

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE BROWN JA
THE HON MR JUSTICE LAING JA**

SUPREME COURT CIVIL APPEAL NO COA2020CV00070

BETWEEN	RADIO JAMAICA LIMITED	APPELLANT
AND	JOHN W MORRIS	RESPONDENT

**Miss Stephanie Williams and Vasheney Headlam instructed by Henlin Gibson
Henlin for the appellant**

Ms Jean Williams for the respondent

24, 25 February 2025 and 2 October 2026

**Civil appeal – Defamation – Libel – Radio broadcast concerning police raid –
Whether trial judge erred in determining natural and ordinary meaning and
pleaded meaning of the broadcast– Whether learned judge erred in rejecting
defences of justification and qualified privilege based on responsible
journalism – Defamation Act, 1963, section 7**

**Damages – Whether award excessive – Principles governing appellate
interference with award – Interest on damages – Whether award of interest
on damages resulted in double compensation – Law Reform (Miscellaneous
Provisions) Act, section 3**

**Costs – Special costs certificate – Whether learned judge erred in granting
certificate – Civil Procedure Rules, 2002, rule 64.12**

STRAW JA

[1] This is an appeal by Radio Jamaica Limited, the appellant, against the decision of Daye J (‘the learned judge’) given on 19 August 2020, by which the respondent, Mr John Morris, was awarded damages of \$9,500,000.00 together with interest and costs, on his claim against the appellant and one of its journalists, Latoya Johnson, for an alleged

libellous publication. The appellant challenges the learned judge's findings on both liability and damages.

Background

[2] By his claim filed on 20 December 2012, the respondent alleged that on 17 December 2009, the appellant published a news item during the 5:00 pm newscast on its radio station ('RJR'), entitled "Senior Cop being probed in lottery scam". The respondent was then a retired Superintendent of Police and businessman residing in the parish of Saint James. During the newscast, details were given of a raid that was being carried out by the police at the respondent's offices, and the respondent was named in the report. The respondent contended that the newscast contained defamatory words, as a result of which, his reputation was severely injured, and he suffered loss and damage.

[3] At the time of the publication, the respondent operated a company under his name, "John W Morris and Associates Limited". The company was in the business of private investigations, background checks, and surveillance exercises. The respondent did not dispute that, on 17 December 2009, the police conducted a search of his business place. However, the respondent averred that at no point in time was he told that the search related to the lottery scam. He also categorically denied being involved in the lottery scam.

[4] It was the respondent's contention that the 5:00 pm newscast enjoys wide listenership, is broadcast internationally and is accessible by way of the internet. Further:

"14. That the newscast suggested that [the respondent] was involved in criminal activities that transcend international borders.

15. That the newscast suggested that [the respondent] was involved in criminal activities and that he was guilty of criminal activities."

[5] In his amended particulars of claim, the respondent gave details of his over 36 years of service with the Jamaica Constabulary Force ('JCF'), including his professional experience, training, and awards received. These were detailed with a view to supporting the nature and extent of his reputation.

[6] On 20 December 2009, the appellant issued an apology to the respondent, and this was broadcast on its network. However, the appellant failed to respond to two letters written on behalf of the respondent by his attorneys.

[7] It was against this backdrop that the respondent claimed general damages together with aggravated and/or exemplary damages for libel.

[8] The appellant disputed the claim and contended that it did not allege that the respondent was involved in the lottery scam. Neither did the newscast give rise to the suggestions contended for by the respondent. Rather, the fact of the search suggested that the respondent was suspected of being involved in criminal activities. It was averred that, as the searches were conducted pursuant to warrants issued under the Dangerous Drugs Act, Forgery Act, Unlawful Possession of Property Act and Firearms Act, the imputation that there was a suspicion of involvement in criminal activities was true.

[9] Reliance was also placed on the defence of qualified privilege in the following terms:

"a. [The appellant] says that [the respondent] was the subject of a criminal investigation. His offices were raided as a result of this. The fact that [the respondent] was a former Superintendent of Police who once upheld the law and was now the subject of a police probe is a matter of public interest.

b. In all the circumstances [the appellant] broadcast the story complained of in full compliance with the duties and obligations of responsible journalism pursuant to its duty to broadcast and transmit the story and inform the listening and viewing public of matters that they had a corresponding interest in receiving."

The evidence at trial

[10] The trial took place over several days, during which evidence was given by several witnesses, including the respondent, and two witnesses called on his behalf. Evidence was given on behalf of the appellant by Ms Johnson.

Key exhibits

[11] The exhibits before the court included three search warrants used to conduct the raid, namely, under the Forgery Act, Dangerous Drugs Act, and Firearms Act. Also exhibited was a copy of the list of items that were seized from the respondent's office. Based on the list, among the items seized were documents and two cell phones. Other exhibits included articles covering the raid from the Jamaica Observer and the Gleaner, as well as the transcript of the newscast aired by the appellant, as follows:

"Still to come, ... And, a senior cop being probed in the lottery scam.

Police today swarmed the offices of a Montego Bay business place said to belong to a former senior ranked policeman as the probe into the lottery scam continues. The cops seized computers and other equipment said to belong to senior superintendent [sic] John Morris. Our reporter Latoya Johnson is at the scene. Latoya?

...

And returning to an earlier story where police today swarmed the offices of a Montego Bay business place said to belong to former senior ranked policeman, senior superintendent [sic] John Morris, we now join our reporter Latoya Johnson who is at the scene.

Hugh, I'm standing across from the offices on Gloucester Avenue of John Morris and Associates Limited special investigator and security consultant where a special team from Kingston also including persons from the Caribbean Search Department have been carrying out a forensic search of not just the offices but his vehicles. They have already seized several documents which they took out in plastic bags. They've been searching the premises since nine o'clock this

morning and it was not until minutes after four that they emerged from the offices with Mr. Morris looking through his vehicle and they have been searching the vehicles since then. We are still here waiting to hear further what's the latest on the situation but we have been told that they will be taking him back to Kingston with them.

Thank you very much. Latoya Johnson on location there in Montego Bay."

[12] The court also had a transcript of the appellant's apology as follows:

"On an editorial note, last Thursday a story we carried on a police raid of offices operated by a former senior superintendent of police in Montego Bay, John Morris, intimated that the raid may have been associated with investigations into the illegal lottery scam. RJR news has since ascertained that this is not the case and apologizes for any discomfiture which may have been caused Mr. Morris."

The respondent's evidence-in-chief

[13] Mr Morris testified to, among other things, the fact of the raid which took place at his office, and lasted several hours, from about 9:30 am to after 5:00 pm. He gave evidence that the search was done under warrants issued under the Dangerous Drugs Act, Forgery Act, Unlawful Possession of Property Act, and Firearms Act. Arising from the raid, documents and all computers were removed from his office, but were subsequently returned to him, and he was not charged for any offence.

[14] It was also his evidence that he had known Ms Johnson for about 10 years and that they knew each other well. He would receive phone calls from her, including on his personal cellular phone, seeking information relating to police matters, both prior to and subsequent to his retirement from the JCF.

[15] He testified to hearing the broadcast over the radio and expressed his surprise that the appellant would be so "reckless and cruel". He gave details of the negative treatment that he received from friends and persons with whom he would socialise, as a result of the raid. He said he was bombarded with phone calls from persons residing both

locally and abroad. He spoke of experiencing great embarrassment, stress, mental trauma, and pain as a result of the publication of the news item. He stated that although an apology was issued by the appellant, it did not help him to feel better about himself.

[16] It was his testimony that he was never told during the raid that he was being investigated for involvement in lottery scamming activities. Furthermore, he was not taken back to Kingston by the police.

[17] After the broadcast and at the end of the police operation, he came outside of his office and saw a crowd of 200 to 300 persons standing in front of his office and along the roadway. Shortly thereafter, the police officers left and he heard persons saying “mi neva know sey im was involved in di Lottery Scam”. He saw persons pointing at him as they spoke.

[18] He explained that he understood the lottery scam to be an activity by which millions of dollars are fleeced from unsuspecting persons in North America, and further that it has resulted in hundreds of murders within western Jamaica.

[19] The learned judge gave permission for amplification of the respondent’s witness statement, as a result of which he testified to speaking to reporters after the raid, particularly from the Gleaner, the Western Mirror, and the Observer. He also testified to accessing the RJR website in August 2015 and retrieving a publication relative to the raid, dated 18 December 2009, which was admitted into evidence. This publication also reported that the search of the respondent’s office related to the lottery scam.

The respondent’s evidence under cross-examination

[20] Under cross-examination, the respondent agreed that the raid was carried out because he was suspected by the police of being involved in criminal activities relating to dangerous drugs and gun-related crimes, which transcend international borders. Also, that decent people would not want to associate with persons involved in the drug trade or gun-related crimes. He agreed that the raid attracted a lot of interest, caused him

embarrassment, and would have caused persons to suspect that he was involved in criminal activities.

[21] He stated that he could not recall whether prior to 2013, lottery scamming offences were dealt with under the Unlawful Possession of Property Act and the Forgery Act but said he would not be surprised if the Unlawful Possession of Property Act had been used. He spoke of having experience, prior to his retirement, in investigating lottery scamming offences and on those occasions he used the Forgery Act and the Larceny Act.

Evidence from the respondent's witnesses

[22] Charles Scarlett, retired Deputy Commissioner of Police, and Orgille Scarlett were called in support of the respondent's case. Both testified to knowing the respondent for at least 35 years and characterised him as being of impeccable character. Both also testified to hearing the news report of 17 December 2009 and that they understood the report to have been about the respondent. Orgille Scarlett, in particular, was in the United States of America when he heard the broadcast via the internet. Both men expressed that they were shocked by the report, angry and disappointed in the respondent. Neither man wished to be associated with the respondent, as a result.

[23] Under cross-examination, Charles Scarlett agreed that he would have been embarrassed or disappointed to learn that any of his colleagues was suspected of involvement in criminal activities. Likewise, Orgille Scarlett agreed that he would have had the same feelings of disappointment and betrayal if he knew that the respondent was being investigated under the Dangerous Drugs Act, Firearms Act, or Unlawful Possession of Property Act.

Evidence-in-chief on behalf of the appellant

[24] Latoya Johnson testified that she received a phone tip from a usually reliable source that a lottery scam raid would be carried out at premises on Gloucester Avenue. She sent her cameraman to the scene ahead of her and later found out that it was the respondent's place of business. Whilst there, she saw a "barrage of uniformed and plain

clothes joint military/police personnel moving in and out of the offices with documents and equipment". She stated further that she called a member of the police hierarchy to get information, and it was confirmed that the raid was being done to retrieve documents and equipment believed to be connected to the lottery scam. Ms Johnson denied intimating in her report that the respondent was involved in the lottery scam. She also stated that she contacted the respondent, who declined to give his side of the story, was angry, and refused to speak. She testified that she stood by her report, as she was well-informed and acted based upon what she was told and what she saw. She denied having any reason to defame the respondent and spoke of them having a good rapport previously.

Evidence under cross-examination and re-examination of Ms Johnson

[25] Under cross-examination, Ms Johnson maintained that the story was breaking news and that, as the situation was unfolding, she would not have had an opportunity to speak to the respondent. She explained that a breaking story cut into regularly scheduled programming and also that if one is the first to carry a story, it was breaking news.

[26] In re-examination, she made a distinction between electronic media and print media and stated that, in respect of print media, there is more time to gather information. She also stated that based on the nature of the raid, the respondent's phone would have been taken from him, and, therefore, she would have to try to speak to him on the landline.

The decision of the learned judge

[27] The learned judge determined that the issue was whether the words of the publication were capable of bearing the defamatory meaning alleged by the respondent. The learned judge examined the sentences "A senior cop being probed in the lottery scam" and the name of the cop identified as "Senior Superintendent John Morris" and concluded that the respondent's name was broadcast to the world at large as being associated with a known serious criminal activity in Jamaica, which was his responsibility to deter and prosecute.

[28] The learned judge also considered the narrative of the search and seizure of items from the respondent's office and his vehicles and found that this was also capable of bearing a defamatory meaning. He then considered the last few lines of the broadcast, "and they have been searching the vehicles since then. We are still here waiting to hear further what's the latest on the situation but we have been told that they will be taking [the respondent] back to Kingston with them". The learned judge stated at para. [24] of his judgment:

"When looked at or listened to as whole or as one news item this broadcast is capable of conveying to the ordinary reasonable listener here and abroad that the police team has **found the proof of lottery scam against [the respondent] and he [sic] will be taking, both man and evidence, back to Kingston.** In other word [sic], [the respondent] was guilty of the unlawful criminal activity lottery scam [sic]. This is the single meaning I find the broadcast is capable of meaning. It seems to me that the journalist adopted and endorsed these last three sentences quoted above. Whether the news item was in fact, defamatory to [the respondent] is a question of fact which this court in its fact-finding function will have to decide." (Emphasis supplied)

[29] Further, in examining the defence of justification put forward by the appellant, the learned judge stated that the broadcast expressed that the respondent was being investigated for lottery scamming, which was not true, and that lottery scamming had a clear defamatory meaning separate and apart from other offences. He stated also that the publication conveyed the impression that the respondent was caught after an intensive search and was, therefore, guilty. This was also not true.

[30] With respect to qualified privilege and responsible journalism, the learned judge found that the broadcast concerned the efforts of the State to fight crime and allegations that a former senior law enforcement officer was engaged in criminal activities. As such, the public had a right to know and an interest in receiving the information. However, as it related to the standard of conduct of the journalist, the learned judge found that as the journalist reported that the respondent would have been taken back to Kingston following

the search and seizure, which imputed that the respondent was guilty of being involved in criminal activities related to the lottery scam, the journalist was required to verify this information, which was not done. The learned judge found that the allegations against the respondent were very serious and could have severely damaged his character, and that the matter was not so urgent as something in the nature of an emergency. Rather, the broadcast could have been published during the six o'clock news. The learned judge found, in respect of the tone of the publication, that the broadcast adopted the allegation that the respondent was taken back to Kingston as a statement of fact.

[31] The learned judge held that the publication was not a "neutral investigative report" and that it went into being sensational. In the circumstances, the defence of qualified privilege was not established.

[32] With respect to damages, the learned judge accepted that the respondent suffered serious injury to his feelings and reputation. The learned judge took account of the fact that the appellant made an early apology, therefore, no award was made for aggravated or exemplary damages. As previously indicated, an award was made for general damages at \$9,500,000.00, with interest at a rate of 3% per annum from the date of the publication to the first date to which judgment was reserved (19 June 2017). The respondent was also awarded costs and a special costs certificate was granted.

Grounds of appeal

[33] The appellant filed the following 10 grounds of appeal:

"a. The learned judge erred as a matter of fact and/or law when he found that the defence of responsible journalism 'Reynolds Privilege' was not established and the [appellant] is liable to the [respondent] for the defamatory publication having regard to all the circumstances of the case including but not limited to the following:

- i. The learned judge erred as a matter of fact and/or [sic] in characterising the journalist's report of the information as investigative journalism which fact tainted his entire

judgment resulting in a more exacting and inaccurate analysis of her actions against the non-exhaustive list of factors to be considered as 'responsible journalism' and also the award of damages: [sic]

ii. he [sic] discounted the imparting of the information as being mere sensationalism and not worthy of urgency or of being treated as breaking news and found that the journalist should have waited until the 6 o'clock news although there was no evidence of when the joint-police [sic] military raid would have ended.

iii. He found that there was an opportunity for the Respondent to comment or for the gist of his version to be presented and for the journalist to verify the story **[34.4, 34.8]** notwithstanding his finding that *'one has to take into account the practical reality of the search. It was a high profile search under strong joint military security. There would be no opportunity to obtain a comment from the claimant until after the search ...'* **[34.7]**

b. The learned judge erred as a matter of fact and/or law in finding that the defence of justification was not made out having regard to his findings at paragraph 27 of the reasons for judgment which includes the Respondent's admission that prior to the passage of the Law Reform (Fraudulent Transactions) (Special Provisions) Act, 2013 lotto crimes were charged under the Unlawful Possession of Property Act and also including but not limited to:

i. the fact that it was a joint police-military operation.

ii. the Respondent's admissions as set out at Paragraph 27 aforesaid of the reasons for judgment.

iii. the legislation under which the investigations were conducted.

iv. the Respondent's statement of case as to the defamatory meaning as being linked to unlawful activities that transcend international borders.

v. the facts on which the entire story was based were substantially true.

c. The learned judge erred as a matter of fact and/or law in exercising his discretion as to meaning in that he failed to consider the publication as a whole as against the circumstances of the publication and the Respondent's pleading as to meaning which are set out at Paragraphs 14 and 15 of the Amended Particulars of Claim:

i. It was not the Respondent's case that he was defamed because the Appellant reported that he was guilty of being engaged in lottery scamming activities.

ii. It was the Respondent's case, that he was defamed because it was reported that he was involved in criminal activities that transcends international borders.

iii. The reason for requiring a party to plead meaning, notwithstanding the judge's duty to construe meaning, is that the party is more likely to set out the meaning that is most disadvantageous or extreme.

iv. In this instance however, it is the judge who selected and construed the more extreme and/or disadvantageous meaning.

d. The learned judge erred as a matter of fact and/or law in his analysis of meaning when he extracted three sentences out of the entire publication which he construed by 'itself' or taken with the entire publication of conveying a single meaning which affected his finding as to meaning and also as to the defence of justification.

e. The learned judge erred as a matter of fact and/or law in exercising his discretion as to meaning including his finding that the words were only capable of a single meaning, being that the Respondent was guilty of being involved in criminal activities which were related to the lottery scam having regard

to the undisputed evidence that the search was conducted under legislation used in connection with the investigation of lottery scamming, criminal activities and transnational crimes. **[27]**

f. The learned judge was wrong to find that the mere fact that a person in the circumstances of the Respondent is 'taken into the custody of the police' or brought back to Kingston is evidence from which guilt would be inferred by the ordinary reasonable listener and moreso having regard to the entire publication.

g. The learned judge erred as a matter of fact and/or law in his finding of liability in all the circumstances and against the weight of the evidence in that he misdirected himself thereon and found facts that did not exist or drew inferences on those facts that are not capable of arising on them including:

1. the journalist adopted a statement that was defamatory and untrue being that the Respondent was taken to Kingston and which meant that the ordinary listener would have understood that the Respondent was caught after an intensive search and was therefore guilty. **[30]** and **[33]**

2. the finding that the Respondent telephoned the journalist first because he was angry. On the contrary, for example, the questions in cross-examination on his behalf is that he did not call the journalist because he was angry.

3. the evidence of the Respondent's reputation or loss thereof was not challenged on cross-examination. **[27]** and **[28]**

h. The award of \$9,500,000.00 was excessive in all the circumstances including but not limited to the following:

1. There was no basis for treating this claim as sitting at the higher end of the scale based on the range of awards cited to him including the Respondent's \$5.5M as well as cases in relation to persons of a standing more similar to the Respondent. **[48.6]**

2. The learned judge erred in equating the Respondent's position to that of a former Prime Minister in the face of more appropriate comparisons such [sic] in **Seaga v Harper** where the Claimant Harper was of a higher rank than the Appellant and who was awarded \$1,500,000.00 in circumstances where there was not a scintilla of evidence as to the alleged defamatory imputations.

3. The learned judge erred when he calculated the award of damages by updating the comparable awards to December 2019 without taking account of the over three (3) years delay in delivering the judgment which properly is attributed to the State and not the Appellant which fact properly should result in a further discount.

4. There was no or no sufficient evidence of injury to character caused by this publication to substantiate the award of \$9,500,000.00.

5. The evidence is that the Respondent's staff left his employment because of the raid and not the broadcast.

6. The respondent suffered loss as a consequence of the raid and not the broadcast, [sic] there 200 – 300 persons gathered at his premises and the matter was in any event widely reported even in local media such as the Western Mirror.

7. The evidence of the Claimant's witnesses is that they would have shunned him or anyone who was suspected of involvement in the matters contained in the warrants viz: dangerous drugs, illegal possession of firearms as well as lotto scamming.

8. The award was punitive and coloured by the learned judge's characterisation of the journalist's report of information as investigative journalism.

9. The learned judge overlooked the Respondent's acceptance of the award of general damages at \$5.5m.

10. The fact that it is not disputed that a search and investigation were undertaken based on warrants that were issued to the joint police-military team.

i. The learned judge erred as a matter of fact and/or law in exercising his discretion in making an award for interest in a defamation matter in circumstances where it was not pleaded nor warranted.

j. The learned judge erred as a matter of fact and/or law in exercising his discretion to grant a special costs certificate in this matter and moreso in circumstances where it was not applied for and no submissions were made in relation to it.”
(Bold and italics as in the original)

Issues for determination

[34] Based on the appellant's grounds of appeal, the following issues arise for determination:

- (1) Whether the learned judge erred in holding the appellant liable to the respondent for defamation (grounds (a), (b), (c), (d), (e), (f), and (g));
- (2) If not, whether the learned judge erred in his award of damages, including his award of interest (grounds (h) and (i)); and
- (3) Whether the learned judge erred in issuing a special costs certificate to the respondent (ground (j))

Issue (1) – Whether the learned judge erred in holding the appellant liable to the respondent for defamation (grounds (a), (b), (c), (d), (e), (f), and (g))

Submissions

[35] Grounds of appeal (a), (b), (c), (d), (e), (f), and (g) relating to liability were argued together by the parties. Miss Stephanie Williams, for the appellant, submitted that the

meaning attributed by the learned judge to the words of the publication (that the respondent was guilty of lottery scamming) was inconsistent with the natural and ordinary meaning of the words of the broadcast. Rather, the words of the broadcast suggested that the respondent was being investigated for lottery scamming. Similarly, the fact that it was reported by Ms Johnson that they were told that the respondent would have been taken back to Kingston did not impute that the respondent was guilty. To derive a conclusion of guilt would mean that the listener was overly suspicious or avid for scandal. Further, based on the warrants that were used to conduct the search, and the items removed from the respondent's office, the appellant had shown, on a balance of probabilities, that there was a basis for the information that was reported. As such, the learned judge should have accepted the defence of justification, as the appellant was not required to prove that the respondent was guilty of lottery scamming.

[36] With respect to responsible journalism and qualified privilege, Miss Williams submitted that the learned judge applied a very restrictive approach in his consideration of the defence, thereby rendering the privilege meaningless. Further, he erroneously referred to the report as "investigative journalism" when there was no investigation, but rather a report of a live event as it unfolded. As such, the learned judge's incorrect classification resulted in an erroneous conclusion. Reliance was placed on the cases of **Flood v Times Newspaper Limited** [2012] 4 All ER 913 ('**Flood**'), and **Jameel and another v Wall Street Journal Europe SPRL** [2006] UKHL 44 ('**Jameel v Wall Street HL**').

[37] In written submissions, it was contended that the learned judge's reliance on the cases of **Edward Seaga v Leslie Harper** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2004, judgment delivered 20 December 2005 ('**Seaga v Harper CA**') and **Panday v Gordon** [2005] UKPC 36 did not take account of the fact that the *dicta* in those cases about care and skill were made in the context of a discussion on qualified privilege prior to the case of **Reynolds v Times Newspaper Limited and others** [1999] 4 All ER 609 ('**Reynolds**'). He also failed to take account of the Privy Council's guidance that the test in **Reynolds** should be considered holistically.

[38] In opposing the appeal, counsel for the respondent, Miss Jean Williams, submitted that the learned judge was correct in the meaning that he attributed to the words of the publication. She contended that during the trial, it was agreed that the criminal activity of lottery scamming was different from other criminal activities and has resulted in several murders. Further, the evidence regarding the dangers of lottery scamming was unchallenged.

[39] Counsel submitted that Miss Johnson reported on more than what she saw. What she saw was a raid in progress, but she took it upon herself to report that the raid related to the lottery scam and that the respondent would have been taken back to Kingston. She could have verified with the police whether the respondent would have been taken back to Kingston before reporting that, since she was at the scene. In the circumstances, the journalist was required to be more careful. In reporting that the raid related to lottery scamming, she took a risk. She could also have waited until the completion of the raid to speak to persons on the ground. In the result, the journalist did not exercise responsible journalism. Counsel referenced several authorities including **Slim and others v Daily Telegraph Limited and others** [1968] 2 QB 157, **Lewis v Daily Telegraph Limited** [1963] 1 QB 340 and **Sim v Stretch** [1936] 2 All ER 1237.

[40] With respect to the Unlawful Possession of Property Act, it was submitted that it was never agreed that it was used to prosecute lottery scamming offences.

Analysis

[41] In determining the issue of whether the learned judge erred in holding the appellant liable for defamation, it is necessary to consider three sub-issues as follows:

- i. Whether the learned judge ascribed an incorrect meaning to the published words and failed to have sufficient regard to the pleaded case;
- ii. Whether the learned judge erred in finding that the defence of justification was not made out; and

iii. Whether the learned judge erred in his assessment of the defence of qualified privilege.

[42] This court has to consider whether the learned judge misdirected himself on the law or in its application and whether he erred in his findings of fact. It is well known that this court will not lightly interfere with a decision of a judge at first instance based on findings of fact unless it can be demonstrated that he was “plainly wrong” in his conclusion (see **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 and **Thomas v Thomas** [1947] 1 All ER 582).

[43] This was also explained in the case of **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 where Brooks JA (as he then was) detailed the law relating to the treatment by an appellate court of findings of fact, as follows:

“[9] In [**Clarence Royes v Carlton Campbell and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered 3 November 2005] Smith JA set out the principles that should guide an appellate court in considering findings of fact by the court at first instance. The other members of the panel agreed with the principles which he set out at pages 21-23 of his judgment:

‘...The authorities seem to establish the following principles:

1. The approach which an appellate court must adopt when dealing with an appeal where the issues involved findings of fact based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was ‘plainly wrong’. - See **Watt v Thomas** (supra), **Industrial Chemical Company (Jamaica) Limited** (supra); **Clifton Carnegie v Ivy Foster** SCCA No. 133/98 delivered December 20, 1999 among others.

2. In **Chin v Chin** [Privy Council Appeal No. 61/1999 delivered 12 February 2001] para. 14 their Lordships advised that an appellate court, in

exercising its function of review, can 'within well recognized parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a rehearing below.'

3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the finding of the trial judge - See Rule 1. 16(4)

4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in **Watt v Thomas** (supra).'

[10] In [**Eurtis Morrison v Erald Wiggan and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/2000, judgment delivered 3 November 2005],

K Harrison JA, with whom the rest of the panel agreed, set out, at page 15, the following guiding principles:

‘The principles derived from the [previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge’s findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make.’”

[44] The appellant has challenged the learned judge’s finding that it was liable to the respondent for defamation. The factual circumstances are, for the most part, agreed between the parties and the few disputed facts will be assessed in light of the evidence at trial. The impugned broadcast was made on 17 December 2009 (prior to the passing of the Defamation Act, 2013) when the law of defamation was regulated by the now repealed Libel and Slander Act 1851 and the Defamation Act, 1963. These provisions were neither relied on by the learned judge nor cited by counsel before this court, and, for the most part, are not relevant in the resolution of the issues raised on appeal.

[45] There is no dispute between the parties in relation to the use of search warrants by the police, in conducting the raid. The search warrants were issued under sections 18(d) and (e) of the Forgery Act (permitting search for documents and books relating to a charge of forgery), the Firearms Law (permitting search for firearms), and the Dangerous Drugs Law (permitting search, seizure, and detention of any dangerous drugs). It was agreed in cross-examination by the respondent that there was also a warrant under the Unlawful Possession of Property Act, but this was not among the exhibits before the court.

i. Whether the learned judge ascribed an incorrect meaning to the published words and failed to have sufficient regard to the pleaded case

[46] In challenging the meaning ascribed by the learned judge to the words of the broadcast, the appellant argued that the newscast merely asserted the imputation that the respondent was suspected of being involved in criminal activities. The appellant also submitted that the respondent never pleaded the defamatory meaning to be that the respondent was involved in lottery scamming activities.

[47] It is undisputed, as the respondent admitted at the trial, that searches were conducted at his office pursuant to the warrants described above. He also admitted that the investigation was due to suspicion of him being involved in criminal activities.

[48] In **CVM Television Limited v Michael Troupe and Sylvan Reid; Television Jamaica Limited v Michael Troupe and Sylvan Reid** [2025] JMCA Civ 40 (**'Michael Troupe'**), this court examined how a trial judge is to assess the meanings to be attached to statements and what constituted defamatory statements. At para. [38] of that judgment, McDonald-Bishop JA (as she then was) stated:

"... The essential question to be answered by the court was expressed by Lord Atkin in **Sim v Stretch** [1936] 2 All ER 1237 at 1250, and is: 'would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?'"

[49] Having examined the authority of **Jamaica Observer Limited v Joseph Matalon** [2019] JMCA Civ 38 in which Morrison P quoted **Jeynes v News Magazines Ltd & Another** [2008] EWCA Civ 130, McDonald-Bishop JA then set out the following summary at para. [39]:

"... the required approach is an inquiry into the meaning of the words, bearing in mind the context in which the words were used and the persons to whom the communications were made, using reasonableness as the yardstick for arriving at a conclusion. It is evident from the above that there is no consideration of the truth or falsity of the alleged defamatory words. **Therefore, whether the words themselves were**

an accurate representation of the status and existence of the police investigations was an irrelevant consideration, because in law the words complained of are generally presumed to be false.” (Emphasis supplied)

[50] And at para. [40], citing **Jameel and others v Wall Street Journal Europe SPRL** [2005] EWCA Civ 74, she concluded that “[t]he case law demonstrates that the presumption of falsity should be applied as a general rule except when determining the applicability of **Reynolds** privilege...”. There is a presumption that the words are false at this stage.

[51] In the Privy Council judgment of **Bonnick v Morris** [2003] 1 AC 300, a case arising out of this jurisdiction, Lord Nicholls of Birkenhead, who delivered the judgment of the Board, at para. 9, spoke to the correct approach to meaning as follows:

“ ...As to meaning, the approach to be adopted by a court is not in doubt. The principles were conveniently summarised by Sir Thomas Bingham MR in *Skuse v Granada Television Ltd* [1996] EMLR 278, 285-287. In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the ‘Sunday Gleaner’, reading the article once. The ordinary, reasonable reader is not naive; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant. An appellate court should not disturb the trial judge’s conclusion unless satisfied he was wrong.”

[52] The ordinary and natural meaning of words may either be the literal meaning or it may be implied or inferred or may be an indirect meaning (see **Gordon Berkeley Jones v Clement John Skelton** [1963] 1 WLR 1362 at page 1370).

[53] The appellant does not dispute that the words of the broadcast would tend to lower the respondent in the estimation of right-thinking members of society, and would, therefore, be capable of being defamatory. Rather, that the meaning ascribed by the

learned judge was unduly suspicious and that the learned judge selected one bad meaning where another non-defamatory meaning was available, that is, the meaning that the respondent was suspected of involvement in criminal activities, not that he was guilty.

[54] In dealing with the meaning to be attributed to the words, the learned judge considered **Flood**. It is expedient to set out his deliberations as expressed at paras. [19] to [22] of his judgment:

“[19] The circumstances where the words published in an article relating to publication alleging police investigation into the conduct of a claimant and may possibly have more than one meaning and where the issue is raised whether the article bear [sic] a defamatory meaning came before the Court of Appeal [sic] and Wales in **Flood v Times Newspaper Limited** [2012] UKSC 11. There Lord Philips who delivered the first judgment adopted the useful shorthand approach.,[sic] to determine the defamatory meaning or sting to be derived from an article when read as a whole, by Brooke LJ in **Chase v News Group Newspapers LTD.** [2002] EWCA Civ. 1772; [2003] EMLR 2018. The ‘Chase level 1’ meaning is that the claimant was guilty. The ‘Chase level 2’ meaning is there were reasonable grounds to suspect that the claimant was guilty. The ‘Chase level 3’ meaning is that there were grounds for investigating whether the claimant was guilty. The claimant, Detective Sgt. Flood in **Floods’** [sic] case pleaded a Chase 2 meaning that there were reasonable grounds to suspect he corruptly accepted bribes. While the TNL pleaded a Chase 3 meaning for the purposes of a plea of justification.

[20] In the instant trial Retired Superintendent John Morris plead [sic] a Chase 1 meaning that the news broadcasted [sic] imputed he was guilty of engaging in criminal activity. The [appellant], RJR, plead [sic] a Chase 2 meaning in their defence that the broadcast only imputed that there were grounds to suspect that the [respondent] was involved in criminal activities and the imputations are true.

[21] I now consider the words of this broadcast in the context of the broadcast as a whole and ask myself what broad impression it would convey to the ordinary reasonable reader listening to the 5’0 clock [sic] news on Thursday the 17th

December 2009. It is the ordinary reader who is not easily ready to give the worst meaning to this broadcast about retired Supt. John Morris or the ordinary reader who is not naïve. It is the ordinary reader who read [sic] between the lines taking into account his general knowledge and experience of day to day affairs in the city of Montego Bay and crime in Jamaica.

[22] The first words that would attract his attention are the opening sentence 'A SENIOR COP BEING PROBED IN THE LOTTERY SCAM' and the name 'SENIOR SUPERINTENDENT JOHN MORRIS' [sic] The words Lottery Scam is not found in any dictionary but the ordinary reader or listener in and from Jamaica and in the city of Montego Bay from general knowledge would be aware that this was a new fraudulent activity involving obtaining large sums of money from vulnerable victims particularly from the USA. The ordinary person knew the equipment and mean [sic] to commit this unlawful activity were items [sic] cell phones and laptop computers and magic jack instruments and names and addresses and telephone numbers of residents abroad. Not even the interpretation [sic] Section 2 of the Law Reform (Fraudulent Transactions) (Special Provisions) Act of 2013 contains a definition of the words lottery scam. But the legislation n [sic] proceed [sic] on the premise that fraudulent activity involving transferring sums of money from outside or within Jamaica was the mischief the Act was aimed at. The interpretation section defines 'unlawful activity' as any conduct that constitutes an offence against the Act. In short, the [respondent's] name was broadcasted [sic] to the world at large as associated with known serious criminal activity in Jamaica that he had first responsibility to deter and prosecute [sic]"

[55] Having examined the broadcast as a whole, both the introductory headlines, the identification by name of the respondent, as well as the subsequent report given by the journalist on site, the learned judge stated at para. [24]:

"When looked at or listened to as whole or as one news item this broadcast is capable of conveying to the ordinary reasonable listener here and abroad that the police team has found the proof of lottery scam against the [respondent] and he [sic] will be taking, both man and evidence, back to

Kingston. In other word [sic], the [respondent] was guilty of the unlawful criminal activity [sic] lottery scam [sic]. This is the single meaning I find the broadcast is capable of meaning. It seems to me that the journalist adopted and endorsed these last three sentences quoted above. Whether the news item was in fact, defamatory to the [respondent] is a question of fact which this court in its fact-finding function will have to decide.”

[56] It is my considered view that the learned judge’s consideration of the law, review of the factual circumstances and the conclusion reached that the broadcast in its entirety, was capable of bearing a single defamatory meaning, cannot be faulted. This issue is resolved in favour of the respondent.

[57] The appellant is contending that the respondent did not plead the meaning as determined by the learned judge (specifically the imputation that the respondent was involved in and/or guilty of lottery scamming activities).

[58] In the amended particulars of claim, the following meanings were pleaded:

“14. That the newscast suggested that [the respondent] was involved in criminal activities that transcend international borders.

15. That the newscast suggested that [the respondent] was involved in criminal activities and that he was guilty of criminal activities.

16. The ‘Lottery Scam’ has been confirmed by the police to have resulted in hundreds of murders committed in western Jamaica alone.”

[59] At paras. 9 and 10 of the amended particulars of claim, the respondent also averred that at no time was he told that the search related to the lottery scam and that he is not involved in the lottery scam.

[60] As seen at para. 16 of the amended particulars of claim, reference is made specifically to the “Lottery Scam”. In my view, when the amended particulars of claim are taken as a whole with specific regard to paras. 9, 10, 11, 14, 15 and 16, it is apparent

and readily inferred that the defamatory meaning complained of is the imputation that the respondent was involved in and guilty of lottery scamming. As such, I am unable to agree with the appellant that the learned judge failed to have sufficient regard to the respondent's pleaded case in determining the meaning to be attached to the impugned words.

[61] As indicated above (see para. [51]), when a trial judge is determining the defamatory meaning to be attached to the words, he has in mind the ordinary reasonable listener who is not naïve, not avid for scandal, and can read between the lines. In that regard, I am not of the view that the learned judge's conclusion of what the broadcast in its entirety conveyed can be faulted. That is, that the broadcast in its entirety, was capable of bearing a single defamatory meaning that there was proof of lottery scamming against the respondent, who would be taken back to Kingston as a result (see para. [55] above).

ii. Whether the learned judge erred in finding that the defence of justification was not made out

[62] The next issue to be determined is whether the learned judge was incorrect when he rejected the defence of justification. McDonald-Bishop JA in **Michael Troupe**, at para. [43], stated that the accuracy or truthfulness of the words complained of would only become relevant if it had been established that the words complained of were defamatory and there was reliance on the defence of justification. She referred to the case of **Lonrho PLC and others v Fayed and others (No 5)** [1993] 1 WLR 1489 and indicated:

"[43] ... Stuart-Smith LJ pithily recognised the interplay between the presumption of falsity and the defence of justification in this way (at page 1502 of the report):

'...[N]o one has a right to a reputation which is unmerited. Accordingly one can only suffer an injury to reputation if what is said is false. **In defamation the falsity of the libel or slander is presumed; but justification is a complete defence.**' (Emphasis added)"

[63] In the case at bar, the appellant has submitted that the impugned publication is essentially accurate or truthful. The appellant contends that the defence of justification was established based on the findings set out by the learned judge at paras. [27] and [28] of his judgment:

“[27] In a searching cross-examination of the [respondent] by counsel for the [appellant] she elicited the following:

- a. That there was a raid of his offices and he was issued search warrants above.
- b. That the subject of the warrant would be investigated due to suspicion of being involved in criminal activities relative to the legislation under which the warrant was issued.
- c. That he would have been suspected of criminal activities and the raid caused persons to suspect him to be involved in criminal activities.
- d. There was a link between possession of guns and drugs and lottery scamming and these crimes transcend national borders.
- e. That prior to the 2013 Act was [sic] passed the Anti-Lottery Scam Task Force would conduct raids and charge persons under the Unlawful Possession of Property Act.
- f. That decent person [sic] would not want to associate with persons in the drug trade or suspected of being involved in the drug trade. (see pp. 14-40 Transcript of evidence and para 78-89 [appellant] Submission on trial)

[28] Both witnesses for the [respondent] Charles Scarlett and Orgille Scarlett also agreed that someone investigated under the respective legislation [sic] under which the warrants were issued would have been suspected of being involved in criminal activities.”

[64] In essence, the appellant contends that it has been established that the raid on the respondent's office meant that he was suspected of being involved in criminal

activities; and that based on the legislation under which the raid was conducted, there was a basis to report that the respondent was suspected of involvement in lottery scamming. In any event, the appellant submits that an investigation in lottery scamming was not materially different from the investigations conducted pursuant to the legislations under which the search was carried out.

[65] There was also evidence before the learned judge that the respondent's reputation would nevertheless, have been lowered in the eyes of both witnesses for the respondent, based on the police investigation.

[66] Of some relevance to the above submissions is the discussion by Morrison JA (as he then was) of the common law position on justification in **Jamaica Observer Limited and another v Wright** [2014] JMCA Civ 18 (**Jamaica Observer v Wright**).

"[69] ... At common law, in order to succeed on a plea of justification, a plaintiff 'had to justify the whole of the libel' (Gatley on Libel and Slander, 9th edn, para. 11.11). The consequence of justifying a part only of a libellous statement was explained by Tindal CJ in a well-known statement in the old case of **Clarke v Taylor** (1836) 2 Bing NC 654, 664–665, 132 ER 252, 256:

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

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

[67] In essence, in the case at bar, the respondent is only complaining about part of the entire publication. Section 7 of the Defamation Act 1963, while not strictly relevant, spoke to this issue where there were two or more distinct charges against a claimant:

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

[68] This is not a case of two or more distinct charges set out in the publication. But the wording of section 7 does provide some insight, as the question can be asked whether the words not proved to be true have materially injured the claimant's reputation having regard to the truth of what, I would describe, as the remaining portion of the publication.

[69] There is also the case of **Polly Peck (Holdings) plc and others v Trelford and others** [1986] 2 All ER 84 referred to by Morrison JA in **Jamaica Observer v Wright** at paras. [73] and [74]. The passages are extensive but worth setting out:

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

‘The first principle is that where a plaintiff chooses to complain of part of a whole publication the jury are entitled to see and read the whole publication; this is unchallenged and has been the law for well over 150 years. What use are the jury permitted to make of the material now in evidence? There is no doubt that they can use it to provide the context to the words complained of when considering whether any, and if so what, defamatory meaning is disclosed. A classic example of the context deciding the meaning of words to be different to their face value meaning is found in *Thompson v Bernard* (1807) 1 Camp 48, 170 ER 872, a slander action

where the plaintiff complained that the defendants said of him: 'Thompson is a damned thief; and so was his father before him; and I can prove it.' The evidence was that the defendant added: 'Thompson received the earnings of the ship, and ought to pay the wages.' Lord Ellenborough CJ directed a nonsuit on the ground that it was clear from the whole conversation that the words did not impute a felony, but only a mere breach of trust.

What other use can be made of the material depends on its nature and on the defences put forward by the defendant.

The second principle is that where a publication contains two distinct libels, the plaintiff can complain of one and the defendant cannot justify that libel by proving the truth of the other. The difficulty with this apparently self-evident proposition is in deciding whether the two libels are indeed distinct in the sense that the imputation defamatory of the plaintiff's character in the one is different from the other.

The third principle is that it is for the jury to decide what the natural and ordinary meaning of the words complained of is. This simple proposition has become enmeshed in the question how far the plaintiff can, by his pleading, limit the meanings which may be canvassed at the trial.

The fourth principle is that the trial of the action should concern itself with the essential issues and the evidence relevant thereto and that public policy and the interest of the parties requires [sic] that the trial should be kept strictly to the issues necessary for a fair determination of the dispute between the parties.'

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

'In cases where the plaintiff selects words from a publication, pleads that in their natural and ordinary

meaning the words are defamatory of him and pleads the meanings which he asserts they bear by way of false innuendo, the defendant is entitled to look at the whole publication in order to aver that in their context the words bear a meaning different to that alleged by the plaintiff. The defendant is entitled to plead that in that meaning the words are true and give particulars of the facts and matters on which he relies in support of his plea as he is required to by Ord 82. It is fortuitous that some or all of those facts and matters are culled from parts of the publication of which the plaintiff has not chosen to complain.

Where a publication contains two or more separate and distinct defamatory statements, the plaintiff is entitled to select one for complaint, and the defendant is not entitled to assert the truth of the others by way of justification.

Whether a defamatory statement is separate and distinct from other defamatory statements contained in the publication is a question of fact and degree in each case. The several defamatory allegations in their context may have a common sting, in which event they are not to be regarded as separate and distinct allegations. The defendant is entitled to justify the sting, and once again it is fortuitous that what is in fact similar fact evidence is found in the publication.”

[70] A defendant can, therefore, be liable in damages if he omits to justify a part which contains libellous material. However, the entire publication including the headlines must be considered as a whole when deciding whether words or images are defamatory (see **Charleston and another v News Group Newspaper Ltd and another** [1995] 2 All ER 313 at page 316 where the statement of Alderson B in **Chalmers v Payne** (1835) 2 Cr M & R 156 is quoted with approval). A key issue in considering a defamatory statement in such a context is whether it is separate and distinct from other defamatory statements. This is a question of fact and degree in each case (see paras. [73] and [74] of **Jamaica Observer v Wright** set out above). In considering all the above, the learned judge

determined that the sting of the libel was the imputation of the respondent being probed for lottery scamming. He concluded that the lottery scam activities in Jamaica had a distinctive negative imputation. The justification for this view is explained at paras. [29] and [30] of his judgment:

“[29] Based on the evidence referred to in the paragraph above the [appellant] submitted [sic] they have established the broadcast of the raid of the [respondent’s] office means he was suspected of being involved in criminal activities and they have established the truth of this. As a result, they contend the [respondent] was not defamed. In addition, they argue [sic] the investigation of lottery scam was not materially different from investigation under the legislations by which the [respondent’s] office was searched [sic] In each investigation the [respondent] would be suspected of being involved in criminal activities. His witnesses testified they would hold the same anger and resentment against him. Therefore, Counsel submits the [respondent’s] reputation was not lowered in the eyes of well-thinking men by the publication of the broadcast that he was being probed in the lottery scam. (para 70- 90 of 1st Defendant’s Submission, dated, June, 19, 2017.) [sic]

[30] This submission is attractive but not sound in principle for the publication expressly asserted that the [respondent] was being investigated for lottery scam and this assertion was not true. Lottery scam had a clear defamatory meaning separate and apart from other offences. The sting of the publication is to link the retired senior officer to this type of criminal activity. In any event, the publication went further to convey the impression that the [respondent] was caught after an intensive search and was therefore guilty. I do not find the [appellant] has proved the substantial truth of the meaning I attribute to the broadcast and they have not thereby established the defence of justification.”

[71] Did the learned judge err on the facts and the law, in concluding that justification was not made out as the sting of the libel was the allegation regarding lottery scamming? Was the sting of lottery scamming totally distinct from the sting of the allegations of the search by the police as described by the journalist? The submissions of the respondent are relevant and persuasive on this point. As noted by the learned judge, the offence of

lottery scamming has its own distinctive negative impact on reputations in general, much more so on a former Superintendent of Police who had established professional and business links in the community. This was, to some extent, acknowledged by McDonald-Bishop JA in **Michael Troupe**. The circumstances of that case related to defamatory allegations of lottery scamming that were broadcast in 2012 (in the same city of Montego Bay). McDonald-Bishop JA noted that lottery scamming "...by itself was, at the time, a topical issue in Jamaica's media landscape and elsewhere" (see para. [186]). Further, as the learned judge stated, there was no proper basis for the journalist to report that she had been told he would be taken back to Kingston. She did not witness such an event, and no such statement was made in public by the police investigators on the scene.

[72] Although several warrants were used to search the respondent's business place, the description of these warrants was never publicised and even if they were, it is not clear that the ordinary reasonable listener would have been able to decipher what the Unlawful Possession of Property Act could be used to investigate. The opening lines containing the reference to such a probe preceded the description of the search witnessed by the journalist. The reference to lottery scamming was again repeated in the details of the impugned publication. There would have been nothing in the report to indicate what other criminal activities were being investigated. In any event, it is not disputed that the statement about the probe for lottery scamming was false. The appellant itself published an apology in which it was indicated that it had since ascertained information that it was not true that the raid related to lottery scamming. As such, even if it were to have been accepted by the learned judge that the correct defamatory meaning to be ascribed to the publication was that the respondent was suspected of being involved in lottery scamming, by the appellant's own admission, such a report was not true.

[73] Based on all the specific factual circumstances that were before the learned judge, I am not persuaded that he erred in his assessment of the effect of the entire publication and whether the defence of justification was made out. Therefore, no basis exists to interfere with the findings of the learned judge regarding the defence of justification.

iii. Whether the learned judge erred in his assessment of the defence of qualified privilege

[74] Qualified privilege is established on the twin-fold criteria of maintaining a balance between freedom of expression and the reputation of individuals. Where established, it is a defence that absolves liability in the event of publication of defamatory material. In **Bonnick v Morris** at para. 23, the test is described in these terms:

“Responsible Journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals ... 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.”

[75] A brief history of the development of the defence was set out by McDonald-Bishop JA in **Michael Troupe** at paras. [108] – [115].

[76] There is no dispute between the parties that publication in the public interest was satisfied in the case at bar. In his judgment, at para. [33], the learned judge referred to the evidence that the respondent had agreed in cross-examination “that the report of an investigation of allegations against him being involved in criminal activities was a matter of public interest. He agreed other media [houses] ... published this raid”. That aspect needs no further consideration by this court. Once the publication is determined to be of public interest, what must then be taken into account is whether the journalist has established that there was due professional skill and care in the publication of the defamatory publication (responsible journalism) (see **Michael Troupe** at para. [116]). If responsible journalism is established, then the defence would be made out. In relation to publication to the world at large, including newspaper reports (which is inapplicable in the present case), certain factors for consideration of responsible journalism were set out in **Reynolds**. The learned judge referred to these factors at para. [34] of his judgment. These include: (1) the seriousness of the allegation; (2) the source of the information; (3) the steps taken to verify the information; (4) the status of the information; (5) whether comment was sought from the claimant (this will not always be necessary); (6) whether the article contained the gist of the claimant's side of the story; (7) the tone of

the article (the newspaper need not adopt allegations as statements of facts); and (8) the circumstances of the publication including the timing.

[77] **Reynolds** makes it clear that the list of factors to be taken into account is illustrative only and is not to be seen as exhaustive. Also, the weight to be given to these and any other relevant factor will vary from case to case (see **Reynolds** at page 626 b – d).

[78] The appellant has challenged the learned judge’s treatment of these factors, which was described as a box-ticking approach. Counsel also contended that the learned judge wrongly described the circumstances of the publication as investigative journalism.

[79] The evidence reveals that the presence of the journalist on the scene was triggered by a tip. She attended the venue and relayed a live report of what was taking place. However, as the learned judge stated, no other media house made any assertion or imputation “that the search of the [respondent’s] office concern [sic] lottery scam or that the [respondent] was taken back to Kingston after the search” (see para. [33] of the judgment).

[80] The learned judge erred in describing the publication as investigative journalism since this phrase is suggestive of systematic, in-depth research carried out over a period of time. However, regardless of the nomenclature, the appellant was required to establish that responsible journalism was exercised. The factors as set out above were a guide for the consideration of the learned judge. He set out at para. [34] of his judgment, his assessment of the various factors:

“[34] The next consideration is the steps taken to gather and publish the information. The journalist attended the scene or office of the [respondent] where this joint military operation was conducted, [sic] that was fair. She described what she saw of items taken from the office and the search of the claimant’s motor car, [sic] that also was fair to the individual whose reputation could be damaged [sic] She went on to report a material fact that was defamatory based not on her personal knowledge but what was told to her. The truth of

this latter information was critical to the reputation of the [respondent]. Fairness demanded that she did more [sic] she published the information to the world at large. Lord Nichols [sic] set out ten illustrative factors that the court should consider and which are guidelines to determine whether the journalist or editor practised responsible journalism.

*(1) **The seriousness of the allegation.** These were very serious allegations against the [respondent] that could severely damage his character. The journalist who knew the [respondent] personally and professionally appear [sic] not to consider [sic] treated with insufficient care before she filed her report.*

*(2) **The nature of the information and the extent to which the subject matter is a matter of public concern.** She gave disproportionate emphasis to this matter to the expense of the individual. This is her evidence in cross-examination:*

'A breaking story if it cuts into the news the story was a breaking story because of the person to whom it relates and because of the nature of the issue these [sic] story would be considered breaking.'

The journalist considered the status of the individual and the nature of the information but not necessarily how the publication may damage the [respondent's] reputation if it is not true. This was not fair to the [respondent].

*(3) **The source of the information.** The [journalist's] source remains **confidential**. In the circumstances this source was not as reliable as expected. She placed overreliance on her source.*

*(4) **The steps taken to verify the information.** The journalist was so confident in her source that she took no steps to verify if the allegation is [sic] true. Lord Phillips in **Flood** explained in Chase 1 meaning imputation [sic] that alleges the claimant is guilty the publisher should reasonably consider the probability the information may not be true and take steps to verify the truth. Neither the journalist nor the editor took any such step.*

(5) The status of the information [sic] the journalist was present and was in a position to obtain first hand information of material facts to avoid any mistake or misstatement of facts that may be defamatory.

*(6) The urgency of the matter. Where a pressing concern in a matter exists or an emergency arises in some circumstances a publication to the public may be privileged. This is illustrated in **Blackshaw v Lord** [1983] 2 All ER 311 at 327*

'There may be extreme case where the urgency of communicating a warning is so great, or the source of the information so reliable, that publication of suspicion or speculation is justified: for example where there is danger to the public from a suspected terrorist or the distribution of contaminated food or drug'

There are no circumstances of the nature surrounding the instant broadcast comparable to the ones described in the above passage, the only urgency was to broadcast this investigation to the public at the prime time 5 o'clock news. Again there was insufficient regard for the reputation of the individual.

*(7) **Whether comment was sought from the plaintiff. [sic] (claimant).** One has to take into account the practical reality of this search. It was a high profile search under strong joint military security. There would be no opportunity to obtain a comment from the [respondent] until after the search. The journalist was cross-examined [sic] what she did after the search. There is conflict on the evidence whether the [respondent] or the journalist first contacted the other by cell phone after the search. I accept the [respondent] first phoned the journalist because he was rightly angry about this broadcast. The journalist had already filed her report without any comment. She did not appear to have in mind that it was fair to get a comment in gathering and publishing the information in her report.*

*(8) **Whether the article contained the gist of the plaintiff's side of the story.** It did not. There was no*

effort taken to do so and this was unfair to the [respondent].

*(9) **The tone of the article.** This broadcast adopted the allegation that the [respondent] was taken back to Kingston as a statement of fact. This carried the defamatory implication already discussed.*

*(10) **The circumstance of the publication, including the timing.** This factor has to be combined with whether there was any urgency to broadcast the information on the 5o' clock news and as a breaking news. This item of news could fairly and accurately be published at the available 6 o'clock news."* (Bold and italics as in the original)

[81] The learned judge also took into account the necessity to accord deference and due weight to editorial discretion and judgment as advised by **Reynolds** (see para. [35] of his judgment). Having examined all of the above, he concluded at para. [35]:

"... I hold this publication was not a neutral investigative report of a serious allegation of criminal conduct against a former senior police officer. It was moreover [sic] the line and into being sensational [sic] the weight of this publication tilts in favour of fairness to the reputation of the individual. Also, I do hold the weight of the meaning the [appellant] ascribe to the broadcast, that, the publication truly and accurately suggested the [respondent] was suspected of being involved in criminal activities, does not carry force in the light [sic] the meaning attributed to the publication by the court when looked as a whole. The defence of **Reynolds privilege** is not established and the [appellant] is liable to the [respondent] for this defamatory publication. The [respondent] is entitled to compensation for the injuries caused to him." (Emphasis as in the original)

[82] Indeed, the factors should not be examined as hurdles to be crossed but assessed in a holistic manner (see **Michael Troupe** at paras. [119] and [120], where McDonald-Bishop JA referred to **Jameel v Wall Street HL**, **Bonnick v Morris**, and **Seaga v Harper** [2008] UKPC 9). As stated previously, relevant factors will vary from case to case and "the standard of conduct required of journalists must be applied in a practical and

flexible manner and must have regard to practical realities” (see para. [119] of **Michael Troupe**, where McDonald-Bishop JA referred to Lord Nicholls’ statement in **Bonnick v Morris**).

[83] I will not separately examine each factor as addressed by the learned judge but will mention a few in examining whether the learned judge engaged in a holistic approach and the overall impact of his assessment. In particular, with reference to the status of the information, there had yet been no official police communication on the matter. In **Flood**, it was stated that where a journalist alleged that there were grounds for suspecting that a person had been guilty of misconduct, the duty of verification required that a responsible journalist should satisfy himself that such grounds existed. This responsibility did not necessarily require that he should know what those grounds were. Their existence could be based on reliable sources or inferred from the fact of a police investigation in circumstances where such inferences were reasonable; before publishing the article, responsible journalism required that the journalists should be reasonably satisfied that the supporting facts were true. In the case at bar, the only verification came from the evidence of the journalist who stated that she called a police officer who verified the information as regards the probe. This has to be weighed against the factual circumstances as no such press release was made by any police officer on the scene. Also, as the judge rightly indicated, the circumstances that existed would not be conducive to obtaining any comment from the respondent at the time. More care was, therefore, required from the journalist in fairness to the respondent. The inferences as regards lottery scamming that were published turned out to have been false. The status of the information was, therefore, a crucial factor in the circumstances since the journalist was present on the scene and, as the learned judge said, she was in a position to obtain first-hand information.

[84] The learned judge’s assessment of the timing of the broadcast cannot be faulted. Even if it could be argued that the journalist only reported what she observed, again, some time was required to establish whether there was indeed a lottery scam probe in process and whether the respondent was indeed intended to be taken into police custody.

Similarly, the learned judge's conclusion that the tone of the publication added to a lack of responsible journalism also carries weight. In the round, the complaint that it was merely a box-ticking exercise cannot negate the learned judge's broad-based assessment of the list of factors in the fact-specific scenario. In assessing the entirety of the circumstances, I am not of the view that the learned judge can be said to have erred in this regard. The defence of qualified privilege cannot avail the appellant.

[85] Having examined all the issues raised concerning liability, I am satisfied that the learned judge was correct to find the appellant liable to the respondent for defamation, and that there is no merit to grounds of appeal (a), (b), (c), (d), (e), (f), and (g). These grounds of appeal, therefore, fail.

Issue (2) – Whether the learned judge erred in his award of damages, including his award of interest (grounds (h) and (i))

Submissions

[86] In contending that the award of damages was too high, counsel for the appellant relied on the cases of **The Jamaica Observer Limited v Orville Mattis** [2011] JMCA Civ 13 and **John v MGN Ltd** [1997] QB 586 in positing that injury to reputation is a critical factor in the determination of the quantum of damages in a defamation case. She asserted that the injury to the respondent's reputation did not justify an award of \$9,500,000.00. She stated that the learned judge failed to take account of the fact that the respondent had assessed his damages at \$5,500,000.00. Further, that the respondent's loss was directly linked to the raid itself and not to the broadcast. This is especially so, based on the evidence that over 200 persons were gathered at the scene of the raid and news of the raid was widely circulated. Counsel submitted that the award of damages should be reduced.

[87] With respect to the award of interest, it was submitted that the learned judge erred in the exercise of his discretion as there were no exceptional circumstances in the case. Moreover, interest was not pleaded, and an award of interest may result in double compensation to the respondent. As such, the award of interest should be set aside.

There was reliance on **Jones v Associated Newspapers Ltd** [2008] 1 All ER 240 and **McPhilemy v Times Newspaper Ltd and others (No 2)** [2001] 4 All ER 861 ('**McPhilemy**').

[88] On the other hand, counsel for the respondent submitted that the award of damages should not be disturbed and that the case of **Percival James Patterson v Cliff Hughes and Nationwide News Network Limited** [2014] JMSC Civ 167 ('the **PJ Patterson** case') was appropriate for use. Further, that the interest awarded was appropriate in the circumstances, as interest is normally awarded on damages.

Analysis

Damages

[89] The basis on which an appellate court would interfere with an award for damages was expressed by the Privy Council in **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4 where Lloyd-Jones LJ writing on behalf of the Board stated at para. 7:

"An appellate court will not, in general, interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong. In *Flint v Lovell* [1935] 1 KB 354 Greer LJ referred (at p 360) to the power of an appellate court to reverse a decision on quantum of damages in the following terms:

'[T]his Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.'

Similarly, in *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 the Board observed (at pp 613-614):

'... before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell* [1935] 1 KB 354, approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601).''

[90] In assessing the quantum, the learned judge referred to sections 24 and 25 of the Defamation Act, 2013, that the award should bear an appropriate and rational relationship between the injury or damage and the sum awarded. As previously stated, the Defamation Act, 2013 was not in force at the time of the publication, and section 24 has no equivalent section in the Defamation Act, 1963. However, the learned judge's reference to section 24 did not create an error, as the principle expressed is one based on the common law as it relates to awards of damages generally in defamation cases (see **John v MGN Ltd**).

[91] The learned judge's award in this matter was made on 19 August 2020. He examined the respondent's evidence of injury at para. [37] of his judgment:

"[37] In his witness statement, filed February 2015, the [respondent's] evidence of his injury is stated:

'40. That I have since lost my Office Manager and several other employees after the publication of this news item.'

'41. That the publication of this news item [has] caused me and my family great embarrassment, stress and pain.

'42. That since the publication my business has lost a number of clients,'

'44. That as a result of the airing of this broadcast I have suffered embarrassment, humiliation, hurt to my feelings, mental trauma, injury to my reputation, I have been shunned and cursed at by persons close to me and I have lost business opportunities [sic] loss of staff members [sic].'

'45. That I am aware the 1st Defendant, Radio Jamaica Limited issued an apology after my Attorney-at-Law contacted the office. However, that did not make me feel any better about myself as a person. I still suffered the same hurt to my feelings, injury to my reputation, embarrassment and humiliation.'

'46. That I was still shunned by persons so much that I stopped going to my hangout spot and basically stayed home as I was afraid of getting more insults. I became very depressed and as a result I was quite withdrawn. I could not even relate to my wife and children. I have suffered loss and damage as a result of the publication of this newscast.'"

[92] The learned judge indicated in his judgment that this evidence was not challenged by the appellant. However, he also took note of the appellant's submission that the respondent did not suffer any injury to his reputation due to the defamatory publication based on the evidence of his two witnesses that they would have shunned the respondent if he was involved in other criminal activities such as possession of guns and firearms, apart from the lottery scam. The learned judge concluded, however, that the respondent suffered a serious injury to his feelings and reputation and for the length of time he described. His assessment of damages was based on this injury, which he indicated went "to the core attributes of [the respondent's] personality such as his integrity and honour" (see para. [38] of the judgment). The learned judge did not include any assessment of financial loss, and he accepted that the appellant had mitigated the damage based on the published apology (see paras. [39] and [40]).

[93] The learned judge relied substantially on the **PJ Patterson** case in arriving at the award of \$9,500,000.00, although the respondent had submitted for a final award of \$5,500,000.00. The request for \$5,500,000.00 was based on an updated award made in **Joseph M Matalon and another v Jamaica Observer Limited** [2014] JMSC Civ 127 (**Matalon**), a first instance decision by Sykes J (as he then was). The learned judge also considered the award in **Seaga v Harper CA**, which was updated to \$5,488,843.00 (Sykes J in **Matalon**, relied on the Privy Council's decision in that case, in which the Court of Appeal's decision was not disturbed). However, the learned judge regarded the **PJ Patterson** case as being on the same scale as the respondent's. He used the updated award in the **PJ Patterson** case, which was \$15,000,000.00 and applied a discount of 35% to reflect the apology that was made. He, therefore, awarded the sum of \$9,500,000.00 to the respondent.

[94] I will, therefore, examine the three authorities mentioned above in order to determine whether the learned judge could be said to have erred in his assessment. In **Matalon**, Sykes J concluded (at para. [93] of his judgment) that omissions and misplacement of chronological history in a newspaper publication, along with a picture of the claimant, were defamatory. He concluded, however, that based on the evidence, no loss of reputation seemed to have ensued. There was also no evidence of loss of face within the family business and no evidence of loss of stature. He found that the case of **Seaga v Harper** (2008) 72 WIR 323 was closer to the circumstances of Mr Matalon's case and awarded damages of \$4,379,310.34, being the then updated value of the award made in **Seaga v Harper**.

[95] In **Seaga v Harper**, the defendant was the leader of the opposition party of Jamaica who made remarks that were found to be defamatory of a Deputy Commissioner of Police who was about to be appointed as the Commissioner of Police. The defendant's publication was found not to be protected, as he had not shown the requisite care to establish the defence of qualified privilege. The Privy Council certified the reduced award made by this court of \$1,500,000.00. It is to be noted that in **Seaga v Harper**, the defamatory words did not speak to a criminal offence.

[96] The claimant in the **PJ Patterson** case was a former Prime Minister. The defamatory material was false and struck at the core of his identity. The trial judge made an award of \$12,000,000.00 in circumstances where she stated, among other things, that “his persona must be taken into account”. The learned judge in the case at bar concluded that a comparable sum should be awarded to the respondent. He stated at para. [48] sub-para. 5:

“....There are some similar features between this case and the present [respondent]. Both are former public officeholders. The former Prime Minister [sic] office may be higher but both were the subject of defamatory publication that was not true and strike [sic] at the core of their integrity and honour.”

[97] He made no other adjustments to the updated figure save for the discount granted for the apology, which is to be considered as an aspect of mitigation of damages. It is my view, however, that the learned judge failed to take into account two relevant factors. He acknowledged that the office of the Prime Minister was higher but failed to apply this fact to the final sum awarded to the respondent. Further, he ought to have considered that there was indeed a search of the respondent’s office by the police which garnered public attention, and, as a result, there is an element of commonality to be shared as regards the loss of reputation and injury to feelings. While the lottery scamming remains the sting of the libel, the learned judge ought to have considered whether a further discount should have been applied on the above bases.

[98] It is my view, therefore, that a further discount of 40% should be made to the award of \$9,500,000.00. This would amount to a reduced award of \$5,700,000.00. Ground of appeal (h), therefore, succeeds.

Interest

[99] Despite the appellant’s submissions, the pleadings disclose that the respondent claimed for interest on damages. The learned judge relied on his discretion to award interest in accordance with the power given to the court by section 3 of the Law Reform (Miscellaneous Provisions) Act (‘LRMPA’). He awarded interest from the date of

publication to the first date reserved for delivery of judgment (19 June 2017). Section 3 of the LRMPA provides:

“In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section-

(a) shall authorize the giving of interest upon interest;
or

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.”

[100] Morrison JA in **Jamaica Observer v Wright**, at para. [115], in summary, stated that this section “gives to the court a clear discretion as regards the rate of interest to be paid on the sum awarded; whether interest is to be paid on the whole or part of that sum; and the period for which interest is to be paid, which may be the whole or any part of the period between the date when the cause of action arose and the date of judgment”.

[101] The issue of the appropriateness of awarding interest in defamation cases was discussed in **McPhilemy**. Chadwick LJ, at para. 17, stated:

“There is, however, force in the final point advanced on behalf of The Times; that is to say, that it is established practice, in defamation cases, for the court to refuse to direct the payment of interest, in respect of any period prior to the date of the award, on the amount of the jury's award. The justification for that practice is that the amount of the jury's award takes account of everything down to the date of the award, including, in particular, the strain and distress caused to the claimant by the conduct of the trial and the fact that

the claimant has had to wait for payment of the compensation to which he has ultimately been held entitled. It is said that it would be unjust to order the payment of interest, under para (2) of r 36.21, on any part of the jury's award in the present case, at least in respect of any period prior to the date of the award, because it has to be assumed: (i) that the award itself includes an element which reflects the loss to the claimant equivalent to the actual or notional cost of being kept out of the monetary compensation, which (on the hypothesis that the libel had been established) he should have had immediately after the libel was published, by the delay occasioned by legal proceedings and a trial; and (ii) that the award itself takes account of the anxiety and distress of the proceedings and trial to which Lord Woolf MR referred in the *Petrotrade* case. To order the payment of interest under para (2), in respect of any period prior to the date of the award, would involve double compensation."

[102] In **Jamaica Observer v Wright**, the trial judge had made an order for interest of 3% until the date of judgment. Although the issue of interest was not a ground of appeal, this court thought it necessary to request submissions from both counsel in the matter. Counsel for the appellants made the "point that, as a matter of general principle, no interest should be awarded on damages in defamation actions prior to judgment" (see para. [117]). Reliance for this was based on **McPhilemy**.

[103] Morrison JA, at para. [119], made the point that Chadwick LJ in **McPhilemy** was concerned with the power to award interest under rule 36.21 of the English Civil Procedure Rules 2002 "in cases where a claimant has, in the result, 'beaten' the defendant's offer to settle". Rule 36.21 has the equivalent provision in rule 35.15 of Jamaica's Civil Procedure Rules, 2002 ('CPR'). Morrison JA stated:

"... In this context, Chadwick LJ made reference (at para. 17) to 'the established practice in defamation cases for the court to refuse to direct payment of interest, in respect of any period prior to the date of the award, on the amount of the jury's award'. The justification for the practice was stated to be 'that the amount of the jury's award takes account of everything down to the date of the award, including, in particular, the strain and distress caused to the claimant by

the conduct of the trial and the fact that the claimant has had to wait for payment of the compensation to which he has ultimately been held to be entitled'. Simon Brown LJ (at para. 28) also took it as given 'that in a defamation action it would generally be unjust to award interest on the damages' (see also, to similar effect, **Jones v Associated Newspapers Ltd** [2007] EWHC 1489 (QB), para. 13, in which Eady J stated that it would 'generally be inappropriate to award interest on libel damages')."

[104] There was no offer to settle in the case at bar. However, Morrison JA remarked that to the extent that the jury or judge's award may be taken "to reflect the court's view of what constitutes appropriate compensation ... up to the time of the award, an order for the payment of interest in addition to damages may involve an element of double compensation" (see para. [120]).

[105] Morrison JA also acknowledged that an order for the payment of interest was subject to the limits established by section 3 of the LRMPA, was within the judge's discretion and cautioned against this court's interference unless the exercise of the discretion could be said to be wrong in law or reached on a plainly wrong basis. This is noted at para. [121] where Morrison JA quoted Chadwick LJ in **McPhilemy**. Morrison JA declined, however, to "second-guess the exercise of [the trial judge's] discretion" in the absence of a ground of appeal challenging the judge's decision. The award of interest was, however, varied for clarification, to reflect the payment of interest at 3% per annum from 27 March 1998 (the date that the cause of action arose) to 22 May 2008 (the date of the judgment).

[106] At paras. [49] and [50] of his judgment, the learned judge in the instant case referred to Morrison JA's statements in **Jamaica Observer v Wright** but, in any event, exercised his discretion to make the order for interest. He has given no reason for such an award, and there is no indication whether he considered the issue of double compensation. This is a concern in the case at bar as double compensation is potentially a live issue. In the absence of a basis for awarding interest on damages, the award cannot properly be upheld. Ground of appeal (i), therefore, succeeds.

Issue (3) – Whether the learned judge erred in issuing a special costs certificate for the respondent (ground (j))

Submissions

[107] Counsel for the appellant contended that as there was only one counsel representing the respondent throughout the course of the proceedings, there was no basis on which to grant a special costs certificate. Furthermore, a special costs certificate was not claimed, and no submissions were invited by the court on the issue.

[108] By contrast, counsel for the respondent submitted that the issuance of the special costs certificate was within the authority of the court and was appropriate in the circumstances.

Analysis

[109] Rule 64.12 of the CPR makes provision for the court to grant a special costs certificate as follows:

- “64.12 (1) When making an order as to the costs of an application in chambers the court may grant a ‘special costs certificate’.
- (2) In considering whether to grant a special costs certificate the court must take into account –
 - (a) whether the application was or was reasonably expected to be contested;
 - (b) the complexity of the legal issues involved in the application; and
 - (c) whether the application reasonably required the citation of authorities and skeleton arguments.
- (3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than –
 - (a) one attorney-at-law on the hearing of an application; or

(b) two attorneys-at-law at the trial, be allowed.”

[110] For completeness, rule 65.17(3), which relates to the basis of quantification of costs, provides:

“(3) In deciding what would be reasonable the court must take into account all the circumstances, including -

(a) any orders that have already been made;

(b) the conduct of the parties before as well as during the proceedings;

(c) the importance of the matter to the parties;

(d) the time reasonably spent on the matter;

(e) whether the cause or matter or the particular item is appropriate for a senior attorney-at-law or an attorney-at-law of specialised knowledge;

(f) the degree of responsibility accepted by the attorney-at-law;

(g) the care, speed and economy with which the matter was prepared;

(h) the novelty, weight and complexity of the matter; and

(i) in the case of costs charged by an attorney-at-law to his or her client -

(i) subject to section 21 of the Legal Profession Act, any agreement that may have been made as to the basis of charging;

(ii) any agreement about the seniority of attorney-at-law who should carry out the work;

(iii) whether the attorney-at-law advised the client and took the client’s instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the matter.”

[111] Although rule 64.12 seems to be focused on applications in chambers, rule 64.12(3)(b) demonstrates that the court may issue a special costs certificate in respect of a trial, directing the payment of costs for more than two attorneys.

[112] Whereas the learned judge gave detailed consideration to the legal basis for the grant of indemnity costs, he did not consider the legal requirements surrounding the issuance of a special costs certificate as set out in the Rules above. He merely indicated, at para. [60] of his judgment, that the trial involved the application of complex issues. However, such an assessment is to be done when there are two attorneys involved in the trial process (see rules 64.12 (3) (b) and 65.17 (3) (h)). Reference was made to the case of **Michael Distant and another v Nicroja Limited and others** (unreported), Supreme Court, Jamaica, Claim No 2010 HCV 1276, judgment delivered 8 March 2011, in which Brooks J (as he then was), considered whether to grant both indemnity costs and a special costs certificate. The learned judge did not adopt the approach of Brooks J because he did not consider the guidance from the CPR on the issuance of a special costs certificate. In the instant case, it is apparent from the face of the judgment, and it has not been disputed, that only one counsel appeared for the respondent at trial. As such, issuing a special costs certificate in those circumstances would have been an order in futility, as the appellant would not be entitled to recover costs not actually incurred. In the absence of a basis to issue a special costs certificate, the learned judge erred in making such an order.

[113] Ground of appeal (j), therefore, succeeds.

Conclusion

[114] Upon consideration of this appeal, I have determined that the learned judge was correct in his assessment that the appellant's broadcast, which stated that the respondent was being probed for lottery scamming was defamatory, having regard to the ordinary meaning of the words of the broadcast and the appellant's admission that the statement was untrue. Therefore, the learned judge was correct in concluding that the defence of justification could not avail the appellant. Moreover, the learned judge was correct to find

that the appellant had not satisfied the requirements of responsible journalism. However, the award of damages was excessive in all the circumstances, and, the respondent was not entitled to an award of interest on damages or the grant of a special costs certificate. It is my proposal, therefore, that the following orders be made in disposing of the appeal:

1. The appeal is allowed in part.
2. The following orders of the learned judge are affirmed:
 - (a) judgment for the respondent.
 - (b) Costs to the respondent to be agreed or taxed.
3. The order of the learned judge awarding damages to the respondent in the sum of \$9,500,000.00 is set aside and substituted therefor is an award of damages in the sum of \$5,700,000.00.
4. The orders of the learned judge awarding interest and granting a special costs certificate are set aside.
5. The respondent is awarded 70% of the costs of the appeal, which costs are to be agreed or taxed.

BROWN JA

[115] I have read, in draft, the judgment of Straw JA and I agree.

LAING JA

[116] I, too, have read, in draft, the judgment of Straw JA and I have nothing else to add.

STRAW JA

ORDER

1. The appeal is allowed in part.

2. The following orders of the learned judge are affirmed:

(a) judgment for the respondent.

(b) Costs to the respondent to be agreed or taxed.

3. The order of the learned judge awarding damages to the respondent in the sum of \$9,500,000.00 is set aside and substituted therefor is an award of damages in the sum of \$5,700,000.00.

4. The orders of the learned judge awarding interest and granting a special costs certificate are set aside.

5. The respondent is awarded 70% of the costs of the appeal, which costs are to be agreed or taxed.