimant's Skeletal Closing Submissions dated and filed 5 April 2013

address an issue which was clearly before it and thereby to give consideration to a relevant factor in assessing the damages to which Joseph M was entitled. In these circumstances, therefore, it is in my view open to this court to look afresh at this aspect of the matter.

[171] As the Privy Council confirmed in **Abrahams**, the function of aggravated damages is essentially compensatory[175]. And in his influential judgment in **John v MGN Ltd**[176], after describing in general terms the court's approach to the award of damages for defamation, Sir Thomas Bingham MR pointed out that:

> "It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way."

[172] Mr Robinson drew attention to a number of features of the instant case which caused additional injury to Joseph M. In the pre-trial memorandum, reference was made to the agreed facts that JOL did not (i) seek "any response/comment/clarification" in relation to the article from either Joseph M or MM at any time before publishing the article; and (ii) publish either a retraction or an apology. In the skeletal opening submissions, reference was made to JOL's conduct of the proceedings, including "refusing

[175] See per Lord Hoffmann at paras 41-42, citing the judgment of Lord Devlin in **Rookes v Barnard**, at page 1228
[176] [1997] QB 586, 607-608

to disclose the name of the author of the article until forced to do so by the Court"[177]. In the skeletal closing submissions, a more extensive list of aggravating factors was provided[178], including what I will call 'the Ackendown factor'; defending the action "on spurious grounds to delay recompense"; and "[f]ailing to defend on justification but defending on fair comment and qualified privilege which were doomed to fail".

[173] On his feet before us, Mr Robinson highlighted a number of additional factors which, he submitted, also justified an award of aggravated damages. Among them, he pointed out the contrast between, on the one hand, the answer given by JOL to the request for information by Joseph M and MM, in which it was stated that the reference in the article to the bonds being touted by the family in the Eastern Caribbean "does not literally mean the Matalons themselves but rather their representatives and those acting on their behalf"[179]; and, on the other hand, Mr Edwards' evidence under cross-examination, in which he was at pains to explain that what he meant was that it was the QIBs who had tried to sell the bonds on the secondary market in the Eastern Caribbean, and not any member or representative of the Matalon family[180]. Mr Robinson's comment on this contrast was that it demonstrated that the conduct of the defence was disingenuous and insincere, and should therefore aggravate the damages.

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[177] Claimant's Skeletal Opening Submissions, para. 15. See also the Order of Hibbert J dated 22 November 2010

[178] At para. 36

[179] See JOL's Response to Request for Information Pursuant to CPR Part 34 dated 31 January 2011, page 2

[180] Notes of Evidence, Core Bundle, Volume II(c), pages 2254-2273

[174] Turning to the conduct of the appeal, Mr Robinson pointed out that this appeal was filed in September 2014. However, no steps were taken to prosecute it for over a year and it was Joseph M who, on an application to this court, obtained an order on 16 July 2015 for the matter to be expedited[181]. In all the circumstances, it was submitted, JOL had also contributed to the delay in prosecuting the appeal.

[175] On this aspect of the matter, Mr Chen submitted that the 'hurt' suggested by Mr Robinson was not such as to aggravate the damages and reiterated that the judge's award should not be disturbed.

[176] On the question of aggravated damages, I will deal first with what I have described as 'the Ackendown factor'. This was, in Mr Robinson's submission, the source of the malice which motivated publication of the article. In considering this aspect of the matter, I note that the suggestion that the Ackendown factor was the true source of JOL's actions was not part of Joseph M's pleaded case. It therefore made its first appearance in his witness statement. The fact that there was no response to it from JOL attracted severe criticism from Mr Robinson, who pointed out that, despite Joseph M's specific reference to Mr Gordon 'Butch' Stewart and his common ownership interest in both JOL and Gorstew, Mr Stewart "did not elect to testify and deny that [JOL's] character assassination was an unethical retaliation in support of him and his associated company".

[177] But this was an action brought by Joseph M in his personal capacity against JOL in respect of libellous statements allegedly made in one of its publications. Neither

[181] See order of McDonald-Bishop JA (Ag) (as she then was), made on 16 July 2015

Ackendown nor Gorstew/Mr Stewart was a party to the action and no issue arose on the pleadings in relation to either of them. Beyond Joseph M's statement[182] that the dispute had to do with "the quantum of rental to be paid to Ackendown related to the operations of the Sandals Whitehouse Hotel", nothing is known about the nature of the alleged commercial dispute between the two companies. Further, any allegation of malice or motive in this case would require to be made out against JOL, and not against Gorstew or Mr Stewart, unless it could be shown that either or both of them acted on behalf of JOL. On the face of it, therefore, no part of this litigation concerned either Ackendown or Gorstew/Mr Stewart. And, in my view, Joseph M's conviction that the Ackendown factor provided the true motivation for publication of the libellous article remained at the end of the day, even if unanswered, no more than pure speculation.

[178] In these circumstances, I am unable to see what weight, if any, the judge could possibly have given to either Joseph M's assertion of the cause of JOL's animus towards him, or the fact that Mr Stewart was not called as a witness in the case. This may well be the reason why the judge did not find it necessary to refer to the Ackendown factor at all, despite the fact that Mr Robinson addressed him on it in much the same terms as he did in his submissions before us.

[179] But, save for the Ackendown factor which I discount entirely, there was in my view more than sufficient material before the judge for him to have considered including an element of aggravated damages in the award which he ultimately made. Without taking

[182] Witness Statement, para. 3

them all or listing them in any particular order of priority, there were (i) JOL's failure before publication of the article to seek any response, comment or clarification from either Joseph M or MM at any time before publishing the article; (ii) JOL's failure to offer any apology, even when it became clear from the information contained in the prospectus that several of the statements in the article could not be justified[183]; and (iii) JOL's conduct of the proceedings.

[180] In this last category, I have in mind in particular JOL's progressive retreat from the bold assertion in the article that, "the family went on a road show to sell [the bonds] in the Eastern Caribbean"; through its later clarification in answer to the request for information that the reference to "the family" was not to the Matalons themselves, but to persons acting on their behalf; and then to Mr Edwards' complete capitulation in cross-examination, when he accepted that neither the Matalons themselves nor anyone acting on their behalf had anything to do with the sale of the bonds on the secondary market to persons in the Eastern Caribbean. All of this now falls to be viewed in the light of the judge's finding that JOL had produced no evidence of a Mechala bonds road show of any kind in the Eastern Caribbean. This sorry progression plainly reflects, in my view, as Mr Robinson submitted, on the sincerity of the positions taken by JOL in its defence to the action.

[181] Under the heading conduct of the action, other matters which might also be mentioned include JOL's failure to answer requests for information when asked to do so.

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[183] See Joseph M's Witness Statement, paras 32 and 35

But, on the other hand, I must leave out of account entirely Mr Robinson's invitation to us to treat JOL's tardiness in moving the appeal along after filing it as a further aggravating factor, since that was a factor which obviously came into play after judgment was given in the case.

[182] Joseph M's evidence[184] was that, rather than offering an apology or to make amends in any way, JOL, through its managing director, Mr Ed Khoury, offered to interview him and to publish his side of the story. According to Joseph M, given that the clear import of the article was to accuse him of dishonesty, this offer "… only served to aggravate me and my hurt about the entire matter …".

[183] The assessment of damages in defamation cases, perhaps even more so than in personal injury cases, is an imprecise science, not always capable of mathematical precision. So, judges must do the best that they can, keeping in mind the circumstances of the particular case under consideration and past awards in similar cases. But, in doing so, it is always necessary to remember Sir Thomas Bingham MR's cautionary note in **John v MGN Ltd**[185], that "comparison with other awards is very difficult because the circumstances of each libel are almost bound to be unique".

[184] There is no question that the claim for aggravated damages was properly pleaded in this case. There was also some material upon which an award of aggravated damages might have been grounded. It seems to me that, had the judge considered these matters,

[184] Witness Statement, para. 33
[185] At page 612

he might well have approached the value of **Harper v Seaga** as a precedent differently, by taking into account, rather than excluding, the amount which the trial judge in that case included in the award as aggravated damages. As has been seen, this court set aside that aspect of the trial judge's award in that case solely on the basis that aggravated damages were not pleaded, but otherwise expressed no disapproval of the award in principle.

[185] In **Harper v Seaga**, the trial judge considered the aggravating factors to be the publicity given to the defendant's speech, as well as the way in which the defence was conducted. While the judge took the view that the circumstances of **Harper v Seaga** provided the most ready comparison to this case, it is probable that he did not consider the aggravating factors, since he did not approach the assessment exercise with that aspect of the case in mind at all. Had he done so, it seems to me that he could well have considered that the aggravating factors in this case would have been at least equal to those in **Harper v Seaga**. On this basis, I would therefore consider the total, unreduced, award of $3,500,000.00 which the trial judge made in that case as an appropriate comparator for the purpose of assessing the damages in this case. Applying the same formula as that used by the judge in this case[186], $3,500,000.00 as at the date **Harper v Seaga** was decided[187] would equate to an award of $10,218,390.08 as at the date of

[186] Consumer Price Index (CPI) at date of award in **Harper v Seaga** was 73.95; CPI at June 2014 is 215.9. The **Harper v Seaga** award of $3,500,000 updated as at the date of judgment is 215.9/73.95x$3,500,000 = $10,218,390.08

[187] 11 December 2003

the judge's judgment. For ease of calculation, I would round this figure up to $10,200,000.00.

[186] Finally, a brief word about the exemplary damages which Joseph M also claimed. As is well known, exemplary damages differ from ordinary damages in that, while the object of damages is generally speaking to compensate, the explicit aim of exemplary damages is to punish and deter[188]. In **Rookes v Barnard**[189], the House of Lords famously confined the entitlement to exemplary damages to cases (i) of oppressive, arbitrary or unconstitutional action by the servants of the government; (ii) in which 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; and (iii) in which exemplary damages are expressly authorised by statute.

[187] **Rookes v Barnard** has been routinely followed and applied in Jamaica. One of the best known of the earlier cases is **Douglas v Bowen**[190], in which this court held by a majority[191] that the **Rookes v Barnard** categorisation of the kinds of cases in which exemplary damages might be awarded should be applied in Jamaica.

[188] In this case, Joseph M's pleaded basis for an award of exemplary damages was that the case fell within the second category, that is, that JOL published the words of the article -

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[188] See **Rookes v Barnard**, per Lord Devlin at page 1221
[189] Ibid, pages 1226-1227
[190] (1974) 22 WIR 333
[191] Luckhoo P (Ag) and Edun JA, Graham-Perkins JA dissenting

> "… with a reckless disregard as to whether or not they were libelous and with the expectation that the salacious nature of the Article would help to increase the circulation of [JOL's] newspaper and, accordingly, its sales and profits in excess of any amount that could be awarded to [Joseph M and MM] in a simple suit for damages."

[189] However, no evidence was placed before the judge to ground this claim and it may be for that reason that nothing at all was said about it in the judgment. Mr Robinson submitted that an award of exemplary damages should have been made in this case. Urging us not to be "shackled" by **Rookes v Barnard**, he submitted that the law must evolve in the light of the nature of the changes which have since taken place in Jamaican society, and that **Douglas v Bowen** may also need to be revisited today. Reliance was also placed on the case of **Mitchell v Fassihi et al**, and to Gordon JA's observation in that case[192] that "the narrow requirement that a defendant must contemplate a profit exceeding the likely damages to be assessed against him has been considerably widened".

[190] Gordon JA based his view on the decision of the Privy Council in **A v Bottrill**[193], an appeal from the Court of Appeal of New Zealand. But I think that, for present purposes, it is necessary to read that decision with caution because, as Lord Nicholls pointed out at the outset of his judgment for the majority[194] –

> "Moderate awards of exemplary damages in appropriate cases are an established feature of the law of New Zealand. The

[192] At para. [16]
[193] [2002] UKPC 44
[194] At para. [3]

> Parliament of New Zealand has confirmed the existence of the court's jurisdiction to award exemplary damages, and to do so in cases of accidental personal injury: see section 396 of the Accident Insurance Act 1998. The court exercises this power with considerable restraint. Awards are reserved for 'truly outrageous conduct' which cannot be adequately punished in any other way: see **Dunlea v Attorney-General** [2000] 3 NZLR 136."

[191] So, in that case, the Board was not concerned, as **Rookes v Barnard** was (and, indeed, this case is) with the category of cases in which exemplary damages could be awarded: both by common law and statute the award of such damages was permitted in appropriate cases in New Zealand. It seems to me that the fact that this was so is confirmed by Lord Nicholls' ironic comparison[195] of the situation in that and other common law jurisdictions to that of "England, still toiling in the chains of **Rookes v Barnard**".

[192] And this, in my view, for better or for worse, is still the situation in Jamaica. In my judgment, therefore, there was no basis in this case for an award of exemplary damages and I agree with Mr Chen that the judge was right to make no award under this head.

Conclusions and disposal

[193] For all the reasons which I have attempted to give, I therefore consider that, firstly, JOL's appeal on liability should be dismissed because the judge was correct to conclude that the defences of fair comment and qualified privilege could not succeed in the circumstances of this case. The judge was also correct to reject JOL's contention that, in any event, Joseph M should be awarded purely nominal damages or some lesser sum

[195] At para. [41]

than the $4,379,310.34 which was in fact awarded. Secondly, Joseph M's cross-appeal should be allowed and the sum awarded to him increased to $10,200,000.00, because, in arriving at his conclusion on damages, the judge failed to take into account the claim for aggravated damages.

[194] I would therefore make the following orders:

1. Appeal dismissed.

2. Cross-appeal allowed and award of general damages of $4,379,310.34 made in the court below set aside. In its stead, this court substitutes an award of general damages in the sum of $10,200,000.00.

3. Costs of the appeal and the cross-appeal to the respondent, such costs to be taxed if not agreed.

An apology

[195] I cannot possibly end this judgment without, on behalf of the court, offering profuse apologies to the parties for the long delay in delivering it. While some of the reasons for such delays are well known, I do not advance any of them as an excuse, since I am painfully aware that they can in no way lessen the great inconvenience which the parties inevitably suffer in a case such as this.

PHILLIPS JA

[196] I have read in draft the judgment of the learned President. I agree with his reasoning and conclusion. There is nothing that I can usefully add.

P WILLIAMS JA (AG)

[197] I too have read the draft judgment of the learned President and agree with his reasoning and conclusion.

MORRISON P

ORDER

1. Appeal dismissed.

2. Cross-appeal allowed and award of general damages of $4,379,310.34 made in the court below set aside. In its stead, this court substitutes an award of general damages in the sum of $10,200,000.00.

3. Costs of the appeal and the cross-appeal to the respondent, such costs to be taxed if not agreed.

APPENDIX A

Grounds of Appeal

(i) The Judge's conclusions were based on a misunderstanding of the expression '*toxic bonds'*. This misunderstanding was fundamental and applied throughout his decision. As a result the decision ought to be set aside.

(ii) The Judge found (see e.g. paragraph [24] – [26], [80] and [89] of the judgment) that the expression '*toxic bonds*' meant '*bonds which the issuers knew from the outset were totally worthless as distinct from a bond issued in good faith that runs into difficulty because of poor performance by the bond issuer*'.

(iii) This was and is the natural and ordinary meaning of the words. The expression *'toxic bonds'* means only that the bonds proved to be worth much less than their face value, and so became a liability rather than an asset. This is the natural and ordinary and the generally understood meaning of the words, as the Judge ought to have found. In the circumstances of this case the expression '*toxic bonds*' was an entirely accurate description.

(iv) The learned Judge thus fell into error.

(v) Even if the expression could bear the meaning found by the Judge, this could not be understood as the only meaning of the words. They were at least ambiguous. The expression could reasonably have been understood only to mean bonds that proved to be worth less than their face value. The defence of fair comment should therefore have succeeded, on the principles explained in **Bonnick v Morris** [2002] UKPC 31, [2003] 1 AC 300, at [17] – [25].

(vi) The learned Judge in fact accepted that the expression '*toxic bonds*' was ambiguous, and/or could have a different meaning than that suggested by the [Respondent]. In paragraph [80] of the judgment he found: *'While it is true that the expression toxic bonds, at the time it was used, was not defined by scholars…'* In paragraph [89], he referred to: '*the meaning which it acquired over time'*. In the circumstances, and without prejudice to the Appellant's case that the natural and ordinary meaning of the words is clear and not

defamatory, the Judge should have followed his own finding that the expression '*at the time it was used, was not defined'*. He should not have found that the words meant that the [Respondent] and/or Mechala knew from the outset that the bonds were '*dodgy or worthless*'.

(vii) The judge further erred by repeated and misplaced emphasis on the fact that Mechala's prospectus for the bond issue had included warnings, and complied with regulatory requirements. He appears to have thought that this was equivalent to full disclosure to investors, and that it put Mechala beyond criticism or reproach. However this was not so, and in any event was not the point. The article did not accuse Mechala or the [Respondent] of failure to indicate risk or failure to comply with regulatory obligations.

(viii) The Judge further misunderstood what had happened as a result of the scheme of arrangement when the bond issue had failed and were re-valued at US$0.47 cents per dollar. He said (see paragraphs [22], [23] of the judgment) that the failure of the bond issue and subsequent scheme of arrangement meant that the Matalon family '*suffered like the other bondholder. There is no evidence to suggest that the Matalon family bond holders came out better off than the other investors. They were in fact worse off because they put up additional money and lost the value of their bonds*.'

(ix) This finding was wrong. But it plainly coloured the Judge's attitude to the Claim and his consideration of the article. In fact the evidence was that the Matalon family took shares for the money they introduced at the time of the tender so they increased their equity position in the revamped entities and so benefitted from the huge discount on the bonds, as shareholders. Their position was not worse but better.

(x) This error was generally typical of the Judge's apparent inclination to accept the [Respondent's] position, which was generally self-serving. He did not approach the article from the viewpoint of the ordinary reader as explained in e.g. **Lewis v Daily Telegraph** [1964] AC 234.

(xi) The statement quoted in paragraphs [73] and [74] of the judgment, '*The Matalons in effect used other people's money to capitalize their*

businesses, eradicate debt and because of poor performances of their companies were unable to make good", was an accurate description of the bond issue and refinancing exercise by Mechala. In context its meaning was clear and unexceptionable. It was comment, and certainly not defamatory.

(xii) The statement by a disappointed bondholder, quoted in the article and relied on by the Judge at paragraphs [73] – [74], was a further example of comment; which the person concerned was entitled to make, and the Appellant was entitled to publish under ordinary accepted principles. The quotation was: *'Looking back there (were) a number of us that felt disgruntled and unhappy with the bond issue. One of the problems with that bond offering was the Matalon group of companies are private, not listed, so no one really knew what was going on. We had to take their word for it and the picture they painted was rosier that really was the case*.' This was clearly comment, and the facts upon which the comment was based were clearly correct (and hardly capable of dispute). The picture painted by Mechala when the bonds were issued was plainly rosier that was the case, because the value of the bonds diminished below their face value.

(xiii) The Judge's finding (see paragraph [37] of the judgment) that the statement in the article `*Many Jamaicans were not inordinately impressed with the Matalon bonds and so the family went on a road show to sell them in the Eastern Caribbean'* is disputed as being contrary to the evidence. Mr. Edwards' evidence was that this had taken place.

(xiv) Alternatively, the statement was not capable of and/or it did not have a defamatory meaning.

(xv) Alternatively, the statement was protected by section 8 of the Defamation Act: "*In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not provided if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved*."

(xvi) Section 8 of the Defamation Act further operated to protect any mistake as to the date upon which the [Respondent] took over responsibilities at Mechala. The [Respondent's] case in this regard was summarized by the Judge a paragraph [27]] of the judgment: '*Joseph M complained that paragraphs 4 – 6 omitted the correct time sequence. While he accepts that paragraph 4 is correct, the next two paragraphs and indeed the whole article, failed to make the point that (a) Joseph A did not step down until 2000, well after the bonds were issued and the pay-back to the bondholder made. The paragraphs created the impression that Joseph A was pushed aside and Joseph M took over, in a sort of putsch. The article created the impression that this coup d'état was necessary in order to launch the rescue of the Matalon – owned companies. Having deposed Joseph A, Joseph M then set about resolving the debt-crisis for the group of companies. Paragraph 6 was said to be chronologically inaccurate because ICD was not formed until after the bond pay-back*.'

(Emphasis added). However this part of the [Respondent's] case was not established and the Judge made no such finding as to the meaning of the article.

(xvii) Generally, the Particulars of Claim alleged that the Appellant's article had categorized the bond issue as '*an insincere and disingenuous plot to obtained money from investors'* and to use that money '*for the personal benefit of the [Respondent]*'. This complaint, and the various particulars alleged in the Particulars of Claim at paragraphs 10 (a) – (i), was not remotely established.

(xviii) The Judge's finding (see paragraph [77] of the judgment) that he expression '*in their pockets*' was defamatory was wrong, an ought not to be accepted. The natural and ordinary meaning of the words is plainly not defamatory. Nor were they defamatory in the context of the article. The section of the article referred to by the Judge did not '*clearly suggest or imply that some form of sleight of hand was afoot*.' Nor were these words, or the relevant section of the article, '*capable of suggesting that Joseph M (the [Respondent]) engaged in sharp if not dishonest practice*.'

(xix) This section of the article was plainly comment, and went no further that the quotation by the late Morris Cargill, which the article also set out in full, at paragraphs 26 – 29. The Appellant will refer to this

quotation at the hearing of the appeal. It was not the subject any complaint by the [Respondent]. It was protected by the principles of fair comment. In the circumstances, the findings against the Appellant, were wrong. They were equally protected.

(xx) The Judge was wrong in any event to break down the article into sections, as he did (e.g. in paragraph [77] of the judgment). In spite of statements to the contrary he did not consider the article as a whole; or the effect the whole of the article would have on an ordinary reader. Instead he analysed it in parts and from the [Respondent's] point of view, and found strained meanings that were not consistent with the natural and ordinary meaning of the words.

(xxi) There was no basis for the Judge's finding in paragraph [92] of the judgment that the reader of the article would conclude '*that Joseph M was part of a scheme to sell bonds without giving full and accurate information. They would conclude that Joseph M was associated with selling bonds known to Joseph M to be dodgy but he sold them nonetheless*.' These meanings are not present in the words of the article, which cannot be stretched in this way.

(xxii) With respect to the defence of fair comment, the learned Judge fell into the trap of allowing his disagreement with Mr. Edwards' opinions to blind him to the fact that he was perfectly entitled to hold and publish them, as was the Appellant. That is the purpose of the defence of fair comment. The Judge said (at paragraph [91] of the judgment):

> '*Having read Mr. Edwards' article and the exhibits in the case it is difficult to appreciate the point Mr. Edwards was making. Mechala was not a financial institution. It did not collaterise any debt obligations and sold them as bonds. In light of its detailed prospectus outlining losses and its heavy indebtedness and the risk factors highlighted it really is difficult to see how anyone could conclude that there was an overestimation of potential earnings by Mechala or fail to get a sense of the true worth of the company's value. The risk of inadequate performance was there for all to see*.'

(xxiii) With respect, the learned Judge's disagreement with Mr. Edwards, and his view that Mr. Edwards was wrong, was not relevant. For the purposes of the defence of fair comment, the fact that an opinion is

exaggerated, prejudiced, obstinate or wrong and the judge (or jury) totally disagrees with it, is not a bar to the defence succeeding. It is only necessary for the reader to be able to recognize the material as being the opinion of the writer. In the present case, the whole of the article was obviously comment on past events. The bond issue took place in 1996/1997 and the scheme of arrangement took place in 2000/2001.

(xxiv) Mr. Edwards did not mis-state any substantial underlying facts. Contrary to the Judge's view, the history of events made it manifestly obvious that Mechala had overestimated its potential earnings when bonds were issued. Plainly the investors did not get a sense of the true worth of the company's prospects, or they would not have purchased the bonds. All of this was open to comment by Mr. Edwards and the Appellant. The defence of fair comment should have succeeded.

(xxv) Quantum. The Judge accepted that the [Respondent] had sustained no loss of reputation, or indeed any appreciable loss at all (see paragraphs [94] – [99] of the judgment. Therefore if, contrary to the Appellant's case, the article was defamatory, the award of damages ought to have been a purely nominal sum.