[2020] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 57/2008 AND 111/2011

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**WAYNE REID**	**1st APPELLANT**
AND	**JENTECH CONSULTANTS LIMITED**	**2nd APPELLANT**
AND	**CURTIS REID**	**RESPONDENT**

CONSOLIDATED WITH

BETWEEN	**CURTIS REID**	**APPELLANT**
AND	**CABLE AND WIRELESS JAMAICA**	**1ST RESPONDENT**
AND	**JENTECH LIMITED**	**2ND RESPONDENT**
AND	**WAYNE REID**	**3RD RESPONDENT**

Ransford Braham QC and Jordan Whittingham instructed by Vaccianna & Whittingham for Wayne Reid and Jentech Limited

Daniella Gentles-Silvera and Miguel Williams instructed by Livingston Alexander and Levy for Cable and Wireless Jamaica

Captain Paul Beswick, Christopher Dunkley and Ms Carissa Bryan instructed by Ballantyne Beswick and Co for Curtis Reid

26, 27, 28, 29 October, 2 November 2015 and 16 June 2020

MORRISON P (AG)

Introduction

[1] In 1998, Cable & Wireless (Jamaica) Limited ('C&W') was the sole provider of telephone and related services for the island of Jamaica. At that time, Mr Curtis Reid ('the respondent'), a professional engineer who had been employed to C&W for almost 22 years, was C&W's Business Development Manager ('BDM').

[2] By a letter dated 20 July 1998, C&W commissioned Dr Wayne Reid of Jentech Consultants Limited (Jentech) to do a review of "the overall standards of certain project designs and administrations managed by one of our consultants, Technical Enterprises Limited".

[3] Technical Enterprises Limited ('TechEnt') is a consulting engineering firm. Its principal is Mr Robert Evans, a civil engineer by profession.

[4] Jentech is an engineering consultancy firm. Dr Reid, a professional engineer in the specialities of structural engineering and civil engineering, is a director of the firm.

[5] In December 1998, Dr Reid submitted his report, entitled "Investigation of Projects for Cable & Wireless (Jamaica) Limited" ('the Jentech report').

[6] On 19 February 1999, in circumstances which are more fully explained in the judgment of Brooks JA, C&W dismissed the respondent from its employment.

[7] In due course, the respondent filed two actions arising out of his dismissal and the publication of the Jentech report. In the first, he claimed damages for wrongful dismissal against C&W, and against C&W, Jentech and Dr Reid for conspiracy ('the wrongful dismissal action'). In the second, he claimed damages against Dr Reid and Jentech for libellous statements allegedly published of him in the Jentech report ('the libel action').

[8] Both actions were tried before R Anderson J ('the learned judge'), sitting with a special jury. In a judgment given on 30 April 2008, the special jury awarded the respondent $7,000,000.00 as damages for libel against Dr Reid and Jentech in the libel action. And, in a judgment given on 30 September 2011, the learned judge gave judgment against the respondent in the wrongful dismissal action.

[9] In these appeals, which were heard together, Dr Reid and Jentech challenge the judgment against them in the libel action, while the respondent challenges the judgment against him in the wrongful dismissal action.

[10] The respondent's appeal from the judgment against him in the wrongful dismissal action has been fully dealt by Brooks JA. I have had the advantage of reading Brooks JA's judgment in that matter in draft and I agree with his conclusion that that appeal must be dismissed. The judgment which follows is therefore confined to Dr Reid and Jentech's appeal from the judgment against them in the libel action.

[11] For the purposes of this appeal, save where it is necessary to refer to them individually, I will refer to Dr Reid and Jentech as the appellants.

[12] Although this case is primarily concerned with the contents of the Jentech report, the assignment from which it resulted was in fact the second which C&W had asked Dr Reid to undertake in connection with its relationship with TechEnt. In a letter dated 17 July 1998 C&W instructed Dr Reid to consider and review the financial and technical details of a project proposal submitted by TechEnt in relation to the construction of a building at C&W's Coopers' Hill Radio Relay Station ('the Coopers' Hill project'). In this regard, Dr Reid was also asked to consider a new design and report prepared by Mr Milton Weise, a director of C&W, and to submit a comprehensive report on his findings. Dr Reid submitted his report on the Coopers' Hill project to C&W in November 1998.

[13] By letter dated 20 July 1998, C&W instructed Dr Reid to undertake a wider investigation of projects managed by TechEnt. The letter stated the following:

> "Dear Dr. Reid
>
> This serves to invite you to review the overall standards of certain project designs and administrations managed by one of our consultants, Technical Enterprises Limited.
>
> Such a review should seek to ascertain the reasonableness of:
>
> - the overall costs of these projects including variations;
> - the fees charged by Technical Enterprises.

> In addition, your opinion regarding the quality of the designs and any intellectual property rights violation is solicited.
>
> Any issue identified during your review which constitutes a breach of or a deviation from standard or acceptable industry norms should be brought to our attention.
>
> Kindly submit your proposed charges for this engagement for our consideration. Should we agree to proceed, you will be provided with a detailed brief.
>
> We look forward to formally engaging your services and your usual diligence in executing this review and presenting your comprehensive report."

[14] This letter was followed by a further letter, dated 14 August 1998, from C&W to Dr Reid, under cover of which a large number of photographs, plans and other documents relating to the various projects to be covered by the proposed investigation were submitted to him.

[15] In due course, an agreement was reached between C&W and Dr Reid as to the fee basis for the proposed investigation (see letter dated 23 September 1998, from C&W to Dr Reid). The Jentech report, which Dr Reid submitted to C&W on or about 8 December 1998, was the outcome of this investigation.

[16] The scope of the engagement and the scheme of the report were described as follows in the introduction to the Jentech report:

> "Cable & Wireless (Jamaica) Limited retained the services of Dr Wayne Reid to investigate the design and construction of eight (8) exchanges, three (3) generator rooms, one (1) cellular site and a tower by way of letters issued on July 20, 1998, August

14, 1998 and September 23, 1998, copies of these letters are in Appendix 1. These projects which had Technical Enterprises Limited as the Consultants were:

Exchanges	-	Junction
		Brunswick
		Runaway Bay
		Granville
		Chapelton
		Williamsfield
		Grange Hill
		Christiana
Generator Rooms	-	Carlton
		Montego Bay
		North Pembroke
Cellular Site	-	Training School
Tower	-	West Exchange

Documents including drawings, contracts, bill of quantities, certificates of payments, claims, correspondence and internal memoranda were made available for scrutiny and analysis. Inspections were made with Cable & Wireless personnel of all the sites and photographs taken at some with [sic] are included in the report. Discussions were held with pertinent officers of Cable & Wireless to obtain clarification and additional information.

The report is presented as follows:

1. A recitation of facts as elicited from the documentation, analysis of these and relevant comments are given for each of the projects.
2. A report on the proposed and actual management principles and methodology utilized for the projects. Comments are given on each aspect of the methodology.
3. Conclusions are then made on the information obtained and the consequential analysis.
4. Recommendations are given for improvement of existing systems and the introduction of beneficial ones."

[17] In the executive summary, the findings of the report were stated as follows:

> "(i) Most of the projects had significant overruns in time and cost with the former exceeding 100% in cases and the latter exceeding 30%. These were due to
>
> > (a) Inadequate project management directly causing prolongation of contract times.
> >
> > (b) Late issuing of information and late signing of subcontracts.
> >
> > (c) Incomplete pre-construction planning.
>
> (ii) Some of the fees charged by Technical Enterprises Limited were unreasonable. The reasons are varied and outlined in detail in the 'Conclusions'.
>
> (iii) The architectural design is standard and gives functional though not necessarily aesthetically pleasing buildings. The structural design concept is questionable and in some instances excessive. Plagiarism occurred on the Junction Project as Aubrey Dawkins Architects' drawings were appropriated and passed off as Technical Enterprises' own.
>
> (iv) There was no documentation to show that other industry norms had been breached.

> (v) There were breaches of various company regulations by the executives of Cable & Wireless in managing the projects. There were also weaknesses in the system which have been highlighted. Recommendations have been made to assist in rectification of the project management and implementation process."

[18] The body of the report then followed. It covered a total of 74 pages, incorporated photographs and concluded with detailed recommendations. It will, of course, be necessary to consider the contents of the Jentech report in greater detail in due course.

[19] The respondent considered that he was libelled by the Jentech report in a number of respects. Accordingly, as has been seen, he filed suit against the appellants claiming damages for libel, among other things. Somewhat unusually, the respondent provided particulars of the libel of which he complained for the first time in the reply to the defence filed on 27 January 2004. But Captain Beswick explained this course on the basis that the respondent was not aware of the full contents of the Jentech report until after discovery in the action. Nothing now turns on this. The particulars of the allegedly libellous words revealed that the Jentech report was critical of the performance of C&W's management, in particular, the Building Development Department (BDD), of which the respondent was the head. The relevant portions will be quoted in detail below (see paragraph [42] below).

[20] In their defence to the claim for libel, the appellants denied that the words complained of were defamatory and/or were used in reference to the respondent. They also pleaded that, in any event, the Jentech report was published on an occasion of qualified privilege (see defence filed on 19 January 2004). This last contention was met in reply by the respondent's assertion that, in publishing the Jentech report, the appellants were actuated by malice and spite directed at him.

[21] As I have already indicated, after a trial before the learned judge and a special jury, the jury found for the respondent. Their unanimous responses (Volume D, Bundle 4, pages 1459-1460) to the four questions put to them by the learned judge at the end were as follows :

> Q: "Are the words complained of defamatory in their natural and ordinary meaning?"
>
> A: "Yes."
>
> Q: "If they are not defamatory in their natural or ordinary meaning, are they defamatory by virtue of innuendo, in the context of the report?"
>
> A: "Not applicable, bearing in mind question two is related to question one."
>
> Q: "[H]as [sic] the Defendants shown by their evidence that they can rely upon the defence of qualified privilege?"
>
> A: "No."
>
> Q: "If the answer to (3) is yes, has the Claimant established that the statement was published maliciously or with malice?"

A: "Not applicable, same thing, three is related to four."

[22] In this appeal, the appellants' principal complaint is that the learned judge's approach and directions in relation to their defence of qualified privilege and the respondent's contention that they were actuated by malice were deficient. In addition, they also complain that the learned judge failed to give proper or adequate directions to the jury on the evidence; that the verdict of the jury was unreasonable or perverse; and that the award of damages of $7,000,000.00 was, in any event, manifestly unreasonable and excessive. The respondent, for his part, maintains that the learned judge gave adequate directions on all relevant issues that arose and that his judgment should be affirmed in all respects.

[23] In their amended notice of appeal filed on 13 March 2015, the appellants put forward a total of 16 grounds of appeal. However, in their skeleton submissions filed on 19 May 2015, the appellants helpfully classified the grounds of appeal under six headings, which I will deal with in the following order:

(i) Whether the words complained of were defamatory and/or were made in reference to the respondent (grounds (b) and (c))

(ii) Whether the judge gave proper directions in relation to the evidence (grounds (a), (j) and (k))

(iii) Qualified privilege (grounds (d), (e) and (h))

(iv) Malice (grounds (f), (g) and (n))

(v) Whether the verdict of the jury was unreasonable or perverse (ground (o))

(vi) Whether the damages awarded by the jury were excessive (ground (p))

Some relevant background evidence

[24] The evidence at trial was given in the first place by reference to witness statements. The approach was for each witness to identify his witness statement and then to read it, more or less verbatim, to the court. In some cases, with the permission of the learned judge, further evidence in amplification of the witness statements was also given. Cross-examination then followed.

[25] In his amended witness statement (dated 12 October 2004), the respondent set out the history of his employment with C&W and explained the scope of his responsibility as head of the BDD in some detail (the amended witness statement ran to 21 single-spaced pages). He outlined the company's standard procedures in connection with building and engineering works generally.

[26] He stated the circumstances in which he was introduced to TechEnt in 1991 as a possible consultant for road rehabilitation at certain C&W equipment sites, and to his

subsequent satisfaction with the company's fees and work performance. He referred to various other projects later undertaken by TechEnt and to problems which arose with regard to cost overruns and late completion. He referred to the problems encountered with some of the projects undertaken by TechEnt, notably the construction of the Junction Exchange, which was initially designed by others, and explained his own and C&W's responses to them. These problems led to meetings with Mr Weise, a C&W director and a member of the contracts committee, and other C&W executives, at which his explanations appeared to have been accepted.

[27] He spoke to being queried at a point as to why he was giving TechEnt so much work and explained that they understood C&W's requirements and performed in a timely and efficient manner. He described in some detail problems which arose in relation to the Coopers' Hill project, which he had initially assigned to TechEnt; and the subsequent decision, based on a report by Mr Weise to the C&W board, to adopt a different design from the one recommended by TechEnt and supported by him, in favour of a design put forward by Mr Weise himself. He spoke to a subsequent decision by the C&W board to reject another project design done by TechEnt, to appoint Mr Weise to investigate the high cost of the project and ultimately to award the project contract to a different contractor.

[28] Towards the end of July 1998, he was directed by Mr D R Lee, C&W's vice-president for network operations, to hand over the files for all work previously carried out by TechEnt. In November 1998, he was summoned to a meeting with Dr Reid and

others, at which Dr Reid asked a number of questions with respect to projects in which TechEnt was involved. He was unable to answer many of the questions as they related to things which had happened many years before and his files in connection with them had been taken away from him. He therefore had no documentation from which to refresh his memory. Dr Reid "charged" him for allowing TechEnt to increase their fees at the end of many of their jobs. Dr Reid also "charged" him for allowing TechEnt to use another architect's drawings on the Junction project. At a subsequent meeting on 18 February 1999, at which Dr Reid was also present, he was again asked questions about the various projects, but was unable to respond effectively without a copy of the Jentech report. At that meeting, Dr Reid "leveled an accusation" against him in respect of the absence of the calculations for a particular project on the file.

[29] At a meeting at C&W on 19 February 1999, he was handed a letter of dismissal. At that meeting, he was asked whether he agreed with the Jentech report and he stated that he did not. In the witness statement, he set out the five reasons given for his dismissal in the letter of dismissal and explained his position in relation to each of them.

[30] Under cross-examination by counsel for C&W, the respondent agreed with the suggestion that, if the company "believeed [sic] or suspected that something is going wrong … it is their right to have it investigated" (Bundle 4, Volume A, page 249). Further, that based on his knowledge of Jentech as a civil engineering consultancy firm, and the fact that the projects handled by his department were civil engineering

projects, "Jentech would have been an appropriate organization to review the project" (Bundle 4, Volume A, page 250).

[31] Under cross-examination by counsel for the appellants, the respondent was taken in great detail through the Jentech report – project by project – with a view to suggesting that its contents were generally accurate. It was further suggested to the respondent that the report was not defamatory of him, either because it made no reference to him or because it was true. The respondent rejected these suggestions and maintained his position that, expressly or by implication, he was libelled by the Jentech report.

[32] Dr Reid filed four witness statements in all. Not all of them have a direct bearing on the issues raised in the libel action. In the first (dated 26 February 2004), he gave details of his qualifications and experience as a professional engineer and spoke to the circumstances in which Jentech came to be retained to carry out the review of the TechEnt projects. He explained that, having received numerous documents from C&W under cover of a letter dated 14 August 1998, he personally visited all of the relevant sites accompanied by personnel from C&W. He also attended meetings at C&W's offices in connection with the assignment on at least three occasions. One of them was the meeting of 10 November 1998 to which the respondent had referred. He denied having accused the respondent, either at that meeting or any other time, of being responsible for any of the matters referred to by the respondent. He presented the Jentech report in December 1998 and all of the information used in the report was derived from his

site visits, the site plans and drawings in relation to each project, C&W's documents, and meetings with C&W personnel.

[33] Dr Reid concluded his first witness statement on the following note (at paragraphs 21-25):

> "21. The report states matters of fact, and do [sic] not refer to the [respondent] either directly or indirectly.
>
> 22. My conclusions, statements, observations and words in the report do no[t] and cannot be reasonably be [sic] said to refer to the [respondent] or any one person in particular.
>
> 23. I was presented with [C&W's] policy manual and guidelines governing their relationship with external consultants. I found that in all the various projects referred to in the report, that these guidelines were not followed. In many cases, there were blatant breaches and these matters are specifically referred to in my report.
>
> 24. In the course of my investigation, I did not speak to nor have any interaction with the [respondent] on the matter except at meetings called by [C&W].
>
> 25. I do not, nor did I ever bear any malice towards the [respondent] in relation to this matter, nor do I have any reason to bear such malice."

[34] In a supplemental witness statement (dated 5 March 2004), Dr Reid stated that the Jentech report was based on factual matters only and that the words and statements contained in it did not in their natural and ordinary meaning bear the meanings attributed to them by the respondent.

[35] As might have been expected, Dr Reid was cross-examined in detail and at great length by counsel for the respondent (Bundle 4, Volume B, pages 739 -767, Bundle 4, Volume C, pages 770 -932 and pages 945-1004).

[36] It was suggested to him that he had falsified or omitted material in the Jentech report, "actuated by an intent to portray [the respondent] as dishonest and incompetent" (Bundle 4, Volume C, pages 882-883). Similar suggestions may also be found at, for instance, pages 894, 929, 955, 973 and 974. Dr Reid denied all such suggestions.

[37] Dr Reid agreed that he did not speak to the respondent directly during the course of his investigation. But he pointed out that the respondent was in fact one of a number of C&W personnel present at the meeting of 19 November 1998, at which he had asked certain questions arising from the material which he had seen (pages 834-835). He said that he made no other enquiries of the respondent, because he did not think it was necessary (page 955).

[38] Dr Reid denied the suggestions that the Jentech report was "a collection of lies, half-truths and misleading statements" (page 1000); that the purpose of the report "was to ensure that there was a basis for the final removal of Technical Enterprises from its consultancy at [C&W]" (pages 1000-1001); and that "the final purpose of your report was to ensure that [C&W] had a basis to fire Mr Curtis Reid for incompetence and or dishonesty" (page 1001).

[39] Dr Reid stated that he did not know Mr Reid before and that although they shared a surname and were from the same part of the country, they were not related to each other. His only purpose in writing the Jentech report was to recite the facts as he saw them, "based on my experience and knowledge" (pages 1002-1003).

[40] Against this background, I will now turn to a consideration of the grounds of appeal under the headings identified at paragraph [23] above.

(i) Whether the words complained of were defamatory and/or were made in reference to the respondent?

[41] Grounds (b) and (c) read as follows:

> "(b) That despite an application being made by the Appellants the learned Judge erred in failing to make a ruling and to advise the jury upon the question of law of whether the words and statements complained of were capable of bearing the meaning attributed to them by the Respondent or any other defamatory meaning.
>
> (c) That the learned Judge erred in failing to make a ruling and to advise the jury upon the question of law as to whether there was any evidence to be submitted to the jury that the words complained of would be understood by reasonable persons to refer to the Respondent."

[42] I will first set out the particulars of the libellous words complained of by the respondent:

"PARTICULARS OF LIBELLOUS WORDS

Page 1:

(i) Most of the projects had significant overruns in time and cost with the former exceeding 100% in cases and the latter exceeding 30%. These were due to:

(a) Inadequate project management directly causing prolongation of contract times.
(b) Late issuing of information and late signing of subcontracts.
(c) Incomplete pre-construction planning.

(ii) Some of the fees charged by Technical Enterprises Limited were unreasonable.

(iii) Plagiarism occurred on the Junction Project as Aubrey Dawkins Architects' drawings were appropriated and passed off as Technical Enterprises' own.

(iv) There was no documentation to show that other industry norms had been breached.

(v) There were breaches of various company regulations by the executives of Cable & Wireless in managing the projects.

Page 7:

The utilization of Aubrey Dawkins' drawings particularly with the changing of the blocks without his permission is unethical.

Page 8, 9:

As stated above, the architectural modifications of Aubrey Dawkins' drawings by Technical Enterprises were minor. The fees that should have been paid for consultancy work to the new Consultants prior to construction should have been based on time charges as established in the guidelines for architectural and engineering fees. This is the basis used

when drawings are to be modified in a minor way as occurred with this project. Therefore the fee of 12.25% charged for the works by the consultants is an overcharge.

Page 9:

The contract documents prepared by Technical Enterprises have a marked similarity in areas to those prepared by Goldson Barrett Johnson.

Apparently this information was not conveyed to the President of the Contracts Committee of Cable & Wireless as the contract was still awarded on October 17, 1995 in the original sum.

Page 10:

The contract for the construction of the exchange, which is classified as a small station with a capacity not exceeding 5,000 lines, was awarded on February 8, 1996 to Alval Limited in the sum of $25,899,995.00. The site was handed over to the Contractor on March 19, 1996. The contract period was set at seven (7) months with a starting date of March 25, 1996 and a completion date of October 26, 1996. The works proceeded slowly with extensive variations mainly for rock excavation being made to the contract within the first three (3) months. These excavations included that for the fuel tank which could have been located above ground to save on the massive additional cost of rock excavation.

Page 12:

The changes made as indicated above were minor a [sic] therefore instead of paying a fee as percentage of the total cost for these modifications, a time charge should have been instituted as the method of payment. This would have reduced the total fees even below the 6.4% charged.

Page 13:

There was a lack of satisfactory pace on the work as at March 25, 1996 after the original completion date had been reached, the certified value of the works was $8.79 million only 36% of the value of the works. Up to February 7, 1996, the Electrical

Consultants were still asking for requirements for the vault and this was only five (5) weeks before the extended completion date.

There was therefore a total lack of coordination on the works as two (2) main aspects of the project were not even dealt with until 2-3 months after the original completion date of the project.

Page 14:

The Final Accounts dated March 24, 1997 gave the final contract sum as $30,464,991.61 yet the evaluation of the contract done by the Property Management & Maintenance Department stated that the Contractor had delivered Brunswick within the budget. It is not clear which budget figure is being referred to as there had been an overrun of $7.3 million on the contract or approximately 31%.

Page 16:

On June 10, 1996, three (3) months after the contract started, national Safety Limited [sic] signed a sub-contract with Matrix Engineering, the Main Contractors, for nine (9) months for the installation of Fire Suppression Equipment. The date of the sub-contract was three (3) months before the scheduled completion and hence, the signing of the sub-contract with the full knowledge of the Consultant and the Building Development Department (BDD) automatically gave the Main Contractor a 6-month extension on his contract.

Page 16, 17:

Goldson Barrett Johnson (GBJ) were retained by Cable & Wireless to give an opinion on the quantity surveying services and found that the payment of a labour increase of $1.29 million was incorrect and not allowed for under contract. This opinion was ignored by both the Consultant and the BDD and the payment made to the Contractor. GBJ also found that the amount of money paid for dewatering of the site was extremely high and could easily have been avoided if the proper description of work items had been made in the bills of quantities.

There was no indication that any comments on that opinion were made by the BDD or by the Consultant. It therefore appears to have been irrelevant to have engaged Goldson Barrett Johnson to undertake that exercise.

The fees paid on this project were 10.5% of the contract sum including the generating set. This was done after Aubrey Dawkins Architects had been retained and had completed all of the works on the job. They had been paid a fee of 8.5% for all services excluding quantity surveying which had been done by Goldson Barrett Johnson. Fees paid to Aubrey Dawkins should not have been as high as 8.5% as the design was the same for that at Brunswick and therefore the fee for repetitive use should have been paid. Similarly, the fee paid to Technical Enterprises Limited should also have reduced below the 10.5% as the architectural layout reflected only minor changes to the drawings done by Aubrey Dawkins.

Page 18:

A site visit on December 1, 1998 showed that the finishes inside the building were poor with numerous areas where the rendering was cracking and particularly in the battery room where spalling had taken place.

It appears that the BDD had accepted it in that condition as even though the rendering has fallen off the unrendered ceiling had been painted.

Page 19:

These works finally reached the stage of practical completion on March 31, 1997. The value of the work as at March 6, 1997 was $28 million. Despite the fact that a practical completion certificate was issued on March 31, 1997, the various user departments continued to find defects in May, July, and September of 1997. These works should have been completed before the issuing of the practical completion certificate and indicated a breakdown in the approval system as defined by the BDD.

Page 20:

In discussing the matter with Goldson Barrett Johnson, the Quantity Surveyors on a number of projects for Cable & Wireless, it was stated by them that no specific requirements for these buildings had been given to them for inclusion in the specifications hence there would be problems between the expectations of user departments and the works done by the Contractors under contract.

As at December 1, 1996, the issue had still not been resolved as the BDD had not accepted the floor in its finished condition from the Contractors and therefore had not made final payment to the Contractors. However, a final account had been prepared by the Consultant and agreed with the Contractor.

Page 22:

Table submitted in report is not the table submitted by the Consultant (see document for actual details).

An examination of this table which was accepted by Cable & Wireless shows that not only does the percentage fee increase but the total fee increases even though the services required had decreased. This method of proposing fees had been used by the Consultant not only on the Chapelton Exchange Job but on a number of other projects where Cable & Wireless had reduced the scope of the job particularly by removing the generator. It has resulted in Cable & Wireless paying more fees than it should as there is never a review of the fees when the cost of the job increases.

All fee schedules have a reduced percentage when the cost of the job increase except when a fixed fee is agreed for the services. In the absence of a review of the fees with increasing cost on the projects particularly those which have large variations, the amount paid out by Cable & Wireless is greater that it should have even using the concept proposed by the Consultants.

Page 27:

The expected completion date of the contract was given as November 30, 1997. Subsequently, the Contractor complained in a letter to his Electrical Sub-Contractor of his slow work which was causing delay to the main works and the lack of adequate supervision on the works. It should be noted that, on this particular job, Cable & Wireless had decided to act as its own Electrical Consultant for the entire works including supervision for that aspect of the works.

Page 29:

This exchange is a small station with the maximum capacity of lines being 5,000. It has the same layout and design as for Williamsfield with the only modification being the site layout to suit the topography. On this project, fees were paid to the Consultant for electrical and mechanical consultancy even though the service was provided by [C]able & Wireless. This amount was an overcharge.

Although the Grange Hill and Williamsfield Exchanges were the same, design fees paid to the Consultant in both instances was 10% of the contract sum. There was therefore no indication that Cable & Wireless had benefited from the re-use of work for which it had already paid. The architectural fee scale gives a guideline for the re-use of work already commissioned by an employer. The amount therefore to be paid for pre-construction architectural structural electrical and mechanical engineering work should not have been greater than 1% of the contract sum.

In addition to the total fees paid out, an additional fee of $65,000.00 was paid on December 4, 1995 to the Consultant for determination of flood levels to assist in the setting of floor levels for the building. This payment was superfluous and unnecessary as it was the responsibility of the Civil Engineer on the contract to make this determination within the consultancy fees so paid.

Page 31:

[T]here was an obvious lack of coordination in the pre-construction aspect of the works as up to January 31, 1997, requests were being made from various user departments within Cable & Wireless for changes on the contract. On January 16, 1997, the estimated completion date was given as February 27, 1997. On February 21, 1997, the likely completion date was given as the end of June 1997. On June 25, 1997, there was a long list of works which were identified as incomplete or not yet started.

Page 32:

At August 17, 1997, the value of the work stood at $13.8 million with variations at $1.22 million. A final contract sum of $17.05 million was obtained with total variations of $2.75 million. The Senior Vice President demanded explanations on November 13, 1997 when faced with the large cost of variations. This obviously was the result of a breach of Cable & Wireless regulations which stipulated that the executive who signed and awarded the contract should be notified of any change in the scope of works.

It was apparent that up to that time the Senior Vice President had not been notified despite the fact that variation orders were issued from the start of the works. There was no indication, despite the extended duration of the contract that any Liquidated Damages were charged to the Contractor. In fact, was is no documentation which indicated that on any of the contracts were any Liquidated damages charged to the Contractor despite the fact that all of the contracts were completed late. This means that either the Client together with the Consultant [sic] was at fault in all cases or the enforcement of the Liquidated Damages Clause was neglected by the Consultant and the Client.

Page 35:

AB Construction was awarded a contract in the sum of $1.3 million which was scheduled to start on July 29, 1996 to January 29, 1997. Alval Limited had their Performance Bond released as at August 26, 1996 even though there was

certification for them up to December 12, 1996. In fact, there [sic] Final Accounts were not done until March 27, 1997 at which time the value of the work was given as $5.85 million. There is no indication that any Liquidated Damages had been assessed on the contract.

Page 35, 36:

Two (2) sets of consultancy fees were paid on this project. In the first instance, on an estimated contract sum of $12,985,000.00, an amount totaling $908,950.00 was paid to Technical Enterprises Limited on June 7, 1994 and November 3, 1994. Apparently, this approach to the project was aborted and a new concept introduced. The fee proposal for the first concept was 10% for full service in pre-construction and during construction, in the second concept, the fee proposal was again 10% for the contract sum. This sum was given as approximately $5.76 million making the fee approximately $570,000.00[.] However the total fees paid out are as follows:

a) Invoice No. 95/017 dated April 24, 1995 - $425,802.20
b) Invoice No. 97/14 dated March 24, 1997 - $574,975.40
c) Invoice No. 97/36 dated August 12, 1997 - $ 89,586.29

The first fee on the aborted project had been paid out on Invoice No. 94/1447 dated November 1994 for $980,950.00. The total amount paid out therefore on this project is $1,999,313.89. The value of the works including all contracts is $6,745,617.10.

Page 37:

Officials at the BDD stated that the installation was to be designed to take winds up to 200 ml/hr. However, they had not received structural calculations to indicate that the original building had been analyzed whether it could accommodate the additional wind-generated stress.

The fees paid on this project are 13.5% of the contract sum. A breakdown of the sum was not found hence it is difficult to understand how a project which is solely of a structural engineering nature could attract fees of 13.5%. The

engineering scale of fees, is [sic] used as a guideline gives a fee of 8 ¼% for this size project.

Page 39:

The fee charged by the Contractor was originally 13.5% on a contract sum of $6.34 million. When the contract sum was reduced to $5.49 million, the fee was increased to 16%. There is no indication that there was any change in the scope of the services.

The documentation does not yield an answer to this change in fees and discussion with officials at Cable & Wireless did not yield any further information. The percentage fee charged appears to be significantly high for a job of that size.

Page 42:

There is no formal method of engagement of Consultant. There is no written brief nor is there any signed contract. There are only verbal discussions without any written understanding of the expectation of the level of management to be employed on the project.

A fee proposal is requested from the Consultant and the BDD Heads negotiate and give a verbal agreement to this proposal. The BDD head does not have the authority as prescribed by the regulations of Cable & Wireless to engage Consultants in excess of $750,000.00. However this was breached in a number of the projects as the Head of the Department states that it is an inherited practice.

There was therefore no basis for fees to have been paid for Project Management Services since the services provided were limited to Construction Supervision which contractually is a part of the Architectural and Engineering Consultancy Works.

Page 48:

Significant delays occurred due to a lack of information and/or other input from the Client.

There was therefore a clear need for better coordination of the projects by the Consultants and the BDD to ensure that all of the works could be done within the projected contract period so as to prevent this avoidance of the effective clauses of the contract.

Page 50, 51:

There was unprofessional and unethical usage of drawings prepared by Aubrey Dawkins Architects on the Junction Exchange Project. Plagiarism occurred in [sic] the drawings of Aubrey Dawkins Architects were used as if they were the property of Technical Enterprises Limited.

Fees charged on some of the projects were unreasonable for the following reasons:

(a) Charging for full architectural/schematic presentation services in the pre-construction phase when only modifications to drawings were done (Junction, Brunswick, Runaway Bay, Granville).

(b) Charging for services not rendered (Electrical Consultancy at Grange Hill).

(c) Charging for duplication of services without offering the Client the benefit of repetition (Grange Hill, and Williamsfield; Granville and Brunswick).

(d) Increasing the total fee paid even though the scope of the services were [sic] reduced (Chapelton and Junction).

(e) Charging for Project Management Services when the services undertaken Construction Supervision [sic] which is within the scope of Architectural and Engineering Services (All Projects).

(f) Significant differences in percentage charged even though the services were similar (Junction and Brunswick).

(g) Amount paid appears to be greater than agreement (Carlton).

(h) High charges for services rendered (Training School Cellular Site, West Exchange Tower).

Page 51:

There was a lack of adequate construction management and contract coordination in all of the projects, responsibilities of the BDD and the Consultants respectively. This is reflected in the following statistics:

(table follows).

Despite the consistently late completion of works there was only one (1) occasion that the Consultants recommended termination of the contract. This was rejected by the Clients as being given too late to effect savings to the company. There is also an infrequent issuing of warnings to Contractors indicating that the faults did not reside with the Contractors.

Subcontracting with nominated Sub-Contractors was invariably done long after the main contract had been started sometimes after the original completion date had been passed. This again shows a lack of adequate contract supervision in that it allows for automatic extensions of time with costs attributed to the Client. There was a lack of coordination at the planning stage as user departments sometimes asked for significant changes and on one project pointed to defects in design."

[43] The respondent pleaded (at paragraph 12 of the reply) that the words set out in the above particulars "were intended to and did in fact convey in their natural and ordinary meaning and by innuendo in the context used by [Dr Reid] the meaning that [the respondent] was either incompetent and/or negligent and/or acting in collusion

with [TechEnt] to improperly and illegally increase the fees payable by [C&W] to [TechEnt]". He then set out further particulars as follows:

> "a. At all material times, [the respondent] was the Building Development Manager (BDM) of [C&W];
>
> b. At all material times, [Dr Reid] well knew that [the respondent] was the BDM of [C&W's] Building Development Department (BDD) and was [C&W's] officer responsible for the certification of all consultant's fees payable by [C&W] in relation to building and construction projects undertaken by [C&W].
>
> c. At all material times, [Dr Reid] was aware that [the respondent] was responsible for the project management of the project which he was investigating.
>
> d. At all material times, [Dr Reid] was well aware that [the respondent] had personally approved all of the consultant's fees payable to [TechEnt] on the projects in respect of which [Dr Reid] was undertaking a review;
>
> d. At all material times, [Dr Reid] well knew or must be deemed to have known that his report would be used to judge the performance of [the respondent], and knew that [the respondent's] credibility, professional standing and continued employment prospects with [C&W] would be seriously affected by the said report.
>
> [This sub-paragraph was also lettered (d) in error]
>
> e. At all material times, it was evident or ought to have been evident to [Dr Reid] that he was being asked to investigate and determine the existence or collusive behaviour on the part of [the respondent] in that it was clear that [the respondent] had signed off and authorized many projects undertaken by [TechEnt], and that [C&W] had developed suspicion in relation to [TechEnt] and desired not only to terminate its relationship with [TechEnt] but also to determine whether [TechEnt] had been improperly paid for projects undertaken on [C&W's] Defendant's behalf.

> f. [Dr Reid's] report is replete with inaccuracies, omissions and innuendo, which taken together provide a clear impression of the incompetence and/or dishonesty of [the respondent] who was at all material times the officer of [C&W] who had management control of the projects undertaken by TECHENT on behalf of [C&W].
>
> g. [Dr Reid] well knowing that each and every cost overrun and completion delay were caused by circumstances completely out of the control of [the respondent], nevertheless identified each and every cost overrun and construction delay without citing the proper factors which led to the said overruns and delays, leaving the clear impression that the cause of these was either the poor management of the BDD, or the dishonesty of [the respondent], or both."

[44] In his submissions to the court after the close of the appellants' case, Mr Garfield Haisley, who appeared for the appellants at the trial, invited the learned judge to make a ruling as to whether the words complained of were capable of a defamatory meaning. However, the learned judge deferred the matter until a later stage, indicating that, "I don't have to give that now". But he did not return to the application and, in his summing-up, left it to the jury to determine whether, taken in context and as a whole, the words complained of were defamatory of the respondent (Bundle 4, Volume D, pages 1416-1417). He also told them that, if they came to the view that the Jentech report did not refer to the respondent, "per se, or by implication, that may very well be the basis to say that he has not been libeled [sic]" (Bundle 4, Volume D, page 1417).

[45] It is on this basis that Mr Braham QC, for the appellants, submitted that it was for the learned judge to determine whether the words complained of were capable of a

defamatory meaning, and for the jury to determine whether they were in fact actually defamatory of the respondent. Accordingly, the learned judge erred in failing to make the ruling which Mr Haisley invited him to make. Mr Braham's further submission was that, on a plain reading of the words complained of, they were not obviously defamatory of the respondent, so the learned judge's failure to make the requested ruling was a fatal flaw.

[46] Mr Braham referred us to two passages from Gatley. In the first (at paragraph 36.3), the learned editors explain that in defamation cases the question of whether particular words carry a defamatory meaning is an issue of fact for the jury. In this regard, Gatley refers to **Lewis v Daily Telegraph** [1964] AC 234, 258, in which Lord Devlin stated the following:

> "In general the meaning of words is a matter of law … But in defamation the meaning of words is a question of fact, that is, there is libel or no libel according to the impression the words convey to the jury, and not according to the construction put upon them by the judge."

[47] But, in the second passage (paragraph 36.4), the learned editors state the qualification to this general rule:

> "36.4 **Capable of defamatory meaning**. The jury's exclusive role in determining meaning is subject to one important restriction, namely that it is for the judge to decide whether the words are capable of bearing a defamatory meaning.

> 'It is for the Court to say whether the publication is fairly capable of a construction which would make it libellous, and for the jury to say whether in fact that construction ought, under the circumstances, to be attributed to it.'
>
> The former question is reserved to the judge as it is, or is treated as, one of law. In determining whether the words are capable of a defamatory meaning the judge will construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might extract from them. The reasonable reader is not naïve but not unduly suspicious, can read between the lines, can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking. 'The court should be cautious of an over-elaborate analysis of the material in issue.'"

[48] While the ultimate question of whether the words complained of are in fact libellous of the claimant is therefore a matter for the jury, the trial judge must first rule whether, as a matter of law, the words are capable of a defamatory meaning.

[49] Captain Beswick did not dissent from this proposition. However, he submitted that, because the case was left to the jury, "the learned judge in this instance must be understood to have ruled that the specially constituted jury could have reasonably come to the conclusion that the words complained of were capable of libelling [the respondent]" (Respondent/Appellant's Submissions on Libel filed 1 October 2015, paragraph 18).

[50] I think it is clear that the learned judge did not in so many words make the ruling which Mr Haisley had invited him to make on whether the words were capable of a meaning defamatory of the respondent. However, I am prepared to accept that, as Captain Beswick submitted, by leaving the case to the jury in the face of Mr Haisley's invitation, the learned judge must be taken to have ruled that the Jentech report was in fact reasonably capable of a meaning defamatory of the respondent. So the question which next arises is whether he was right to do so.

[51] Mr Braham submitted that the words complained of were not "obviously defamatory" of the respondent. He emphasised that, even if the words were defamatory in themselves, the claim must fail if they were not capable of referring to the respondent. For his part, Captain Beswick's simple submission was that the words complained of were clearly defamatory of the respondent.

[52] As will be recalled, the respondent's pleading was that the words complained of "were intended to and did in fact convey in their natural and ordinary meaning and by innuendo in the context used by [Dr Reid] the meaning that [the respondent] was either incompetent and/or negligent and/or acting in collusion with [TechEnt] to improperly and illegally increase the fees payable by [C&W] to [TechEnt]" (see paragraph [43] above).

[53] Much of the Jentech report reflected directly on the performance of TechEnt. But I think that it is clear enough that some parts of the report were also critical of the

performance of C&W's management, in particular the BDD of which the respondent was the head. As examples, taken completely at random, I would cite the following extracts which the respondent identified in the particulars given in the reply (see paragraph [42] above):

Page 1

> "**There were breaches of various company regulations by the executives of [C&W] in managing the projects**."

Pages 16, 17

> "Goldson Barrett Johnson (GBJ) were retained by Cable & Wireless to give an opinion on the quantity surveying services and found that the payment of a labour increase of $1.29 million was incorrect and not allowed for under contract. **This opinion was ignored by both the Consultant and the BDD and the payment made to the contractor. GBJ also found that the amount of money paid for dewatering of the site was extremely high and could easily have been avoided if the proper description of work items had been made in the bills of quantities.**
>
> **There was no indication that any comments on that opinion were made by the BDD or by the Consultant. It therefore appears to have been irrelevant to have engaged Goldson Barrett Johnson to undertake that exercise.**
>
> The fees paid on this project were 10.5% of the contract sum including the generating set. This was done after Aubrey Dawkins Architects had been retained and had completed all of the works on the job. They had been paid a fee of 8.5% for all services excluding quantity surveying which had been done by Goldson Barrett Johnson. Fees paid

to Aubrey Dawkins should not have been as high as 8.5% as the design was the same for that at Brunswick and therefore the fee for repetitive use should have been paid. Similarly, the fee paid to Technical Enterprises Limited should also have reduced below the 10.5% as the architectural layout reflected only minor changes to the drawings done by Aubrey Dawkins."

Page 18

"A site visit on December 1, 1998 showed that the finishes inside the building were poor with numerous areas where the rendering was cracking and particularly in the battery room where spalling had taken place.

It appears that the BDD had accepted it in that condition as even though the rendering has fallen off the unrendered ceiling had been painted."

Page 31

"There was an obvious lack of coordination in the pre-construction aspect of the works as up to January 31, 1997, requests were being made from various user departments within Cable & Wireless for changes on the contract. On January 16, 1997, the estimated completion date was given as February 27, 1997. On February 21, 1997, the likely completion date was given as the end of June 1997. On June 25, 1997, there was a long list of works which were identified as incomplete or not yet started."

Page 42

"There is no formal method of engagement of Consultant. There is no written brief nor is there any signed contract. There are only verbal discussions without any written understanding of the expectation of the level of management to be employed on the project.

A fee proposal is requested from the Consultant and the BDD Heads negotiate and give a verbal agreement to this proposal. The BDD head does not

> **have the authority as prescribed by the regulations of Cable & Wireless to engage Consultants in excess of $750,000.00. However this was breached in a number of the projects as the Head of the Department states that it is an inherited practice.**
>
> There was therefore no basis for fees to have been paid for Project Management Services since the services provided were limited to Construction Supervision which contractually is a part of the Architectural and Engineering Consultancy Works." (Emphases supplied)

[54] In my view, the clear implication of at least the words highlighted in the extracts cited above was that the management of C&W, in particular the BDD, was either incompetent or negligent, and acted in breach of company regulations, in its administration of the projects referred to in the Jentech report. To this extent, therefore, if untrue, the words complained of had the clear potential of lowering the persons upon whom they reflected in the estimation of reasonable, right-thinking members of society. In short, they were reasonably capable of a defamatory meaning.

[55] So the more important question for present purposes is whether these or any other words in the Jentech report can be said to be reasonably referable to the respondent. For the general principle, Mr Braham referred us to the following passage from Halsbury's (fourth edition reissue, volume 28, paragraph 39):

> **"39**. **Statement must be published of and concerning the plaintiff**. Words are not actionable as a libel or slander unless they are published of and concerning the plaintiff. The plaintiff can rely only on the defamatory matter contained, whether expressly or by implication, in the

> statement in respect of which the action is brought and not on defamatory matter contained in statements made about the plaintiff by other persons on other occasions ... Where the plaintiff is referred to by name, or otherwise clearly identified, the words are actionable even if they were intended to refer to some other person, and both the plaintiff and the other person may have a cause of action. However, it is not essential that the plaintiff should be named in the statement. Where the words do not expressly refer to the plaintiff they may be held to refer to him if ordinary sensible readers with knowledge of special facts could and did understand them to refer to him; such facts are material facts, must be pleaded in the statement of claim, and must be proven in evidence in order to connect the plaintiff with the words complained of. Such a pleading is often called a 'reference innuendo' in contrast to a 'true innuendo' where the extrinsic facts only bear on the defamatory meaning. In certain circumstances the plaintiff may be required to identify the persons who are alleged to know the special facts relied upon. It is not essential that the special or extrinsic facts be known to those responsible for the publication but the fact that they were unknown may well be relevant to the liability of a printer, distributor or secondary publisher and also to the efficacy of a statutory offer of amends."

[56] In this case, the Jentech report did not refer to the respondent by name, nor did it clearly identify him as the responsible person at C&W. But, as Halsbury's makes clear, this is not essential. The extracts from the report set out in paragraph [53] above demonstrate that the BDD, of which the respondent was head, was specifically referred to more than once, as was the head of the BDD. It is clear from the evidence of Mr Robert Evans, the principal of TechEnt, to take but one person, that he formed the view that the report was unjustly critical of the respondent's performance as head of the BDD. (See paragraph 25 of Mr Evans' witness statement dated 26 February 2004,

Bundle 5, page 32, in which he stated that "[t]he clear innuendo which forms the theme of [the Jentech report] is that in literally every case, I and my office did not provide the requisite services for which we were being paid, or overcharged [C&W] for such services, and in doing so were supported by [the respondent] who knowingly allowed us to behave in this inappropriate fashion.")

[57] In my view, therefore, the words of which complaint was made, or some of them at any rate, were reasonably capable of bearing a meaning defamatory of the respondent. In these circumstances, the learned judge cannot be faulted for leaving the question of whether the respondent was in fact defamed by the Jentech report, to the jury.

(ii) Whether the judge gave proper directions in relation to the evidence

[58] Grounds (a), (j) and (k) read as follows:

> "(a) That the learned Judge erred in failing to consider and to make a ruling and to advise the jury upon the question of law of whether there was any, or any sufficient evidence of the facts in issue fit to be left to the jury for consideration."
>
> "(j) That the learned Judge erred in failing to withdraw the case from the consideration of the jury."
>
> "(k) That the learned Judge erred in failing to advise and/or direct the jury upon the issue of how to treat oral evidence given before the Court which contradicts evidence found in documents."

[59] Mr Braham made no oral submissions to us on these grounds but, in their written submissions, the appellants complained that the learned judge failed to assist the jury as to how to treat with conflicts between oral and documentary evidence, and did not give the jury any or any adequate summary of the evidence given on their behalf. Overall, the appellants' complaint was that "the learned trial judge's handling of this aspect was woefully inadequate" (Submissions on behalf of Wayne Reid and Jentech Consultants Limited, filed 19 May 2015, paragraph (64)).

[60] Captain Beswick submitted that the learned judge gave proper directions and guidance to the jury in all respects and that, in any event, there was nothing in the argument put forward on behalf of the appellants that could possibly affect the jury's verdict in the matter.

[61] Rather unhelpfully, the appellants supplied no particulars of their complaints on these grounds. But grounds (a) and (j) appear to relate to a no-case submission which Mr Haisley attempted to put forward after the close of the case for the appellants. Captain Beswick's response was that, at that stage of the proceedings, the submission was "ill conceived and ill founded" (Bundle 4, Volume D, page 1365). Although the learned judge made no direct ruling on the point, he suggested to Mr Haisley, after considerable discussion, that he might want "to withdraw his application and we proceed" (Bundle 4, Volume D, page 1374). Save for reminding the learned judge that a ruling on the application on the separate question of whether the words complained of were capable of a defamatory meaning was still awaited, Mr Haisley's response to

the learned judge's suggestion was, "I am prepared to accept your Lordship's position". And there, as it appears from the transcript of the proceedings at trial, the matter ended.

[62] I would therefore reject grounds (a) and (j).

[63] With regard to ground (k), it is true that the learned judge did not tell the jury anything specifically on how to treat with contradictions between oral and documentary evidence. While it might obviously have been helpful for this to have been done, there is, as far as I am aware, no rule or principle requiring this. The judge's role in every case is to give the jury such guidance as the circumstances of the particular case dictate to assist them to perform their role as judges of the facts. In this case, the learned judge sought to do this by giving the jury copious guidance on how they should approach the evidence:

> "You the jury, are the sole judges of the facts ... As the jury you have to decide based upon the evidence that you have heard, which parts, if any, of the evidence you accept, which of the evidence you reject …
>
> One of the difficulties of a case like this is that it involves a huge volume of documentation. I venture to say that there are very few persons who would have had the experience which has been yours over the last three weeks, to have been faced with the volume of documentation which have [sic] been placed before you and upon which you must make certain decisions. We were however fortunate to have the benefit of witness statements which were given to you so that you could have looked at the statements of the witnesses which had been made for the purpose of this trial. In addition, you also had the benefit of the witnesses giving

> evidence in the witness box, by reading their witness statements, and you then had the chance to observe then and their demeanor … In most cases you also had the opportunity to hear the witnesses amplify their statements, and then you had the most invaluable experience of hearing them being cross-examined by counsels [sic] for both parties. All that you will take into account in determining whether you believe any facts have been established, and in particular whether the questions which I shall leave to you should be answered in the negative or in the affirmative ... you will forgive me if I do not go into great detail. This is because I believe that the evidence is still fresh in our minds, and you have the benefit of the witness statements to which you can refer ...
>
> You should bear in mind that although you have to look at the evidence of any witness as a whole, as many human beings we are subject to certain failings, such as a lapse of memory, and a mere fact that one has made a mistake or forgotten certain facts does not necessarily mean that his entire evidence is not truthful or even the fact he has forgotten. So you have to bear in mind in looking at the overall decision that you have to make as to whether you accept what the witness says or not."
>
> (Bundle 4, Volume D, pages 1394-1399)

[64] In my view, these directions were entirely appropriate to the circumstances of this case and I would therefore reject ground (k) as well.

(iii) Qualified privilege

[65] At the close of the appellants' case, Mr Haisley for the appellants submitted to the learned judge that the issue of qualified privilege "is a question of law to be determined by the judge" (Bundle A, Volume D, pages 1337-1338). However, the point appears to have been lost in the somewhat unfocussed discussion which followed and,

at the end of the day, it appears that the learned judge did not make a ruling on the question of qualified privilege.

[66] Before coming to the appellants' specific complaints on this issue, I will first set out what the learned judge told the jury as regards qualified privilege. After reminding the jury that the appellants' case was that, "even if the words are defamatory by reason of it being innuendo, there is a good defence based upon what the law has called qualified privilege" (Bundle A, Volume D, page 1419), the learned judge went on to explain the concept of qualified privilege in these terms (pages 1420-1421):

> "… the law recognizes that there are cases where the maker of a statement ought to be protected for the common convenience and welfare of society. In such cases where the maker of the statement has a duty, whether legal, social or moral, to make a statement, and the recipient of that statement has a corresponding interest to receive it, or where the maker of a statement is acting in pursuance of an interest of his, that's the interest of the maker, and the recipient has such a corresponding interest or duty in relation to the receipt of the statement, or where he is acting in a manner in which there is a common interest with the recipient, between the recipient and the maker, the maker will not be guilty of libel unless it can be shown that the statement was made maliciously."

[67] And further (at pages 1423-1424), that:

> "The reciprocity is essential. In the instant case it is the argument of [the appellants] … that the presentation of the report by [Dr Reid] to [C&W] … was upon a privileged occasion, because there was a common duty and interest in the making and receiving of the statements. Even if this is

correct, the fact is if it can be shown that the statement was made without malice then the protection offered by the defence of qualified privilege would disappear.

However, the burden of proving that the statement was made maliciously or made with malice, rests upon the person asserting this fact. So if you are of the view that the presentation of the report was a privileged occasion -- let us say you come to that conclusion, it would then be back to [the respondent] to show that this was not an occasion when the privilege could attach …"

[68] And finally (at pages 1448-1449), that:

"Let me remind you that in answer to the question of whether [the respondent] has been libelled [sic] will depend upon your answers to the questions which you must answer in the following terms:

Firstly, what is the meaning of the words? Are they defamatory in their ordinary and natural meaning?

(3) Are there surrounding circumstances spoken about in the evidence which is before you, such that it makes the words libelous [sic] because there is an innuendo which causes [the respondent] to be libeled [sic]. So you would have to find, for example, that the words in fact referred to [the respondent] and you find that those words … are in fact libellous [sic].

Fourthly, even if there is such a libel by way of innuendo, is the occasion one which the [appellants say] is the subject of the benefit of the defence of qualified privilege. [Have the appellants] established that even if I am libeling [sic] you, it was a situation where I had interest which I was serving the recipient; [C&W] had an interest which they were preserving in receiving, I am making it if they are receiving it, a corresponding interest between us, and I had a duty to do what they asked me to do. They had an interest in receiving it and therefore I am within the parameters of qualified

> privilege. And then you have to consider finally, if you get that far, if it is an occasion of qualified privilege, has [the respondent] shown on a balance of probabilities in the Jentech Report that the report was made maliciously so as to defeat the defence of qualified privilege."

[69] The appellants' complaints on this issue are set out in grounds (d), (e) and (h), which read as follows:

> "(d) That the learned Judge erred in failing to make a ruling and to advise the jury on the question of law as to whether the report entitled 'Investigation of Projects for Cable & Wireless (Jamaica) Limited' was made on an occasion of qualified privilege."
>
> "(e) That the learned Judge erred in leaving it to the jury to determine the question of law of whether the report complained of was given on an occasion of qualified privilege."
>
> "(h) That the learned Judge erred in failing to find that the report entitled 'Investigation of Projects for Cable & Wireless (Jamaica) Limited' was in fact made on an occasion of qualified privilege and that there was no or no sufficient evidence of malice."

[70] Mr Braham made detailed submissions on this issue, both in written submissions and on his feet before us. I trust that I do them no disservice by summarising them in the following way. In its defence, the appellants explicitly raised the issue of qualified privilege in answer to the respondent's claim for libel. By way of reply, the respondent denied that the appellants were entitled to rely on qualified privilege and stated that, in publishing the Jentech report, Dr Reid was actuated by malice. The issue of qualified

privilege was therefore a live one on the pleadings. On the evidence, there was a clear professional relationship between C&W and Jentech, which required the latter to investigate certain completed construction projects and to provide a report on the matters identified to the former. The appellants were therefore under a legal and moral duty to provide the information requested to C&W, which had an equal interest in receiving it. In these circumstances, the learned judge was obliged to make a ruling on whether, as a matter of law, the appellants were entitled to rely on qualified privilege. This the learned judge failed to do, despite the appellants having requested him to do so. Instead, the learned judge expressly left the question of whether qualified privilege applied to the jury and the defence failed on the jury's finding that qualified privilege did not apply. Even if, contrary to the appellants' primary submission, the issue of qualified privilege was properly left to the jury, their answer to the learned judge's questions on the point indicated perversity and was unreasonable. On this basis, the judgment should be set aside.

[71] Responding to these submissions on behalf of the respondent, Captain Beswick accepted that the learned judge did not make any express ruling on whether qualified privilege applied. However, he submitted that the learned judge did make an implied ruling on the question. He also accepted that the learned judge left the question of whether qualified privilege applied to the jury. He submitted that all of this was irrelevant to the jury's verdict, which plainly showed that the jury accepted that, in publishing the Jentech report, the appellants were actuated by malice. In these

circumstances, the defence of qualified privilege was overwhelmingly defeated. Taken as a whole, the learned judge's summing-up was balanced and fair and ultimately there was no miscarriage of justice.

[72] Mr Braham cited a number of authorities on the nature of qualified privilege and the duty of the judge sitting with a jury in a case in which the defence is raised. I will consider some of them.

[73] First, as regards the nature of the defence, we were referred to the following extract from Gatley on Libel and Slander ('Gatley') (11th edition, paragraph 14.6):

> **"Duty and interest**. 'The occasions [of qualified] privilege can never be catalogued and rendered exact' but the tendency of the courts has been to regard most privileged occasions under the common law as very broadly classifiable into two categories: first, where the maker of the statement has a duty (whether legal, social or moral) to make the statement and the recipient has a corresponding interest to receive it; or, secondly, where the maker of the statement is acting in pursuance of an interest of his and the recipient has such a corresponding interest or duty in relation to the statement, or where he is acting in a matter in which he has a common interest with the recipient. 'It may be accepted as a well-established rule that some duty or interest must exist in the party to whom the communication is made as well as in the party making it. The duty or interest may be common to both parties, but this is not essential. It is enough if there is a duty or interest on one side, and a duty or interest, or interest or duty (whether common or corresponding or not) on the other."

[74] Second, as regards the reason for the defence, Gatley helpfully collects a series of statements taken from some of the leading cases on the point (at paragraph 14.4):

> **"The reason for the defence**. Statements published on an occasion of qualified privilege 'are protected for the common convenience and welfare of society'.
>
> 'It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in the protection of some (self or) common interest.' [per Bankes LJ in **Gerhold v Baker** [1918] W.N. 368 CA at 369]
>
> 'In such cases no matter how harsh, hasty, untrue, or libellous the publication would be but for the circumstances, the law declares it privileged because the amount of public inconvenience from the restriction of freedom of speech or writing would far out-balance that arising from the infliction of a private injury.' [per Willes J in **Huntley v Ward** (1850) 6 C.B. (N.S.) 514 at 517]
>
> 'It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interest of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of actions for slander.' [per Lord Sands in **Dunnet v Nelson** 1926 S.C. at 769]
>
> 'It is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded. But the freedom of communication which it is desirous to protect is honest and kindly freedom. It is not expedient that liberty should be made the cloak of maliciousness.' [per Lord Coleridge CJ in **Bowen v Hall** (1881) 6 Q.B.D. 333 at 343]

> 'The principle on which these cases are founded is a universal one, that the public convenience is to be preferred to private interests and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice notwithstanding that they involve relevant comments condemnatory of individuals.' [per Willes J in **Henwood v Harrison** (1872) L.R. 7 C.P. 606 at 622]
>
> If the defendant is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to rely on the privilege. …"

[75] Third, as regards the nature of the duty required to ground reliance on the defence, Gatley states (at paragraph 14.10):

> "**What is a duty**. It is plain that a legal duty (in the sense of one backed by some sanction for its non-performance) is a duty for this purpose. Such a duty might be one to inform the public as a whole, in which case the traditional reluctance to extend qualified privilege beyond private communications would always have been irrelevant. But the expression is not confined to legal duties. For example, there is no legal duty to inform a relative about the character of the person he proposes to marry nor is there in general a duty to a prospective employer to provide him with a character reference on someone he proposes to engage, but both are well established occasions of qualified privilege. The duty may be a moral or social one. In *Stuart v Bell* Lindley L.J. said:
>
> > 'I take moral duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal.'"

[76] Fourth, as regards the nature of the corresponding interest, Gatley states (at paragraph 14.12):

> "**Protection of interests.** In *Hunt v Great Northern Ry*, Lord Esher M.R. said:
>
> > 'A privileged occasion arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist the occasion is a privileged one.'
>
> Anyone, said Lord Denman CJ in *Tuson v Evans*,
>
> > 'in the transaction of business with another, has a right to use language *bona fide* which is relevant to that business and which a due regard to his own interest makes necessary, even though it should directly, or by its consequences, be injurious or painful to another, and this is the principle on which privileged communication rests.'
>
> The law does not restrict the interests which the defendant may protect by asserting freely what he believes to be true. In the majority of the cases, the interests protected have been business interests … But any legitimate interest (that is to say, an interest that is recognised by law as meriting protection) is protected;"

[77] And fifth, as regards the duty of the trial judge when the defence of qualified privilege is raised, the learned editors of Halsbury's Laws of England (fourth edition, Reissue, Volume 28, at paragraph 242) state:

> "**Judge's duty where defence is privilege**. The question whether the occasion is privileged, if the facts are not in

> dispute, is a question of law for the judge. If there are disputed questions of fact upon which the existence of the privilege may depend, the determination of those facts is for the jury and it will be for the judge to say, on the facts so found, whether the occasion is one of privilege."

(See also, to the same effect, **Hebditch v MacIlwaine** [1894] 2 QBD 54, per Lord Esher MR at 58)

[78] These extracts amply support the proposition that it is a defence to a claim for libel for the author/publisher of the statement to show that the publication was made on an occasion of qualified privilege. Such an occasion will be found to exist (i) where the maker of the statement was under a legal, moral or social duty to make the statement and the recipient had a corresponding interest in receiving it; and (ii) where the maker of the statement is acting in furtherance of an interest of his own and the recipient has a corresponding interest or duty in relation to the statement. In a case tried by judge and jury, the question of whether the occasion in issue attracts qualified privilege is a question of law for the judge. If the claim to privilege is based on disputed facts, the resolution of that dispute will be a matter for the jury, but ultimately it will be for the judge to say, on the basis of the jury's findings of fact, whether the occasion attracts the privilege.

[79] There is no question that the defence of qualified privilege was properly pleaded in this case. At paragraphs 25-29 of the defence, the appellants stated the following:

> "25. These Defendants state further and/or in the alternative, that the Jentech Report authored by the Third

> Defendant for and on behalf of the Second Defendant, was prepared on an occasion of qualified privilege for that the Second and Third Defendants were properly employed and commissioned to investigate the several projects undertaken by Technical Enterprises Limited for the First Defendant in or about 1998.
>
> 26. That the Third Defendant, on behalf of the Second Defendant was provided with all the relevant materials, files and papers of the First Defendant in relation to each of those projects to assist him in his investigation.
>
> 27. That the scope of the investigation required this Third Defendant to visit each site on ground, of each of the specific projects he was required to investigate.
>
> 28. That the Jentech Report contains the details and results of his investigation, as he was retained to provide.
>
> 29. That the Third Defendant therefore had a duty to prepare and publish the matters stated in the Jentech Report and the First Defendant had a corresponding obligation and duty to receive the said Report."

[80] In light of the respondent's denial in reply that the Jentech report was published on an occasion of qualified privilege, the issue of qualified privilege was therefore a live one on the pleadings.

[81] The evidence showed that the appellants were retained by C&W on a professional, fee-paying basis, to conduct an investigation into the matters referred to in the letter of 20 July 1998, and to make a report on their findings. In these circumstances, the appellants maintained that the Jentech report was produced in fulfilment of their professional duty and that C&W had a corresponding interest in

receiving it. Leaving aside for the moment the question of malice, there was no suggestion to the contrary from anyone.

[82] I think it is clear from the extracts from the summing-up which I have set out at paragraphs [66]-[68] above, as well as from Captain Beswick's quite proper concessions, that the learned judge did not make a ruling on whether, as a matter of law, the Jentech report was published on an occasion of qualified privilege. Instead, the learned judge expressly left it to the jury to determine whether qualified privilege applied in light of all the circumstances. In my respectful view, as the authorities plainly show, the judge erred in both respects, thus vindicating the appellants' complaints in grounds (d) and (e).

[83] I am further of the view that, had the judge taken on the responsibility of making a ruling on whether the Jentech report was published on an occasion of qualified privilege, there was more than enough evidence in the case to justify such a ruling. As I have indicated above, the appellants were retained by C&W on a professional basis to perform the tasks set out in C&W's letter dated 20 July 1998. They were therefore under a clear legal duty, founded in contract, to investigate and report to C&W on the matters referred to.

[84] The report identified a number of shortcomings in and breaches of C&W's internal policies and processes, relating to the performance of one of its consultants who had responsibility for a considerable number of its building projects and leading to

delays and cost overruns. In these circumstances, as it seems to me, as the entity which commissioned the Jentech report in the first place, C&W equally had a corresponding interest in receiving it.

[85] So, in my view, subject only to the issue of malice, this was therefore a clear case of qualified privilege, based on completely undisputed facts. Accordingly, the appellants' complaint in ground (h) must succeed as well.

(iv) Malice

[86] It is common ground that, as Gatley states in the extract set out at paragraph [74] above, "[i]f the defendant is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to rely on the privilege".

[87] At paragraph 13 of the reply, the respondent pleaded that "[the appellants] were actuated by malice and spite directed to [the respondent] in the preparation of the JENTECH report". The respondent gave the following particulars of malice:

"PARTICULARS

a. The [appellants] were aware of the issue which arose in regards to the report prepared by the Director of [C&W], WEISE, and at all material times was well aware that [the respondent] had supported the competing design of [TechEnt] in relation to the Cooper's Hill project and that [C&W] was on a campaign to obtain evidence of [the respondent's] misconduct in collusion with [TechEnt] and

at all material times, [Dr Reid] resolved to improperly support [C&W] in this campaign.

b. At all material times, in the preparation of the JENTECH report, [Dr Reid] avoided direct discussion with [the respondent] and did not as would be expected attempt to have discussions with [the respondent] to clarify any concerns he may have had in relation to projects of [C&W] which were undertaken by TECHENT as consultants.

c. The JENTECH report has numerous instances of deliberate half-truths where [Dr Reid] asserts a fact which is true, and with knowledge of all of the circumstances then deliberately fails to indicate the real cause of the event and that the BDD under the supervision of [the respondent] could not have been and was not in fact responsible for the event."

[88] On this basis, the respondent denied (at paragraph 14) that the appellants were entitled to rely on the defence of qualified privilege.

[89] Towards the end of his witness statement (at paragraphs 107-109), the respondent posited the following as the motive for the Jentech report:

> "107. It is important to note that at no time during the preparation of the Jentech report did Wayne Reid ever consult with me on the issues which were stated in the letter of termination. Had such consultation taken place, I am quite sure that I would have been able to satisfy him that neither the BDD nor myself were guilty of any infraction of company policy, and that I was not responsible for any delays or cost overrun. Equally significant, I would have been able to indicate to him that in all the projects undertaken by [TechEnt], full value had been obtained by the Company and the proper and fair consultancy rate charged.

> 108. I believe that Wayne Reid's action of not consulting with me as would be expected in a normal investigation was deliberate because it was his intention from the beginning to cast me as a scapegoat for the delays, cost overruns and alleged overcharging by [TechEnt]. I further believe that the reason why Wayne Reid behaved in this fashion was because it was an expressed or implied desire by his client [C&W] that he ensure that his report indicate that I was guilty of assisting [TechEnt] in overcharging the company for poor consultancy and deficient project management, and that he plainly conspired with my then employer to achieve this end.
>
> 109. The history of the events which took place in relation to the Coopers' Hill project is convincing as to the ill feeling which existed between Milton Weise and Robert Evans of [TechEnt]. It was readily apparent to me that Weise felt that I was assisting [TechEnt] and Evans in embarrassing him, and that the Company through Milton Weise harboured feelings of spite and ill-will towards [TechEnt], Robert Evans and myself. This in turn in my view led to the use of Weise's influence to have an investigation commenced with a view to finding evidence of wrongdoing by both [TechEnt] and myself, even in respect of projects which he Weise had signed off on from years before. Accordingly, I believe that the motive for the spiteful conduct of [C&W] and Jentech and Wayne Reid in conspiring together to produce a false and libelous [sic]report was Weise's desire to punish [TechEnt] and Robert Evans and myself for the actions stated hereinbefore."

[90] With regard to the differences of opinion between Mr Evans and Mr Weise to which the respondent referred, Captain Beswick also drew attention to an internal C&W memorandum from Mr Lee to Mr Hugh Cross dated 5 May 1998. The memorandum, which concerned the Cooper's Hill project, confirmed that the differences existed and

demonstrated that Mr Lee also supported Mr Evans' position in the matter (Bundle 6, page 10).

[91] The respondent also relied on the evidence of Dr Donald Walwyn, Mr Evans and Mr Patrick McGhie. Dr Walwyn was a former senior vice president of C&W and Mr McGhie was a former vice president of building services at the company. Mr Evans, as I have already indicated, was the principal of TechEnt.

[92] Dr Walwyn's period of employment to C&W (1974-1997) was roughly the same as the respondent's. Commenting on the respondent's tenure at C&W, he stated (at paragraph 4 of his witness statement dated 26 February 2003) that:

> "[The respondent] was called upon to manage the most intense building period within my experience in CWJ. In retrospect, I am of the opinion that the administrative systems in vogue at the time may not have been tailored for such a concentrated effort and virtually everyone involved felt the pressures."

[93] In relation to the decision made to terminate the services of architect Dawkins and the arrangements which the respondent made for TechEnt to take over a number of ongoing C&W building projects, Dr Walwyn stated (at paragraphs 7-9) that –

> "7 … The Company took the decision to terminate Dawkins and [the respondent] was advised of this decision and asked to assess the drawings produced by Dawkins.
>
> 8. I was advised that [the respondent] found that the designs were not in keeping with the standards required by

> [C&W]. [The respondent] made arrangements for [TechEnt] to take over the projects. I was aware that [TechEnt] had experience with the requirements of [C&W] and I had been advised by [the respondent's] then Vice-President (Mr. Patrick McGhie) that [TechEnt] had been performing with knowledge, skill and timeliness.
>
> 9. The original drawings for the Junction project which were deemed unusable were extensively modified by [TechEnt] so that the project could be completed. To the best of my knowledge and recollection, there was never any considered view taken by myself or anyone else to my knowledge prior to the use of these drawings that there could have been a possible infringement of design rights, etc. I was aware that [the respondent] had been given the original drawings in relation to what was deemed to be a project which was on the verge of falling behind schedule, and that he was charged to correct the situation. I would also have expected that the maximum value would have been extracted from the drawings for which we had already paid in full."

[94] Under cross-examination by counsel for the appellants, Dr Walwyn agreed, when asked to indicate the basis for the statement in paragraph 9 of his witness statement above, that it was "[w]hat I was told" (Bundle 4, Volume B, page 631).

[95] Mr Evans filed two witness statements. The first was dated 26 February 2004 and was accompanied by a large number of documents. The second, described by Mr Evans as "a codicillary assertion", was dated 8 June 2004.

[96] In his first witness statement, Mr Evans spent some time discussing his differences with Mr Weise arising out of the Coopers' Hill project. These differences resulted in Mr Weise making what Mr Evans described as "an erroneous report" on the

matter to the C&W board of directors (Bundle 5, page 28, paragraph 8). This in turn led Mr Evans to make formal complaints about Mr Weise's conduct to C&W's headquarters in London and to the Professional Engineering Registration Board ('PERB').

[97] Mr Evans maintained that all of this had a direct bearing on C&W's decision to engage Dr Reid to, first, review the Coopers' Hill project and, second, produce the Jentech report. Thus, Mr Evans stated his strong belief that C&W:

> "… took the strongest offence to my actions of reporting them to their head office and reporting their director, Mr Milton Weise, to the PERB. I believe they entered into a conspiracy with Jentech and Mr. Wayne Reid to review my design relating to Coopers Hill with a view to discovering something they could use to discredit me. I believe that when this approach failed Mr. Wayne Reid was commissioned to go through several other projects and to produce a report to so vilify me that C&W plc would discard my complaint."
>
> (Bundle 5, page 29, paragraph 15)

And further, that:

> "It is my opinion that Jentech was engaged and asked not for a straightforward review but to embark on a deliberate search for material to be used against the BDM and myself. I note that the date of Wayne Reid's engagement is shortly after the response from London to me and I conclude that the vicious tissue of lies and statements carefully crafted to mislead a reader about my integrity and that of the BDM [sic] including its manager, Mr. Curtis Reid, that characterizes the Jentech report were deliberate and premeditated."
>
> (Bundle 5, page 30, paragraph 19)

[98] For all the reasons set out in his witness statement, Mr Evans commented that –

> "I am not satisfied that Mr. Wayne Reid approached or reported on the projects designed by [TechEnt] and over which [the respondent] presided on behalf of CWJ, with courtesy, fairness or good faith and my comments on his reports will substantiate that he is in breach of [the Jamaica Institution of Engineers Code of Ethics 1986]."
>
> (Bundle 1, page 152, paragraph 11)

[99] And finally, having analysed in detail what he characterised as omissions, misleading statements and falsehoods on the part of Dr Reid in the Jentech report, Mr Evans concluded that –

> "If Mr. Wayne Reid's omissions were deliberate and premeditated then an explanation for his actions was that he was a part of a conspiracy to hide certain facts – a conspiracy that resulted in damage to my name and that of my company and to [the respondent] by virtue of the general insinuations that it was [the respondent] that allowed myself and/or my firm to commit actions that Mr. Wayne Reid in the statement libellously describe [sic] as unethical and dishonest."
>
> (Bundle 1, page 155, paragraph 15)

[100] Much of Mr Evans' second witness statement was concerned to justify TechEnt's performance in the face of the criticisms levelled against it in the Jentech report. To this end, he appended to the witness statement a detailed response to the Jentech report, covering 195 pages in all, including various exhibits. He was again strongly supportive of the respondent, who he described as "a fair but demanding manager who sought at

all times to obtain the best returns for his company on all consultancy contracts" (Bundle 5, page 32, paragraph 26).

[101] Under cross-examination by Mr Haisley, Mr Evans was taken to C&W's letters dated 17 and 20 July 1998, which had respectively instructed Dr Reid to review the Coopers' Hill project and to undertake a more general investigation on projects involving TechEnt. While he agreed that there was nothing in either letter stating expressly that Dr Reid was being retained for the purpose of discrediting TechEnt, he insisted that there was "something subtle" to be discerned in much of the language (Bundle 4, Volume C, page 1153).

[102] In the following exchange with Mr Haisley, Mr Evans emphatically reiterated his view of the true motivation for the Jentech report:

> "Q. Would you agree with me that the basis of the [respondent's] claim, Mr. Curtis Reid, against [the appellants] is that he is alleging that this report expressly or impliedly describes [sic] blame to him for these findings, blames him for …
>
> …
>
> A. Yes, I agree.
>
> Q. Now, you will also agree with me that it is your position as well as [the respondent's] position that this report is made up of lies and misleading statements intended to discredit [TechEnt] and intended to vilify [the respondent]?
>
> A. Yes, it's made up of lies and misleading statements. I didn't get the last part.

> Q. Which were intended to discredit your company and yourself and to discredit [the respondent]. That is your position?
>
> A. That is my view."
>
> (Bundle 4, Volume C, pages 1156-1157)

[103] Mr McGhie gave evidence of the circumstances in which the services of the architect, Mr Aubrey Dawkins, were terminated from the Junction Exchange project. He told the court that, following the termination, "the scope of the project was increased and it became necessary for the consultants to re-engineer the design by Dawkins, although some elements of the original architectural design remained intact" (Bundle 4, Volume C, page 935). When the work was then tendered and a contract award made in a greater sum than originally contemplated, Mr Dawkins put in an additional claim for fees, presumably based on information which he had received as to the increased construction cost of the project. Mr McGhie considered that the claim was unjustified and therefore sought advice from C&W's attorneys-at-law on the issue. The advice supported his position and the drawings and plans for which Mr Dawkins had already been paid were handed over to the new consultants with a view to them being used to complete the project. Dr Walwyn, to whom he reported, would have been briefed on Mr Dawkins' claim and would have been kept aware of the position of the project.

[104] In brief cross-examination, Mr McGhie confirmed that the respondent was one of the persons who reported to him at the material time.

[105] One regrettable outcome of the fact that the learned judge left the issue of whether qualified privilege applied to the jury was that, in the result, despite the fact that the respondent had clearly pleaded malice, the jury made no finding on the issue at all. For, as will have been seen from the jury's answers to the questions put to them by the learned judge (see paragraph [21] above), once they found that qualified privilege did not apply, they declined to express any view on malice, on the basis that it no longer arose ("Not applicable, same thing, three is related to four").

[106] I say regrettable because, in this appeal, the appellants now ask the court to determine an issue in respect of which there was no finding against them in the court below. But, be that as it may, in the light of my conclusion that qualified privilege applies, the issue of malice is obviously relevant to the question of how this appeal should ultimately be disposed of.

[107] In this regard, the appellants rely on grounds (f), (g) and (n), which read as follows:

> "(f) That the learned Judge erred in failing to make a ruling and to advise the jury upon the question of law as to whether there was any or any sufficient evidence from which malice could be reasonably inferred."
>
> "(g) That the learned Judge erred in failing to specify which (if any) evidence was relevant to a finding of malice."
>
> "(n) That the learned Judge failed to indicate to the jury disputed evidence which may have been relevant to malice and obtain the jury's finding as to such disputed evidence and thereafter failed to direct the jury as to what use the

> jury ought to have made in relation to the jury's finding concerning the said disputed evidence."

[108] The appellants accept that the learned judge told the jury several times in the summing-up that a finding that the publication of the Jentech report was actuated by malice would defeat the defence of qualified privilege (see, for instance, the extracts set out at paragraphs [66]-[68] above). And, while he did not give a specific definition of malice in this context, he did give some examples; for instance, where the libellous statement was made knowing that it was untrue or "recklessly not caring whether it was true or not"; where it was made otherwise than "to preserve or protect a legitimate interest of the maker or the recipient"; or where the maker of the statement was not using the occasion "honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected to the privilege" (Bundle 4. Volume D, page 1426).

[109] But Mr Braham's complaint was that (i) the learned judge failed to make an express finding, as he ought to have done, whether there was any evidence capable of supporting the allegation of malice; and (ii) further, to the extent that the respondent's allegation of malice rested on disputed facts, the learned judge ought to have invited the jury to make a finding in relation to those facts and thereafter make a ruling as to whether, on that basis, there was evidence of malice. In any event, Mr Braham submitted, there was no evidence in the case capable of giving rise to any inference of malice on the part of the appellants.

[110] Captain Beswick maintained that (i) the respondent expressly pleaded in his reply that the appellants published the Jentech report maliciously and provided particulars of malice; (ii) the learned judge told the jury clearly that a finding of malice would defeat the defence of qualified privilege; and (iii) even if the learned judge did not invite the jury to make a finding of malice, there was clear evidence in the case from which such a finding could be made.

[111] I will first consider the judge's role in a case in which the claimant asserts malice in answer to the defendant's reliance on qualified privilege. Gatley makes it clear (at paragraph 36.21) that in such a case, while the question of whether the defendant was actuated by malice is one of fact for the jury, it is for the judge to decide whether there is any evidence of express malice fit to be left to the jury. Thus, as Phillips JA explained in **Rudolph Wallace v Vivian Cohen** [2012] JMCA Civ 60, paragraph [125]:

> "This, of course, must be evidence from which a reasonable man could find malice. Evidence which is equivocal is not sufficient. The evidence should at least raise a probability of malice and unless that is so, it should not be left to the jury for their consideration. It should be evidence upon which a jury properly directed could infer that the defendant subjectively did not honestly believe in the words uttered."

[112] It is clear from a perusal of the summing-up in this case that the learned judge made no ruling on whether there was evidence of malice fit to be left to the jury. Indeed, Captain Beswick did not suggest otherwise.

[113] It is equally clear that the learned judge did not undertake any analysis for the jury's benefit of the areas of dispute in the evidence pertaining to the issue of malice. In this regard, the appellants pointed to the particulars of malice given by the respondent in his reply to the defence, all of which Dr Reid denied, that (i) Dr Reid was aware of the history of his relations with C&W director Mr Weise and the fact that he had supported TechEnt's design over that of Mr Weise in relation to the Cooper's Hill project; (ii) in the preparation of the Jentech report, Dr Reid deliberately avoided direct discussion with him to clarify any concerns he may have had in relation to projects which he was investigating; and (iii) the Jentech report was replete with deliberate half-truths.

[114] These omissions on the learned judge's part clearly entitle the appellants to succeed on grounds (f), (g) and (n). But, given the fact that, as I have already explained, the jury did not consider the issue of malice at all, this is a somewhat hollow victory. The more substantial question, therefore, is whether, in any event, there was any evidence of malice on the appellants' part, sufficient to defeat their defence of qualified privilege.

[115] There is no question that, in this context, the concept of malice means express or actual malice. In this regard, the appellants rely on the following passage from Duncan and Neill on Defamation (third edition, paragraph 18.04):

> "In the context of qualified privilege, express malice connotes that the occasion of privilege has been misused.

> This misuse of the occasion can be shown in three ways: (a) by proof that the publisher did not believe that what he said was true; (b) by proof that in making the publication the publisher was reckless as to the truth of what he wrote or said; or (c) by proof that the publisher's dominant motive in making the publication was an improper one, for example, to injure the claimant or to obtain some advantage or to further some interest (of his own or others) which is unconnected with the duty or interest that gives rise to the privilege. In all these cases, the defendant will have used the occasion for some purpose other than that for which the occasion was privileged."

[116] And, to similar effect, Captain Beswick referred us to the statement in Halsbury's Laws (5th edition, 2012, volume 32, paragraph 5(i) 651), that "[i]n the context of qualified privilege, express or actual malice is ill will or spite towards the claimant or any indirect or improper motive in the defendant's mind which is his sole or dominant motive for publishing the words complained of".

[117] In the well-known case of **Horrocks v Lowe** [1974] 1 All ER 662, 669, Lord Diplock gave what would later be described (by Lord Nicholls of Birkenhead in **Reynolds v Times Newspapers Ltd and others** [1999] 4 All ER 609, 615) as "the classic exposition of malice in this context". I need only quote a part of it (although the entire judgment always repays careful reading):

> "[Qualified privilege] is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit—the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or

of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.

So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests."

[118] But Lord Diplock went on to sound a note of caution (at page 670):

"Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his

> motives for publishing what he believes to be true that 'express malice' can properly be found."

[119] So the notion of express malice connotes a deliberate misuse of the occasion of privilege. It equates to ill will or spite on the defendant's part towards the claimant, or any indirect or improper motive in his mind, which is his sole or dominant motive for publishing the words complained of. It will be for the claimant to show that there is evidence from which a reasonable man could find malice in this sense. Evidence which is equivocal will not suffice.

[120] It appears to me that, stripped to its essential parts, the theory of the respondent's case that the publication of the Jentech report was actuated by malice amounts to this. Differences of opinion arose between Mr Weise, a member of C&W's contracts committee and a director of the company, and TechEnt/Mr Evans over the appropriateness of the latter's design of the proposed generator building for the Coopers' Hill project. These differences led to Mr Weise putting forward an alternative design. But, in the end, C&W decided to go ahead with the original TechEnt design, which was the course favoured by the respondent. Mr Evans was greatly disturbed by what he considered to be Mr Weise's unethical and unprincipled behaviour during this episode. As a result, Mr Evans lodged a complaint against Mr Weise with C&W's head office in London and with the PERB. Upset by Mr Evans' actions, Mr Weise used his influence with C&W to get the company to retain Dr Reid/Jentech to investigate and report on the Coopers' Hill project and, more generally, on all C&W projects in which

TechEnt was involved. C&W's unstated agenda in doing this was to obtain evidence which would discredit TechEnt and the respondent, with a view to terminating its relations with both of them. Dr Reid, who was fully complicit in this scheme, accordingly produced the Jentech report, deliberately filling it with misleading statements, half-truths and lies.

[121] I am bound to say that, even if there had been a scintilla of evidence in the case to support this theory, I am strongly inclined to think that the jury would have found it impossible to accept that, quite apart from the capacity for Machiavellian machination which the theory attributes to C&W, a professional of Dr Reid's reputation and standing could have been enlisted in anything of the sort. In my view, there was absolutely nothing in the evidence which could possibly support the theory. In fact, there was nothing more than the opinions, albeit strongly held, of the respondent and Mr Evans. As the learned judge himself felt moved to interject, in the absence of the jury, at a point during Mr Evans' reading of his second witness statement into evidence, "it is trite law that the court nor the jury is not really interested in his opinion unless as an expert he is proffering an expert opinion" (Bundle 4, Volume C, page 1029).

[122] The evidence suggested that C&W, as it was plainly entitled to do, decided to commission a report from Dr Reid, a qualified and acknowledged expert in the field of civil engineering, to investigate a problem which it perceived in its building programme. Dr Reid's evidence was that, in fulfilment of this assignment, he was given and studied copious documentation in relation to each of the 12 building projects which he was

asked to investigate. He also visited the site of each of them, accompanied by C&W personnel. He did not find it necessary to speak directly to the respondent, who was in any event present at meetings which he attended with other persons from C&W. In the Jentech report, he sought to set out the facts as he saw them, and made recommendations based on his experience and knowledge.

[123] At the end of the day, Dr Reid's account of the circumstances in which he had prepared the Jentech report stood without contradiction. In light of this, I would conclude that there was absolutely nothing in the evidence from which a reasonable man could find that he published the Jentech report with actual or express malice, not honestly believing in all that he wrote in it. In short, there was no evidence of malice fit to be left to the jury.

(v) Whether the verdict of the jury was unreasonable or perverse

[124] In respect of issues (iii) and (iv), I have concluded that the learned judge erred in leaving the question of qualified privilege to the jury without himself ruling whether, as a matter of law, the Jentech report was published on an occasion of qualified privilege; and that the learned judge erred in not making a ruling as to whether there was evidence of malice fit to be left to the jury's consideration.

[125] My conclusions on these issues have made it unnecessary to consider ground (o), in which the appellants complained that the verdict of the jury was "manifestly unreasonable and perverse".

[126] I would therefore content myself with the observation that, given the unusual way in which the case proceeded, it would in any event be impossible to treat with the ground in the terms in which it is framed. In other words, in light of the way in which the learned judge left the case to the jury, their verdict could not fairly be stigmatised as perverse on the basis of how they dealt with those two issues. Further, as Captain Beswick submitted, basing himself on a passage from Halsbury's to which the appellants referred us, it is only in extreme cases that a finding will be made on appeal that the verdict of a jury in a defamation case was perverse (see Halsbury's, Fourth edition reissue, volume 28, paragraph 246).

[127] I would therefore reject ground (o).

(vi) Whether the damages awarded by the jury were excessive

[128] In ground (p), the appellants complain that the jury's award of damages in the sum of $7,000,000.00 was "manifestly unreasonable and excessive". Despite the fact that this issue has also been overtaken by my conclusions on issues (iii) and (iv), I think that I should, for completeness, state my views on it.

[129] The respondent gave some evidence as to the negative impact which his dismissal from C&W had on his life, his economic status and his social relations. He referred in particular to the loss of his pension and the resultant financial hardship, his inability to finance his daughter's law school education and the embarrassment brought

about by having to face his colleagues in the professional engineering community in the wake of his dismissal. In addition, the respondent stated that –

> "… the realization that I was being branded as dishonest in front of my colleagues both at [C&W] and in the entire engineering profession in Jamaica caused me to experience great mental depression and anxiety and even affected my health negatively."
>
> (Respondent's amended witness statement filed on 12 October 2004, paragraph 116)

[130] While the bulk of this evidence was obviously directed at the negative impact of his dismissal from C&W, the respondent also relies on it to submit, as was done on his behalf in this appeal, that "[t]he publication has also had a prolonged and significant effect on [the respondent] …" (Respondent's/Appellant's Submissions on Libel, filed 1 October 2015, paragraph 29).

[131] After the jury had returned its verdict, the learned judge told them the following:

> "The question of damages is one for the jury, the factors which are to be taken into account are how serious the allegations are, the nature of the position the person held, the position in society, how the person has been affected by it and so on. You can take into accounts [sic] all those things. You can also take into account whether the person has achieved any benefit in any other way despite the libel. So it … is a matter which is really up to the jury. There is little I can do to assist you. You consider a figure which you think is reasonable in the circumstances.
>
> This is a matter which you would consider how the facts that you have found there was is a libel could affect [the

> respondent], and unlike personal injury matters one can't just say in this case this amount was given and in that case another amount was given. You really have to use your best discretion to come up with what you think might be a reasonable figure bearing in mind that damages are intended to try to compensate, not just fully compensate a victim of a tort for the damages which he has suffered, and put him back in a position he would have been had he not -- that's as broad as I think I can give you. So you come up with some figure."
>
> (Bundle 4, Volume D, pages 1454-1455)

[132] The jury were then invited to retire to consider the matter. However, the learned judge then requested that they be brought back into court for two furthers directions, the second of which was this:

> "… one thing I had not mentioned which you also need to consider is how widely the thing had been published, how wide these statements have been published in this case. We have no evidence of publication beyond the publication to [C&W], and its offices. That is one of the things you take into account, and given those things and given my inability to quote you figures, you need to try to be fair and reasonable not only to the [respondent] but also to [the appellants]."
>
> (Bundle 4, Volume D, pages 1457-1458)

[133] Mr Braham submitted that the learned judge's directions to the jury on damages were inadequate. He did not give them any guidance, by reference to previously decided cases, on a benchmark that they might apply; and, while he did tell them to take into account the limited publication of the Jentech report, he did not tell them

what effect this fact had on the level of damages to be awarded. In the circumstances, the jury was left to its own devices and got it wrong. On the basis of comparisons with previous awards for libel, the award of $7,000,000.00 was manifestly excessive.

[134] Captain Beswick reminded us that damages were a matter for the jury. The fact that the libel was not widely published in this case did not detract from its seriousness and, accordingly, in the circumstances of this case, $7,000,000.00 was not an excessive award and should not be disturbed.

[135] We were referred to a number of authorities on the role and function of compensatory damages in libel cases. I will mention a few of them.

[136] Both sides relied on the decision of the Court of Appeal of England and Wales in **John v MGM Ltd** [1996] 2 All ER 35, 47-48 in which Sir Thomas Bingham MR stated that:

> "The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel: the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of the publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award

> of damages to vindicate his reputation: but the significance of this is much greater in a case whether the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate the plaintiff for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way.""

[137] Mr Braham referred us to the test for whether a jury's award of damages in a defamation case is excessive approved by the Privy Council in the landmark case of **The Gleaner Company Limited and another v Abrahams** [2003] UKPC 55, paragraph 64:

> "Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation?"

(This test was originally proposed by Neill LJ in **Rantzen v Mirror Group Newspapers (1986) Ltd** [1994] QB 670, 692)

[138] Captain Beswick relied on a passage from Carter-Ruck on Libel and Slander (fifth edition, 1997, page 194):

> "*Compensatory damages* are the jury's estimate of the sum necessary to vindicate the plaintiff's reputation, and to

compensate him for the injury to his feelings. Lord Hailsham summarised it in *Cassell & Co v Broome* thus:

> 'In case the libel, driven underground, emerges from its lurking place at some future date, the plaintiff must be able to point to a sum awarded by a jury sufficient to convince the bystander of the baselessness of the charge … Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in litigation, the absence of apology, or the re-affirmation of the truth of the matters complained of, **or the malice of the defendant**.'" (Emphasis added by the respondent in Respondent's/Appellant's Submissions on Libel, filed 1 October 2015)

[139] Captain Beswick also relied on **Kiam v MGN Ltd** [2002] All ER (D) 235 (Jan), to delineate the circumstances in which an appellate court will interfere with the award of a jury in a libel case. In that case, another decision of the Court of Appeal of England and Wales, Simon Brown LJ said this (at paragraphs 48-49):

> "48. This court can only interfere with a jury's award if it is 'excessive' … The question for the court is whether a reasonable jury could have thought the award necessary to compensate the claimant and to re-establish his reputation. If the answer is 'no', the award is to be regarded as excessive and the court will substitute for it a 'proper' award …
>
> 49. To my mind, therefore, this court should not interfere with the jury's award unless it regards it as substantially exceeding the most that any jury could reasonably have thought appropriate."

[140] On the basis of these authorities, I would therefore summarise the relevant principles in this way:

(i) the successful claimant is entitled to recover a sum sufficient to compensate him for the damage to his reputation and to vindicate his good name;

(ii) in arriving at an appropriate sum, regard may be had to the distress, hurt and humiliation which the defamatory publication has caused the claimant;

(iii) in this regard, the most important factor is the gravity of the libel, but the extent of the publication is also a relevant factor, with a publication to an audience of millions being potentially more damaging than one with a more limited exposure;

(iv) other relevant factors include the question whether any apology was proffered, the nature of the defence and the manner of the defendant's conduct of the action, all of which may cause additional injury caused to the plaintiff's feelings;

(v) the question for the appellate court is whether a reasonable jury could have thought that the award which was made was necessary to compensate the plaintiff and re-establish his reputation; and

(vi) at the end of the day, this court should not interfere with the jury's award unless it regards it as substantially exceeding the most that any jury could reasonably have thought appropriate in the circumstances of the particular case.

(See also **Jamaica Observer Limited and another v Gladstone Wright** [2014] JMCA Civ 18 ('**Gladstone Wright**'), where the court adopted the same approach at paragraph [107].)

[141] To make good the submission that the award of the jury in this case was manifestly excessive, Mr Braham referred us to three awards in previous cases, two at first instance and one which was upheld on appeal to this court.

[142] The first is **Dennis Chong v The Jamaica Observer Ltd** ((unreported), Supreme Court, Jamaica Claim No. CLC 578 of 1995, judgment delivered 26 February 2008) ('**Dennis Chong'**). The claimant in that case was a civil and structural engineer and senior civil servant. In an article published by the defendant newspaper, it was

alleged that he had been suspended from his job for his part in the unauthorised importation of a quantity of unsuitable asphalt from Trinidad and Tobago; and had overstepped his bounds in an attempt to secure asphalt at a cheaper and more competitive price. The claimant contended that, among other things, the article conveyed the defamatory meanings that he was incapable of making purchases of material in the best interests of the country; that he had engaged in improper, unprofessional and/or negligent conduct; and that he was incompetent in performing his job and his profession.

[143] In a decision given on 26 February 2008, Mangatal J awarded the claimant $1,700,000.00 for general damages. Although the defendant did not proffer an apology, Mangatal J declined to make an award for aggravated damages. She noted (at paragraph 91) that the defendant's conduct demonstrated "a failure to take due professional skill and care and to my mind does not rise to the level of wilful or outrageous".

[144] (However, I should point out that Mangatal J's decision on liability in **Dennis Chong** was set aside on appeal to this court in **The Jamaica Observer Ltd v Dennis P Chong** [2016] JMCA Civ 35. But, for present purposes, it may also be worth noting that, at paragraph [25] of his judgment in that case, Panton P observed that, "[i]f I were of the view that the respondent's claim was justified, I would certainly have held that the amount awarded could not by any stretch of the imagination be regarded as inordinately high ... an award of $1,700,000.00 for libel is low, if not very low".)

[145] The second decision is **The Jamaica Observer Limited v Orville Mattis** [2011] JMCA Civ 13 ('**Orville Mattis**'), in which the respondent/claimant in was a serving member of the Jamaica Constabulary Force. In an article published by the appellant/defendant newspaper, it was reported that he was one of three police officers who "were recently transferred after it was alleged that they took away cocaine from a man without turning it over to the Narcotics Police". The respondent/appellant's suit for libel succeeded and this court declined to interfere with the jury's award of $1,000,000.00 for general damages, which was given on 11 February 2008. Speaking for the court, Panton P observed that (at paragraph[16]):

> "… I am not convinced that the award of the jury is excessive. It has long been settled in this jurisdiction that the size of an award of damages may only be interfered with if it is either inordinately high or inordinately low. The jury in this case would have been expected to bear in mind that the publication was to the effect that the respondent was being accused of having committed a very serious criminal offence. Instead of detecting and apprehending offenders, he was involved in wrongdoing that compromised his role as a police officer, according to the publication. The jury would have also borne in mind that the appellant, in the face of its apparent inability to defend the suit, had not offered an apology to the respondent."

[146] And the third is **Rodney Campbell v The Jamaica Observer Limited and Chester Francis-Jackson** ((unreported) Supreme Court, Jamaica, Claim No CL 2002/C-238, judgment delivered 9 June 2005) ('**Rodney Campbell**'), another decision of Mangatal J at first instance. The claimant in that case was a broadcaster, public

relations practitioner, speech-writer and actor. In an article published in the defendant newspaper it was reported, wrongly as it turned out, that the claimant had "thrilled and trilled the audience" in a poetry reading which he did in the nude at a function at the Hedonism III hotel in Runaway Bay, Saint Ann. Although the defendants originally sought to defend the action, their amended defence was in the end struck out on the claimant's application and the matter proceeded to assessment of damages. The learned judge took into account as an aggravating factor a degree of malice which she found to have accompanied the publication and, taking all factors into consideration, awarded $1,000,000.00 for general damages.

[147] Mr Braham invited us to note that there was widespread publication of the defamatory material in each of these cases, as opposed to this case in which there was very limited publication. On this basis, he submitted that an award in the range $300,000.00 - $450,000.00 would have been appropriate in this case.

[148] The jury's award in this case was made in April 2008. The awards in **Dennis Chong** and **Orville Mattis** were both made in February of that same year. Although the award in **Rodney Campbell** was made some three years earlier, it does seem to be in the same general range of damages suggested by the two later cases. On the face of it, therefore, this trio of cases does suggest that an award of $7,000,000.00 made in early 2008 may have been wholly out of range.

[149] In order to test this preliminary view, I have sought to compare this case with **CVM Television v Fabian Tewarie** ((unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 46/2003, judgment delivered 8 November 2006) ('**Fabian Tewarie**') and **Gladstone Wright**, both previous decisions of this court.

[150] In **Fabian Tewarie**, the jury accepted that the claimant, a sergeant of police, had been libelled by a television news report which implicated him in the murder by shooting of a member of the public. The jury's award of $20,000,000.00 for general damages (made on 3 June 2003) was set aside and reduced by this court on appeal to $3,500,000.00.

[151] In **Gladstone Wright**, the jury accepted that the claimant, a former bank manager, had been libelled by a newspaper report which implied that, using funds belonging to the bank, he had acquired a certain parcel of land fraudulently, dishonestly and/or through other unlawful means. The jury's award of $20,000,000.00 for general damages (made on 22 May 2008) was set aside and reduced by this court on appeal to $6,500,000.00. The court expressly treated the award in **Fabian Tewarie** as a suitable comparator and therefore arrived at the award of $6,500,000.00 by updating the award of $3,500,000.00 in that case by reference to the consumer price index (see paragraph [113] of **Gladstone Wright**).

[152] As has been said more than once, it is often dangerous to make this kind of comparison between awards in the libel cases, given that the circumstances of each

case are almost always different. (See, for instance, Lord Hoffmann's comment in **The Gleaner Company Limited and another v Abrahams**, at paragraph 48, on the "danger of time-consuming and inconclusive arguments before the jury about the facts of other cases and the extent to which other awards are truly comparable".) But, having said that, it seems to me that the decisions of this court in **Fabian Tewarie** and **Gladstone Wright** both strongly suggest that the awards at first instance in **Dennis Chong**, **Orville Mattis** and **Rodney Campbell** may have been on the low side. I am therefore be more inclined to treat the awards in **Fabian Tewarie** and **Gladstone Wright** as reliable guides to what might be considered a suitable award in this case.

[153] As it happens, by coincidence, the awards of the juries in this case and in **Gladstone Wright** were made within a couple months of each other, therefore making the cases even more readily comparable, at least in that respect. It is, of course, possible to argue that **Gladstone Wright**, as a newspaper case, is distinguishable on the basis of the presumptively wider circulation that the libellous material would have received. But, in my view, this consideration by itself would not make the jury's award of $7,000,000.00 in this case inordinately high, in the sense that it substantially exceeds the most that any jury could reasonably have thought appropriate in the circumstances of the case. Although it is difficult to disaggregate the respondent's evidence with regard to the impact which his dismissal from C&W and the libel he alleged it had on his life, there was some evidence that he was affected by the latter.

[154] I would therefore conclude that ground (p) cannot succeed.

Conclusions and disposal

[155] As far as the grounds of appeal go, each party has had a measure of success on this appeal. On the one hand, I have concluded that the appellants cannot succeed on issues (i) (whether the words complained of were defamatory and/or were made in reference to the respondent); (ii) (whether the judge gave proper directions in relation to the evidence); (v) (whether the verdict of the jury was unreasonable or perverse); and (vi) (whether the damages awarded by the jury were excessive).

[156] But, on the other hand, I have also concluded that the appellants are entitled to succeed on issues (iii) (qualified privilege); and (iv) (malice). In light of my conclusions that (a) the Jentech report was published on an occasion of qualified privilege; and (b) there was no evidence fit to be left to the jury that it was published maliciously, the appellants' success on these two issues must, in my view, be determinative of the appeal as a whole.

[157] I would therefore allow the appeal and set aside the judgment of the court below. On the question of costs, I would invite written submissions from the parties within 14 days of the date of this judgment. Upon receipt of the parties' submissions, I propose that the court make a ruling on costs within a further period of 14 days.

An apology

[158] I cannot leave this judgment without acknowledging that the delay in the delivery of the decision in these appeals has been inordinate. While there are reasons

which could be advanced for delays such as this, the inconvenience which parties inevitably suffer as a result is fully appreciated. On behalf of the court, I unreservedly apologise for the delay.

BROOKS JA

[159] I have had the privilege of reading in draft, the judgment written by Morrison P (Ag) in relation to the appeal in respect of the libel issue. I respectfully agree with his reasoning and conclusion and have nothing to add in that regard. The following is my opinion in respect of the appeal by Mr Curtis Reid. He will be referred to below as Mr Reid. Whereas, Dr Wayne Reid and Jentech Consultants Limited (Jentech) were, together, referred to by Morrison P (Ag), as "the appellants", they, along with Cable and Wireless Jamaica Limited (C&W), will hereafter, collectively be termed, "the respondents". There will be some slight repetition of facts, but only for context.

[160] When, on 19 February 1999, C&W dismissed Mr Reid from his employment with it, he had been employed to C&W for almost 22 years, and was just three years away from retirement. On dismissing Mr Reid, C&W paid him three months' salary in lieu of notice.

[161] In addition to the claim for libel, Mr Reid sued C&W for damages for wrongful dismissal as well as for conspiracy to injure him in his employment. He alleged that

C&W had conspired with Jentech and Jentech's principal, Dr Wayne Reid, to injure Mr Reid by relieving him of his employment.

[162] In Mr Reid's appeal from the decision of Anderson J, the main issue to be determined, in respect of the wrongful dismissal aspect of the appeal, is whether the principles in **Addis v Gramophone Company Limited** 1909 AC 488; [1908-1910] All ER Rep 1, HL (**Addis**), apply to this case. The conspiracy to injure aspect, will largely turn on the principles to be extracted from the decision in **Crofter Hand-Woven Harris Tweed Co Ltd and Others v Veitch and Another** [1942] AC 435; [1942] 1 All ER 142.

Background to the claim

[163] Mr Reid's dismissal came in the wake of a meeting between him and his supervisor on 18 February 1999. During that meeting, Mr Reid was asked to respond to the contents of a lengthy, detailed report, which had been prepared by Jentech (the Jentech report). The Jentech report concerned certain building projects that fell under Mr Reid's portfolio. Mr Reid asserts that, when he was confronted with the Jentech report, he had had no prior knowledge of it. He says that he told his supervisor that he needed time to study it in order to respond. The meeting was terminated, and the following day, Mr Reid was dismissed. He was not given any further opportunity to present any response to the Jentech report, which, he says, was very critical of his professionalism and his handling of his portfolio.

[164] Despite including the reference to the payment in lieu of notice, C&W's letter, dated 19 February 1999, dismissing Mr Reid, accused him of professional misconduct. In a letter, dated 5 July 1999, responding to Mr Reid's attorneys-at-law, C&W repeated those accusations in defending its dismissal of Mr Reid.

The learned judge's decision

[165] In a well-reasoned judgment, the learned judge explained the bases for arriving at his decision. He applied the learning to be gleaned from the relevant cases and found, in respect of the claim for damages for wrongful dismissal, that:

a. the dismissal was pursuant to a clause forming part of the terms and conditions of the contracts of employment for senior management (the 1995 terms), including Mr Reid (paragraph [7]);
b. Mr Reid was aware of that term (paragraph [11]);
c. the inclusion of a reason for dismissal in the termination letter of 19 February 1999, did not prevent C&W from relying on the payment in lieu of notice as the basis for the dismissal (paragraph [22]);
d. there was nothing wrong with the dismissal by way of a payment in lieu of notice (paragraph [22]);
e. there is, in this jurisdiction, no claim maintainable on the basis of the manner of dismissal being a breach of

an implied term of mutual trust and confidence (paragraph [27]);

f. C&W's Employees' Code of Conduct (the code of conduct), on which Mr Reid sought to rely, as stipulating a specific course that must be pursued before dismissal, did not assist him, because the disciplinary procedure set out in the code of conduct:

   i. was not a term of the contracts of management staff such as Mr Reid (paragraphs [37] and [39]);

   ii. did not mandate a procedure to be followed prior to dismissal (paragraph [38]); and

   iii. did not apply in Mr Reid's case, since there was no dismissal for cause (paragraph [30]);

g. Mr Reid had failed to prove any loss arising from any pre-dismissal breach of contract; his loss flowed only from the dismissal (paragraph [47]).

[166] In dealing with the claim for damages for tortious conspiracy, the learned judge found:

a. it was Mr Reid's duty to prove that there was an agreement among the respondents, the predominant

purpose of which was to injure him (paragraphs [53] and [54]);

b. the evidence showed that C&W:

   i. was attempting to satisfy itself of the appropriateness and cost of each of the designs in certain of its building projects (paragraph [53]); and

   ii. sought to inform its decision by engaging Jentech and Dr Wayne Reid to assist in the process (paragraph [53]);

c. Mr Reid had not shown that the predominant purpose of the combination of the respondents was to injure him (paragraph [54]); and

d. he had also failed to show that he had suffered any loss from that combination (paragraph [54]).

Wrongful dismissal

[167] Mr Reid's wide-ranging grounds of appeal challenge some of the well-established common law principles relating to the termination of employment as well as some controversial ones. Those principles were recently assessed by this court in **Gabbidon v Sagicor Bank Jamaica Limited** [2020] JMCA Civ 9.

[168] The grounds will be examined, as far as the law is concerned, in line with the findings of the court in **Gabbidon v Sagicor**, which may be summarised to read that, in this jurisdiction:

a. the courts are bound to follow the decision in **Addis**. Accordingly, damages are awarded for a breach of the contract of employment and not for the manner of the breach, the actual loss of the job or pain and distress suffered by the dismissed employee, as a result of the employment contract being terminated;

b. whereas a term of mutual trust and confidence may be implied in employment contracts, according to the principles emanating from **Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)** [1997] 3 All ER 1 (**Malik**), the term cannot supplant an express term in the contract, including express terms which stipulate the methods of terminating the contract;

c. the principles emanating from **Johnson v Unisys Ltd** [2001] UKHL 13; [2001] 2 All ER 801 (**Johnson v Unisys**) are applicable, namely:

i. breaches of the implied term of mutual trust and confidence, which lead to dismissals, may be unfair but are not justiciable at common law as they fall within the **Johnson** area of exclusion (derived from **Johnson v Unisys)**;

ii. there is a comprehensive alternative statutory scheme for providing a remedy where an employee is unfairly dismissed, namely the framework provided by the Labour Relations and Industrial Disputes Act (LRIDA) and its associated subsidiary legislation;

iii. although the remedies, now available through the LRIDA, were not available, before 2010, to persons who were not then members of a collective bargaining unit, those persons still had no access to the courts if their cases fell within the **Johnson** area of exclusion; and

iv. breaches of the implied term of mutual trust and confidence, which occur during the course of the employment, are justiciable, if they lead to loss, and remain justiciable, even after the

employment has been terminated; but such instances are exceptional; and

d. when an employer terminates the employment by making a payment in lieu of notice, the dismissal is not for cause, even if a reason is given for the dismissal (see **Cocoa Industry Board and Others v Melbourne** (1993) 30 JLR 242).

The grounds of appeal

[169] The grounds of appeal will be examined in accordance with those principles. Contrary to rule 2.2(5) of the Court of Appeal Rules (CAR), the grounds were not set out concisely, but had expansions and arguments rolled into them. Accordingly, the grounds will not be set out in full, but are summarised as follows:

(a) The learned judge erred in finding that there was no evidence or pleading that C&W had dismissed Mr Reid based on accusations of professional misconduct and impropriety.

(b) The learned judge erred in finding that Mr Reid had not proved that any loss resulted from any breach of contract which occurred prior to his dismissal.

(c) The learned judge erred in finding that there was no credible or independent evidence that the code of

conduct was treated as a term of Mr Reid's contract of employment.

(d) The learned judge erred in finding that Mr Reid had failed to establish that there was an actionable claim in this jurisdiction based on an implied term of mutual trust and confidence prior to his dismissal.

(e) The learned judge failed to properly construe the code of conduct and erred in finding that there was no defined disciplinary procedure that Mr Reid was entitled to, which C&W had to follow.

(f) The learned judge erred in finding that Mr Reid had failed to prove that C&W had committed any pre-dismissal breach of the contract of employment.

(g) The learned judge erred in finding that there was no pleading or evidence to support a claim for pre-dismissal losses.

(h) The learned judge erred in not adequately or at all assessing Mr Reid's evidence concerning his assertion that the respondents' predominant purpose was to injure him.

(i) The learned judge erred in finding in favour of the respondents in light of the fact that C&W failed to adduce any evidence to support its defence to the claim of wrongful dismissal and the claim for conspiracy to interfere with Mr Reid's employment contract.

(j) The learned judge erred in failing to give the required weight and consideration to the evidence of Mr Reid and his witnesses who testified that he was not guilty of any wrongdoing in relation to his employment.

(k) The learned judge erred when he treated C&W's pleadings as evidence and in doing so disregarded Mr Reid's evidence in arriving at his decision.

(l) The learned judge erred in finding in favour of C&W despite the fact that it failed to adduce evidence of wrongdoing by Mr Reid, in particular, through Mr Hugh Cross, to controvert Mr Reid's evidence.

(m) The learned judge erred in finding that C&W had properly dismissed Mr Reid for breaches of his employment contract.

(n) The learned judge's decision is against the weight of the evidence in respect of the issue of conspiracy.

[170] Some grounds will be discussed together as they cover the same issue. Some grounds also overlap issues. Ground (h), although it is restricted to the issue of the conspiracy to injure, is listed above for convenience and context. It will be later discussed, along with ground (n) and the relevant portion of ground (i), under the heading of "conspiracy to injure".

Grounds

(a) The learned judge erred in finding that there was no evidence or pleading that C&W had dismissed Mr Reid based on accusations of professional misconduct and impropriety

(i) The learned judge erred in finding in favour of the respondents in light of the fact that C&W failed to adduce any evidence to support its defence to the claim of wrongful dismissal and the claim for conspiracy to interfere with Mr Reid's employment contract

(j) The learned judge erred in failing to give the required weight and consideration to the evidence of Mr Reid and his witnesses who testified that he was not guilty of any wrongdoing in relation to his employment

(k) The learned judge erred when he treated C&W's pleadings as evidence and in doing so disregarded Mr Reid's evidence in arriving at his decision

(l) The learned judge erred in finding in favour of C&W despite the fact that it failed to adduce evidence of wrongdoing by Mr Reid, in particular, through Mr Hugh Cross, to controvert Mr Reid's evidence

(m) The learned judge erred in finding that C&W had properly dismissed Mr Reid for breaches of his employment contract

[171] The issue raised by these grounds is based on the premise that C&W dismissed Mr Reid on allegations of professional misconduct and impropriety, yet it had failed to adduce any evidence to support those allegations. Mr Reid's complaint in these grounds is essentially that the learned judge should have taken account of the fact that, despite making a payment in lieu of notice, C&W asserted that it had dismissed Mr Reid for cause. Having failed to provide any evidence to support those assertions, the complaint continued, the learned judge was wrong to have given judgment to C&W on the issue of wrongful dismissal. Ground (i) reflects the fact that C&W, although it had filed a witness statement of a Mr Hugh Cross, a senior vice-president with C&W, failed to call him, or anyone else, as a witness at the trial.

[172] Learned counsel for Mr Reid, Captain Beswick, submitted that the evidence adduced by Mr Reid "clearly indicates that his dismissal was grounded on the findings of the Jentech Report" (paragraph 18 of learned counsel's written submissions). Learned counsel supported these complaints, in part, by pointing to two documents. The first is the letter of dismissal, which is signed by Mr Reid's supervisor Mr Lee, and which states:

> "Please refer to our meeting on Thursday 18 February 1999 involving yourself, Dr. Wayne Reid from Jentech Consultants Ltd. and myself in connection with the [investigation of building projects].
>
> Investigations of certain projects carried out by Jentech revealed a number of breaches including the following:

1) The company's regulations were breached on a number of occasions with respect to the approval process.
2) The consultant was engaged without any formal agreement, written brief or terms of reference.
3) The junction Exchange drawings for the building which was done by the Architect Aubrey Dawkins was given to the consultant who then did very minor modifications and resubmitted the drawings as his own work and you accepted them. The consultant was then paid for the drawings and was allowed to use the said drawings to construct the building. This has resulted in a claim from Aubrey Dawkins for [utilisation] of his drawings.
4) There was lack of control on several projects resulting in massive delays and significant cost overruns.
5) Parish Council stamp of approval could not be ascertained on some projects.

The investigation was very damaging to the Building Development Department and revealed many areas of weakness and ineffectiveness on your part. This has put the company in a very compromising position and has also caused the company to lose a significant amount of money due to major delays and budget overspend.

As a result of the foregoing, this serves to advise you that the company has lost confidence in your ability to manage in the capacity of Building Development Manager. Accordingly and with regret, we hereby terminate your service effective immediately.

You are entitled to and will receive the following:

a) Three months [sic] pay in lieu of notice.
b) Payment of vacation leave due and not taken.
c) Refund of pension contribution.

> Please deliver the following items to the Vice President, Network Operations no later than 5:00 p.m. today:
>
> …" (Emphasis supplied)

The second document, to which learned counsel pointed, is a letter, dated 5 July 1999, that C&W wrote to Mr Reid's then attorneys-at-law, explaining the dismissal. The letter referred to allegations that had been brought to its attention, "which, if found to be true, would constitute violations of the Company's Code of Conduct, as well as its policies and practices". The letter then sets out the procedure, "applicable to senior managers", that was followed prior to Mr Reid's dismissal and, thereafter, said, in part:

> "7. Mr. Reid's termination was on the ground of his gross misconduct as concluded by the Company, and had nothing to do with the redundancy exercises which have occurred in the Company in recent times. We therefore refute your suggestion that Mr. Reid is entitled to redundancy payments.
>
> 8. [The 1995 terms] which are applicable to senior management and non-unionised employees such as Mr. Reid, prescribe a notice period of three (3) months. We were therefore in order in giving three (3) months' notice pay, in accordance with the terms of his contract of employment."

Both documents are contained in Bundle 6 of the record of appeal – Respondent's/Appellant's Bundle of Documents.

[173] The 1995 terms are dated 1 April 1995 and are part of Bundle 5 of the record of appeal – Supplemental Bundle. It is the document to which C&W referred in the 5 July

1999 letter, cited above. Clause 2.10 of the 1995 terms deals with termination of employment. It allows for payment in lieu of notice, and states as follows:

> "Your employment with the Company may be terminated as follows:
>
> i. by either party giving the other three (3) months' notice in writing (**the Company may agree to treat all or part of this period as payment in lieu of notice**);
>
> ii. summarily by the Company without notice or pay in lieu of notice for:
>
> a. gross misconduct on or off the job;
> b. gross negligence or continued poor job performance;
> c. serious breach of contract." (Emphasis supplied)

[174] Mrs Gentles-Silvera, on behalf of C&W, supported the learned judge's decision in this regard. She submitted that the learned judge was correct to find that Mr Reid had not been dismissed for cause and that the decision in **Cocoa Industry Board and Others v Melbourne** was applicable. Learned counsel contended that **Cocoa Industry Board and Others v Melbourne** was an established authority in this jurisdiction. She pointed to several cases that followed it.

[175] In assessing these competing submissions, it must be said that, contrary to the complaint in these grounds, the learned judge did deal with the evidence and the issue of pleadings concerning the reason for the dismissal. It must be said, however, that

ground (m) inaccurately asserts that the learned judge found that C&W "had properly dismissed [Mr Reid] for breaches of his employment contract".

[176] The learned judge referred to the contents of the letter of dismissal, and noted Mr Reid's response to it. At paragraph [11] of his judgment, the learned judge stated that counsel for Mr Reid accepted that C&W had sought to resist the claim on the basis of clause 2.10 of the 1995 terms, that is, by way of a payment in lieu of notice. The learned judge, at paragraph [15] of his judgment, accurately stated that there was no pleading by C&W that it had dismissed Mr Reid for cause.

[177] Mr Reid has complained that the learned judge inaccurately stated that Mr Reid had not pleaded that C&W had dismissed him for cause. The learned judge made no such statement. Indeed, the tone of the judgment was that Mr Reid's claim was so based. Mr Reid did specifically plead, at paragraph 28 of his statement of claim, that he was summarily dismissed on the basis of the Jentech report. What the learned judge said, however, was that Mr Reid had not pleaded a breach of the implied term of trust and confidence. That is an accurate statement, but the learned judge stated that even if that had been pleaded it would not have been justiciable in this jurisdiction. The learned judge dealt with both the evidence and the pleadings at paragraph [23] of his judgment. He said, in part:

> "It is not clearly articulated in [Mr Reid's] submissions but it appears that the purported breach to which reference was being made was a 'breach of an implied term of mutual trust and confidence'. According to the submission, it was the

> 'levelling of accusations of professional misconduct and impropriety and the decision to act upon them in these circumstances' by [C&W] against [Mr Reid] which constituted a breach of the implied term referred to above. Despite the submission by [Mr Reid's] counsel, there is no evidence of [C&W] deciding to act upon 'accusations of professional misconduct and impropriety'. The further fact is, as counsel for [C&W] has pointed out, there is no pleading in [Mr Reid's] statement of claim to support such a submission. But even if there were such pleading, it is not at all clear that [Mr Reid] has established that there is such a claim in this jurisdiction for which redress is available."

[178] Whereas the learned judge specifically dealt with the contents of the letter of dismissal, he did not refer, in this context, to the letter of 5 July 1999. He held, however, that a decision of this court undermined Mr Reid's contention that he had been dismissed for cause. The learned judge referred to the decision in **Cocoa Industry Board and Others v Melbourne**. In that case, the relevant portion of the headnote accurately states the finding of this court:

> "(i) the contract of employment made it clear that the appellants could terminate the agreement on the giving of one month's notice or one month's salary in lieu of notice. This is what the appellant did and therefore, there is no basis on which a claim for wrongful dismissal can be upheld;
>
> (ii) **the statements of the appellants on the respondent's behaviour in the letter of dismissal is** [sic] **of no importance as the respondent was not dismissal** [sic] **summarily, but was given a month's salary in lieu of notice**;" (Emphasis supplied)

[179] Wolfe JA (as he then was) stated, at page 246 of the report, that if the terms of the contract of employment allowed for a payment in lieu of notice, and that option was adopted, any statement purporting to be a dismissal for cause was ineffective. He said, in part:

> "…The tendering of…wages in lieu of notice is cogent evidence that the dismissal was not for cause. The appellants, in terminating the contract, employed one of the methods permitted…to terminate a contract. More particularly, the contract was terminated by the method stipulated in the letter of appointment…."

[180] The learned judge of appeal's reasoning, with respect, cannot be impugned. If there has been a payment in lieu of notice, it necessarily follows that the other option open to the employer, namely, dismissal for cause, was not adopted. A dismissal for cause cannot properly include a payment in lieu of notice, which is made in accordance with the contract of employment or the accepted practice in the industry. Dismissal for cause and a proper payment in lieu of notice, cannot co-exist. They are alternatives, and the payment trumps the alternative course.

[181] That principle also necessarily applies, in the present case, to the letter of 5 July 1999. The inclusion of reasons for dismissal in that letter cannot supplant the fact that the prior dismissal was by way of a payment in lieu of notice.

[182] In following the reasoning in **Cocoa Industry Board v Melbourne**, the learned judge found that it was not in issue that the relevant notice period, contained in the

1995 terms, would have been three months. He therefore found that the payment in lieu of notice that C&W gave Mr Reid, was consistent with those terms and conditions. There was, therefore, no breach of contract by C&W in that regard. The learned judge, quite properly, came to the finding that he did, although C&W called no witness to attempt to justify dismissing Mr Reid.

[183] The short answer to these grounds, in so far as the wrongful dismissal claim is concerned, is that as C&W did not dismiss Mr Reid for cause, it was under no obligation to either plead or prove that he was guilty of any wrongdoing.

[184] In respect of the relevant portion of ground (i), the learned judge correctly placed the burden of proof on Mr Reid. It was not for C&W to prove its defence. In any event, there was evidence, in terms of documentation, before the learned judge that allowed him to make the findings that he did in respect of the issue of wrongful dismissal.

[185] Ground (l) is essentially a procedural complaint. It concerns C&W's failure to call Mr Hugh Cross to give evidence and, alternatively, failing to put Mr Cross' witness statement in as hearsay evidence.

[186] Captain Beswick asserted that C&W, having filed a witness statement in the strong terms in which Mr Cross' statement was framed, ought to have at least placed his statement into evidence as hearsay. Learned counsel referred to rule 29.8(1) of the Civil Procedure Rules (CPR) in support of his submissions on this point.

[187] The context of the complaint is that, at the trial, when counsel for Mr Reid closed his case, counsel for C&W stated that it would not adduce any evidence. Counsel stated that Mr Cross was no longer employed to C&W and so it did not intend to call him as a witness. There was, however, the unusual situation that the learned judge and the jury had possession of Mr Cross' witness statement, despite the fact that he did not give evidence.

[188] Rule 29.8 of the CPR addresses the use of witness statements at trial. This rule placed no obligation on C&W to have Mr Cross attend to give evidence. This obligation only arose if C&W wished to rely on his evidence. Similarly, rule 29.8(1) of the CPR did not place any obligation on C&W to have put Mr Cross' witness statement into evidence as hearsay. The rule states:

> "Where a party –
>
> (a) has served a witness statement or summary; and
> (b) **wishes to rely on the evidence of the witness who made the statement**,
>
> that party must call the witness to give evidence unless the court orders otherwise or it puts the statement in as hearsay evidence." (Emphasis supplied)

[189] Mr Reid, if he wished, could have had the statement admitted into evidence as hearsay. Rule 29.8(3) of the CPR allowed that course. It states:

"(3) Where a party who has served a witness statement does not –

(a) intend to call that witness at the trial; or

(b) put the witness statement in as hearsay evidence,

any other party may put the witness statement in as hearsay evidence." (Emphasis supplied)

Given the strong terms that are ascribed to the statement, it is perhaps, not surprising that counsel for Mr Reid did not seek to make use of rule 29.8(3) at the trial. The complaint in ground (l), concerning Mr Cross' witness statement is wholly without merit.

[190] The learned judge was correct in his reasoning in respect of the issues covered by these grounds of appeal. They have no merit.

Grounds

(b) The learned judge erred in finding that Mr Reid had not proved that any loss resulted from any breach of contract which occurred prior to his dismissal;

(d) The learned judge erred in finding that Mr Reid had failed to establish that there was an actionable claim in this jurisdiction based on an implied term of mutual trust and confidence prior to his dismissal;

(f) The learned judge erred in finding that Mr Reid had failed to prove that C&W had committed any pre-dismissal breach of the contract of employment; and

(g) The learned judge erred in finding that there was no pleading or evidence to support a claim for pre-dismissal losses

[191] The complaints in these grounds essentially are that the learned judge erred in not finding that C&W had breached the implied term of mutual trust and confidence, which existed in its contract of employment with Mr Reid. The complaints also seek to assert that the breach was committed during the course of his employment and is therefore actionable. Captain Beswick argued that C&W's conduct, prior to dismissing Mr Reid, stigmatised him in the engineering field, preventing him from obtaining employment in that field. Learned counsel submitted that C&W is liable to compensate Mr Reid for the loss resulting from the breach.

[192] The conduct to which learned counsel alludes are, firstly the questioning of, and the levelling of accusations against, Mr Reid at a meeting held in November 1998. The matters raised, he said, concerned long completed projects, details of which he would not readily remember. This questioning was also done at a time, he said, when the files, which contained the relevant information relating to those questions, had previously been taken from his department, and were therefore not available to him to research, provide the relevant answers, and to adequately defend himself. The second bit of conduct to which Mr Reid refers is the presentation of the Jentech report to him on 18 February 1999 and requiring him to answer questions about its contents when he had had no advance sight of it, and the files, which would contain the answers, had been taken from his department and had still not been returned. He, therefore, was also hampered in the answers that he could give on that occasion, and was embarrassed by the circumstances on both occasions.

[193] Captain Beswick submitted that the accusations and dismissal led to loss by Mr Reid because of the stigma associated with them. The evidence, learned counsel pointed out, was that when word of the report went abroad into the wider engineering field in the island, Mr Reid had difficulty obtaining employment elsewhere, after his dismissal. Mr Reid was also embarrassed in having to explain his dismissal to his family and associates.

[194] Learned counsel relied on, among others, the decisions in **Malik**, **Johnson v Unisys** and **Eastwood and another v Magnox Electric plc; McCabe v Cornwall County Council and others** [2004] 3 All ER 991(**Malik**); [2005] 1 AC 503 (**Eastwood v Magnox**), to support his submissions.

[195] Captain Beswick submitted that the learned judge failed to properly analyse, interpret and distinguish, where necessary, the relevant authorities and therefore "incorrectly concluded that [Mr Reid] suffered no provable loss resulting from the breach of contract prior to his dismissal".

[196] Mrs Gentles-Silvera, in respect of these grounds, supported the learned judge's finding that there was no evidence to support a claim for damages for pre-dismissal breaches of the implied term of mutual trust and confidence. Learned counsel also submitted that the learned judge, correctly, found that there was no pleading of such breaches.

[197] **Malik**, in this context, establishes two important principles. The principles emanate from their Lordships' finding that courts are entitled to imply that the contract of employment contains a term that the parties will not conduct themselves in such a way as to destroy or seriously damage the mutual relationship of trust and confidence. The principles are readily perceived from the headnote of the case, which accurately records their Lordships' decision:

> (1) "In appropriate cases damages could in principle be awarded for loss of reputation caused by breach of contract. Furthermore, provided a relevant breach of contract was established and the requirements of causation, remoteness and mitigation were satisfied, financial loss in respect of damage to reputation caused by breach of contract could be recovered for breach of a contract of employment…."
>
> (2) "An employer was under an implied obligation that he would not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, and an employer who breached the trust and confidence term would be liable if he thereby caused continuing financial loss of a nature that was reasonably foreseeable. Thus, if it was reasonably foreseeable that conduct in breach of the trust and confidence term would prejudicially affect employees' future employment prospects and loss of that type was sustained in consequence of a breach, then in principle damages in respect of the loss would be recoverable…."

[198] **Johnson v Unisys** established that there were two different spheres of application between **Addis** and **Malik**. **Addis** concerns the manner of dismissal, whilst **Malik** addresses conduct prior to dismissal. One impact of **Johnson v Unisys**, in this

context, is that it establishes that breaches of the implied term of mutual trust and confidence, which result from a dismissal, are not actionable at common law. Those breaches are said to fall within the "**Johnson** exclusion area" in that they speak to the manner of dismissal. Relief for the unfair manner of dismissal (which would normally encapsulate breaches of the implied term of trust and confidence at the time of dismissal), is to be secured by the framework established by Parliament. That impact of **Johnson v Unisys** is helpfully set out in the more recent decision of **Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence** [2011] UKSC 58; [2012] 2 All ER 278.

[199] Lord Dyson SCJ, at paragraph [24] of his judgment in **Edwards v Chesterfield Royal Hospital**, set out the essence of the decision in **Johnson v Unisys**:

> "…The ratio of *Johnson*'s case is that the implied term of trust and confidence cannot be extended to allow an employee to recover damages for loss arising from the manner of his dismissal…."

Lord Kerr SCJ, who dissented in part, in **Edwards v Chesterfield Royal Hospital**, nonetheless agreed with the majority, as to the effect of the decision in **Johnson v Unisys**. He said, at paragraph [145] of his judgment that there were two aspects to the decision in **Johnson v Unisys**:

> "I would prefer to express the ratio [in **Johnson v Unisys**] in terms that more clearly recognise the two separate aspects of the decision. In the first place, **the House of**

> **Lords rejected the notion that the implied term of mutual trust and confidence had any role in determining the nature of the employer's obligations at the time of the dismissal of the employee**. Secondly, it concluded that **compensation for loss flowing from the manner in which an employee is dismissed must be sought within the statutory scheme devised by Parliament** in the 1971 Act and continued in successor enactments. It seems to me that it is the latter of these two which is the more relevant to the issues that arise on this appeal." (Emphasis supplied)

[200] The **Johnson** exclusion area was concisely explained by Lord Nicholls of Birkenhead in **Eastwood v Magnox**. He said, at paragraph [28] of his judgment:

> "In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area."

[201] Based on that learning, the complaint in ground (d) against the learned judge's finding, is misguided. The learned judge accurately stated the law that no claim was maintainable at common law "on the basis of the manner of dismissal being a breach of an implied term of mutual trust and confidence" (see paragraph [27] of the judgment). The important aspect to note is the link between the dismissal and the breach of the implied term. The learned judge was not asserting that a breach of the implied term, by itself, was not actionable at common law. It has been accepted by this court, in **Gabbidon v Sagicor**, that the principles in **Malik** are applicable in this jurisdiction (see paragraph [63] of **Gabbidon v Sagicor**). In **Gabbidon v Sagicor**, this court also

accepted, however, that the principles in **Johnson v Unisys** and the **Johnson** exclusion area also apply (see paragraph [90] of **Gabbidon v Sagicor**).

[202] In applying the principles from those authorities to the present case, although it was open to Mr Reid to claim damages for a breach of the term of mutual trust and confidence, there is some support for Mrs Gentles-Silvera's submission that Mr Reid did not claim those damages as part of his pleadings. Mr Reid, in his statement of claim (the claim had been filed before the introduction of the CPR), described what had occurred in each meeting:

a. at paragraphs 16 and 19, he said that at the November 1998 meeting, Dr Wayne Reid accused him of impropriety in carrying out his job; and

b. at paragraph 25, he said that at the meeting on 18 February 1999, he was asked to comment on the numerous allegations against him in the Jentech report, which he was then seeing for the first time.

He did not, however, set out any specific claim for damages for a breach of the contract other than for wrongful dismissal. Mr Reid did, however, claim such further and other relief as to the court seems just. It may be that he could claim relief under that rubric.

[203] Insofar as the evidence is concerned, the occurrences in those meetings, which Mr Reid described, do not constitute breaches of the implied term of mutual trust and

confidence. They are not circumstances that would have entitled Mr Reid to say that the contract is at an end, and he, certainly, did not regard the contract as being at an end. That is demonstrated by the fact that he was taken by surprise when he was dismissed.

[204] As Lord Nicholls of Birkenhead stated at paragraph [29] of his judgment in **Eastwood v Magnox**, losses arising from pre-dismissal conduct are "exceptional" cases. Lord Nicholls said:

> "Exceptionally [cases do fall outside the **Johnson** exclusion area]. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over."

[205] In addition, the treatment at the meetings, on which Mr Reid relies, does not bear any relation to his inability to obtain employment after his dismissal. Those actions are not what caused his loss. The loss was caused by his dismissal. His evidence supports that finding.

[206] One of his complaints is that the fact of his dismissal has caused him the embarrassment of having to explain it to his family and others. His other complaint

about the contents of the report causing him loss, even if it were proved to be connected to his inability to obtain employment, cannot be said to constitute a breach of the implied term of mutual trust and confidence. His relief for any defamation of his character is, as he sought to do in his claim for libel, properly to be pursued by a separate cause of action. His loss is not outside of the **Johnson** area of exclusion. C&W's allegations against him, as contained in the letter of dismissal, and the later letter of 9 July 1999, would clearly fall within the **Johnson** exclusion area and so **Malik** would not assist him.

[207] It has been demonstrated above that Mr Reid did not specifically plead that C&W had breached the implied term of trust and confidence. It also cannot be denied that although Mr Reid, in his statement of claim described what had occurred at the meetings in November 1998 and February 1999, he did not assert any claim for breach of contract, other than the specific claim for wrongful dismissal. The learned judge dealt with this point when he stated at paragraphs [29] – [30]:

> "[29] The problem with [Mr Reid's reliance on **Eastwood v Magnox**] in the context of this case is that **[Mr Reid] has not demonstrated that any cause of action 'exists independently of the dismissal'.** After all, he who asserts must prove. [Mr Reid's] counsel refers to the evidence of [C&W] confronting [Mr Reid] with a report of [Jentech] and not giving him notice of it before requiring him to comment upon it, and to respond to allegations of professional misconduct including colluding with another to cause [C&W] financial loss.

> [30] Further, it was submitted that in any event, no enquiry had been conducted into the allegations and that an enquiry would have been a necessary pre-requisite to a decision to dismiss for cause. The short answer to this proposition is that there has not been, as I have found above, any dismissal for cause. And even if there had been, there is no evidence that any provable losses have been occasioned to [Mr Reid] by any such breach as distinct from the actual dismissal." (Emphasis supplied)

[208] These grounds cannot succeed.

Grounds (c) The learned judge erred in finding that there was no credible or independent evidence that the code of conduct was treated as a term of Mr Reid's contract of employment

(e) The learned judge failed to properly construe the code of conduct and erred in finding that there was no defined disciplinary procedure that Mr Reid was entitled to, which C&W had to follow

[209] In respect of ground (c), Captain Beswick argued that the learned judge erred in finding that the code of conduct, which required a particular disciplinary procedure to be followed, did not apply to Mr Reid. Learned counsel submitted that C&W's letter of 5 July 1999 indicated C&W's acceptance that the code of conduct applied to Mr Reid. In that letter, learned counsel pointed out, C&W referred to some of the allegations in the Jentech report and stated that, if they were true, they were violations of the code of conduct. That evidence, learned counsel submitted, demonstrated that C&W regarded the code of conduct as forming part of the contract of employment. He argued that Mr Reid was entitled to have the disciplinary procedure, set out in the code of conduct, followed.

[210] The application of the code of conduct is the subject of ground (e). Learned counsel submitted that the learned judge was wrong to find that the disciplinary procedure, which is set out in the code, was not mandatory. Captain Beswick argued that since C&W relied on the code of conduct in dismissing Mr Reid, it was obliged to ensure that he received the benefits of its terms, which were favourable to him. Learned counsel pointed to paragraph 5 of the code of conduct, which, he submitted "requires that if the employee is considered to be incompetent, the employee should be assisted through supervision and training and given a reasonable time to meet the required standards of performance" (see paragraph 104 of the written submissions).

[211] Learned counsel relied, in part, on the decision of the House of Lords in **Edwards v Chesterfield Royal Hospital**.

[212] Mrs Gentles-Silvera attacked these grounds on a number of bases. She submitted that:

a. once more, the submissions on behalf of Mr Reid were not supported by any pleading, in that Mr Reid's statement of claim did not plead that C&W had breached the code of conduct, and the absence of a claim in this regard is fatal to these grounds;

b. clause 2.9 of the 1995 terms is also entitled "Code of Conduct" and in the absence of an express reference

in the 5 July 1999 letter to the code of conduct, it is to the 1995 terms to which the letter must be found to refer;

c. the fact that the code of conduct was not referred to in Mr Reid's contract of employment supported the learned judge's finding that the code of conduct is not a term of Mr Reid's contract; and

d. in any event, the code of conduct does not prevent C&W from dismissing Mr Reid pursuant to the express provision in his contract of employment, as there was no obligation on C&W to pursue any disciplinary process.

[213] The learned judge was, therefore, right, she submitted, to find that the terms and conditions of Mr Reid's contract of employment were embodied in the 1995 terms. Learned counsel also relied, in part, on **Johnson v Unisys** and **Edwards v Chesterfield Royal Hospital**.

[214] Learned counsel sought to draw on the reasoning in both **Johnson v Unisys** and **Edwards v Chesterfield Royal Hospital**, that the inclusion of disciplinary procedure in employment manuals is an attempt to comply with statutory requirements and do not constitute contractual provisions, which are actionable at common law. Mrs Gentles-Silvera submitted that, in the event that the code of conduct was applicable to

Mr Reid, the reasoning was applicable to this case. She drew a parallel between the statutory framework in the United Kingdom (UK), to which their Lordships referred, and the statutory framework in this jurisdiction, namely section 3 of the LRIDA and rule 22 of the Labour Relations Code (the Code), and concluded, at paragraph 57 of her written submissions, that the code of conduct:

> "… is clearly an attempt to comply with [the Code] and was never meant to create contractual duties which are independently actionable or qualify the employer's common law power to dismiss without cause on giving notice…."

[215] An analysis of the judgment in this regard shows that the learned judge relied on two documents as being applicable to Mr Reid. The first is Mr Reid's original letter of engagement dated 27 April 1977, and the second is the 1995 terms. The learned judge referred to these documents in the context of deciding the relevant period of notice for terminating Mr Reid's contract of employment. The learned judge noted that Mr Reid had signed a copy of the former document (paragraph [9]), and that he was aware of the existence of the latter (paragraph [11]).

[216] He also found at paragraph [11] that the 1995 terms formed the terms of Mr Reid's employment contract. The learned judge addressed the issue of the code of conduct at paragraph [39] of his judgment. He found that the code of conduct was aimed at the relationship with, and treatment of, non-management staff and that it did not apply to management staff, the group to which Mr Reid belonged.

[217] There is a difficulty with one of Mrs Gentles-Silvera's submissions, in that C&W did not adduce any evidence to say, to which document the 5 July 1999 letter referred. It was therefore left to the learned judge to decide to which document the letter referred. Another difficulty with Mrs Gentles-Silvera's submissions is that Mr Reid's letter of engagement could not refer to the code of conduct, because the letter predated the code of conduct.

[218] Nonetheless, the last mentioned of Mrs Gentles-Silvera's submissions, that the code of conduct did not prevent C&W from dismissing Mr Reid, cannot be resisted. It is a well-established principle that general provisions cannot displace specific ones. This principle was applied in **Gabbidon v Sagicor** (see paragraph [126]).

[219] The code of conduct, with its general provisions, even if they are applicable to Mr Reid, cannot supplant the specific provision, contained in Mr Reid's contract of employment, which speaks specifically to the manner in which the contract of employment may be terminated.

[220] There is also support for the learned judge's finding that the code of conduct did not apply to Mr Reid. It is noted that, although it states that it applies to all employees, there is no specific reference in the code of conduct as being applicable to the senior management. On the contrary, the 1995 terms are specifically directed to the senior management and have not been shown to have been superseded.

[221] It is also to be noted that there was no assertion that Mr Reid had signed a copy of the code of conduct or that there had been any pre-dismissal reliance upon it, with reference to his employment. Accordingly, the reference to the code of conduct in the 5 July 1999, post-dismissal letter, does not undermine the learned judge's finding.

[222] In addition to the error in the premise in Captain Beswick's submissions that C&W dismissed Mr Reid for a breach of the code of conduct, the above reasoning demonstrates the errors in his submissions.

[223] These grounds, accordingly, must fail.

[224] Those findings make it unnecessary to assess Mrs Gentles-Silvera's comparison of the LRIDA and the Code to the statutory framework in the UK, to which **Johnson v Unisys** and **Edwards v Chesterfield Royal Hospital**, referred. That discussion may be properly applied to a case in which the employee is one to which the Jamaican legislative framework applied. It did not apply to Mr Reid, as it was not until 2010 that the legislative framework was extended to persons who, like him, are not members of a collective bargaining unit.

Conspiracy to injure

Grounds (h) The learned judge erred in not adequately or at all assessing Mr Reid's evidence concerning his assertion that the respondents' predominant purpose was to injure him

(i) The learned judge erred in finding in favour of the respondents in light of the fact that C&W failed to adduce

any evidence to support its defence to the claim of wrongful dismissal and the claim for conspiracy to interfere with Mr Reid's employment contract

(n) The learned judge's decision is against the weight of the evidence in respect of the issue of conspiracy

[225] In addressing these grounds, Captain Beswick submitted that the evidence adduced by Mr Reid was such that the only logical conclusion was that C&W, Jentech and Dr Wayne Reid were a part of a systematic scheme, of which the main objective was to discredit Mr Robert Evans, the principal of Technical Enterprises Limited (TechEnt) and to dismiss Mr Reid. TechEnt, for many years, at least since 1981, had provided consultant services to C&W.

[226] Learned counsel submitted that C&W "failed to discharge the clear evidential burden which it had to adduce evidence that its dominant purpose was to protect its interest and not to damage [Mr Reid]" (see paragraph 163 of his written submissions). He argued that the learned judge failed to address his mind to the evidence on the issue.

[227] To demonstrate his points, learned counsel highlighted evidence which showed:

a. Mr Milton Weise, a director of C&W and a member of its contracts committee, and Mr Evans, submitted competing designs for a building project at Coopers'

Hill, in the parish of Saint Andrew, that C&W hoped to embark upon;

b. on being asked by his supervisor to review both designs and make a recommendation of the preferable one for the purposes, Mr Reid recommended that supplied by TechEnt;

c. Mr Reid's recommendation was approved by his supervisor as well as Mr Cross;

d. a professional dispute arose between Mr Weise and Mr Evans over the design issue and, in June 1998, Mr Evans complained to the Professional Engineers Registration Board about Mr Weise;

e. by letter dated 17 July 1998, C&W approached Dr Wayne Reid and Jentech about investigating the Coopers' Hill project;

f. by letter dated 20 July 1998, C&W contracted Dr Wayne Reid and Jentech, to investigate, not only the Coopers' Hill project, but 13 of the projects that TechEnt had done over the course of many years for C&W;

g. the files for all these projects were given to Dr Wayne Reid and Jentech for the purpose of the review, but in conducting his investigation, Dr Wayne Reid only spoke to Mr Reid's supervisor and Mr Reid's subordinate;

h. the completed files had all been previously signed-off on by Mr Reid's superiors as well as C&W's directors, including Mr Weise, resulting in accounts being agreed and payments made;

h. it was only at the meeting in November 1998 that Dr Wayne Reid spoke to Mr Reid, at which time Mr Reid was at a disadvantage since he did not have the files for the past projects;

i. in February 1999, Mr Reid was instructed to remove TechEnt from a building project that was already underway;

j. at the meeting held on 18 February 1999, Mr Reid was accused of impropriety in the conduct of his job, without any prior notice of the Jentech report, on which the accusations were based; and

k. on 19 February 1999, C&W fired Mr Reid, without giving him an opportunity to properly respond to the accusations.

[228] That sequence of events, Captain Beswick submitted, shows that C&W had hired Dr Wayne Reid and Jentech, solely for the purpose of supporting Mr Weise and discrediting Mr Evans and TechEnt. According to learned counsel, the Jentech report achieved its purpose as it undermined Mr Evans' work "and in so doing defamed and libelled [Mr Reid] who oversaw the projects done by Mr Evans". That report, learned counsel submitted, also led to C&W dismissing Mr Reid "summarily from his job as Building Manager" (see paragraph 132 of the written submissions). Captain Beswick argued that the Jentech report was written to get rid of Mr Evans, but, because Mr Reid had supported Mr Evans' design over Mr Weise's, Mr Reid "became a casualty of war". Learned counsel submitted that C&W had adduced no evidence to prove otherwise.

[229] Captain Beswick relied upon, among other authorities, the landmark case of **Crofter Hand-Woven Harris Tweed v Veitch**.

[230] Mrs Gentles-Silvera stressed that in order to satisfy the requirements of the tort of conspiracy to injure, the burden lay on Mr Reid to prove on a balance of probabilities that the predominant purpose of the investigation was to injure him. Learned counsel submitted that Mr Reid had not discharged that burden. She argued that the mere assertion of a conspiracy "under cross-examination or otherwise, will not amount to

proof" (see paragraph 63 of her written submissions). Conjecture and theories contained in submissions, she argued, are not sufficient.

[231] Learned counsel submitted that the evidence at the trial was that C&W first retained Dr Wayne Reid and Jentech to provide a professional opinion in relation to the two proposals in respect of Coopers' Hill. She said that C&W also engaged Dr Wayne Reid and Jentech to report on other projects that had been supervised by TechEnt. The letters of engagement, she submitted, spoke to the purpose of the engagement, which was to enable C&W to ascertain whether it had "obtained value for money in terms of cost, in terms of fee, whether the designs were up to industry standards, whether there was any breach of policy of [C&W] or industry norms" (see paragraph 68 of her written submissions).

[232] The evidence, Mrs Gentles-Silvera submitted, showed that C&W was acting within its purview to protect and advance its interests. She said that there was nothing unlawful in what C&W had done and that the combination with Dr Reid and Jentech had not been shown to have been aimed at injuring Mr Reid. She supported the findings and decision of the learned judge in this regard. She also relied on, among others, **Crofter Hand-Woven Harris Tweed v Veitch**.

[233] Mr Braham QC, on behalf of the Jentech and Dr Reid, also supported the findings and decision of the learned judge in this regard. Learned Queen's Counsel also

contended that Mr Reid had failed to prove that the predominant purpose of the arrangement between C&W and Jentech was to injure him.

[234] Mr Braham sought to draw a distinction between the two Jentech reports. He argued that Mr Reid, from his pleadings, had centred his complaint on the report on the Coopers' Hill project. On that basis, learned Queen's Counsel submitted, the "reference to the other projects in which Techent were involved and which was the subject of the Jentech Report is wholly irrelevant to the issues that were before the trial judge" (see paragraph (89) of the written submissions on behalf of Dr Wayne Reid and Jentech). Mr Braham submitted that even if both reports were relevant, neither one contains any evidence of a conspiracy to injure Mr Reid. He submitted that these grounds have no merit.

[235] A definition of the tort of conspiracy to injure was approved by Lord Wright in **Crofter Hand-Woven Harris Tweed v Veitch**. Lord Wright said, in part, at page 157 of the All England Report:

> "…The classical definition of conspiracy is that given by Willes J in advising the House of Lords in *Mulcahy v* R [(1868) LR 3 HL 306], at p 317:
>
> > 'A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by un-lawful means.'"

Lord Wright pointed out that "the civil right of action is not complete unless the conspirators do acts in pursuance of their agreement to the damage of the plaintiffs".

[236] The issue of intention arises from that learning. The predominant intent of the combiners is an issue for the tribunal of fact to decide. The tribunal of fact, in considering that question, may infer intention from acts and conduct, which have been proved. In the event of mixed motives or purposes, the tribunal of fact is required to decide the predominant motive or object of the combiners. These principles have been extracted from the judgment of Lord Wright in **Crofter Hand-Woven Harris Tweed v Veitch**, at page 164.

[237] The learned editors of Halsbury's Laws of England Volume 96 (2015), at paragraphs 713 and 715 accurately state the law as follows:

> "**713. Essential ingredients of tortious conspiracy.**
>
> In order to make out a case of conspiracy **the claimant must establish**:
>
> (1) **an agreement** between two or more persons, which either:
>
> (a) where the means are lawful, **is an agreement the real and predominant purpose of which is to injure the claimant**; or
>
> (b) where the means are unlawful, is an agreement an intended consequence of which is to injure the claimant; and
>
> (2) that acts done in execution of that agreement resulted in damage to the claimant."

> "**715. Conspiracy to injure.**
>
> It is a tort to cause damage in pursuance of a conspiracy of which the predominant purpose is to cause injury to another person even if no unlawful means are employed. Conversely, where the primary or predominant purpose of the conspirators is to further or protect some legitimate interest of their own, but they also have the intention of injuring the claimant, it must be shown that they used unlawful means.
>
> Conspiracy to injure may be committed where the conspirators act out of political or religious hatred, or from a spirit of revenge for previous real or fancied injury, but malice in the sense of malevolence is not an element of the cause of action. An admitted desire to punish the claimant is not necessarily decisive for it is consistent with both vindictive vengeance and an intention to deter others from similarly offending. Where the defendants act with mixed motives, feeling that they can kill two birds with one stone by teaching the claimant a lesson at the same time as protecting their own interests, the question is which of these purposes predominated. **However, a combination to forward or defend one's own interests or to further some other legitimate object is not actionable even though it involves inevitable harm to another, provided that nothing independently unlawful is done. It is not for the court to determine whether the agreed conduct is reasonably calculated to advance the object of the combiners: the question is one of the defendants' honest belief**." (Bold headings as in original, other emphasis is supplied)

[238] The tort of conspiracy to injure has not been extensively litigated in this jurisdiction. One of the few cases decided in this court, on this subject, is **American Jewellery Co Ltd and Others v Commercial Corporation Jamaica Ltd and Others** [2010] JMCA Civ 36. In that case, Cooke JA had the opportunity to address the law relating to the tort. He said at paragraph [17]:

> "[17] To succeed in what I will call the 'conspiracy claim', a plaintiff(s) must establish to the requisite standard that (a) there was a combination and (b) that the predominant intention of that combination was to injure and (c) that there was resulting harm. These principles I have distilled from the authorities – see in particular **Total Networks v. Revenue and Customs Commissioners** [2008] UK HL 19."

Viscount Simon LC formulated that test in **Crofter Hand-Woven Harris Tweed v Veitch**, when he said, in part, at page 147:

> "The appellants, therefore, in order to make out their case, have to establish *(a)* agreement between the two respondents *(b)* to effect an unlawful purpose *(c)* resulting in damage to the appellants."

Their Lordships established that the term "unlawful" in the context does not mean "illegal", and need not be accompanied by malevolence; it requires that there must be an intention to inflict harm.

[239] In **Crofter Hand-Woven Harris Tweed v Veitch**, those respondents were officials of a trade union who organised an embargo to stop the sale of yarn produced by the appellants. Accordingly, their members, who were dockers, were instructed not to handle yarn imported by the appellants, or finished tweed, produced by the appellants, from that yarn. The embargo was designed to support the appellants' competitors, who employed union members. The ultimate aim was to increase union membership from, and the wages paid to, employees in the tweed industry.

[240] The appellants sued those respondents claiming that, in imposing the embargo, they had conspired to injure the appellants, since the natural result of the embargo was the destruction of the appellants' businesses. It was, however, found as a fact that the real purpose for which the embargo was imposed was to benefit the employees who were members of the union. On the appeal to the House of Lords, it was held that the appeal could not succeed because "the real purpose of the embargo being to benefit the members of the trade union, the fact that it inflicted damage upon the appellants did not make it an unlawful conspiracy which was actionable at law" (see the headnote).

[241] In **American Jewellery Co Ltd v Commercial Corporation Jamaica**, this court held that a purchaser's (Purchaser C) delay in paying the purchase monies to the vendor of real property, was not actionable, because the vendor had not proved that the delay was intended to render the vendor unable to pay his mortgage debt on other property (the second property), thereby allowing the second property to be sold at auction, and purchased by Purchaser C's connections.

[242] An important part of this court's finding on that issue is that the vendor had not proved that Purchaser C knew that the second property was the subject of a mortgage. The theory advanced by the vendor, as linking the delay with the purchase at auction, was rejected as conjecture. K Harrison JA dealt with the issue thusly, at paragraph [49] of his judgment:

> "…[Counsel for the vendor] sought to persuade this Court, by way of inference, that the real estate agent had knowledge of [the vendor's mortgage debt] and at the meeting with [Purchaser C's principal] and [the vendor], the real estate agent had disclosed this to [Purchaser C's principal]. However, in my view, this is mere conjecture. Nowhere in the evidence of these three individuals is there any indication that this was discussed at the meeting. It is true that [the vendor] in his witness statement did say that he had told [Purchaser C's principal] of his indebtedness. However, in cross-examination he admitted that in none of the correspondences did he or [his attorney-at-law] indicate that the money was needed to pay off the mortgage. Further, although [the vendor's attorney-at-law] in his oral evidence at one point said that he had told [Purchaser C's attorney-at-law] about [the vendor's] indebtedness, he later resiled from this. In fact, the learned judge did not find him to be a witness of truth. I can find no reason to disturb the learned judge's finding that none of the alleged conspirators knew about [the vendor's mortgage debt]."

[243] A common thread running through those authorities is the principle that, in order to be successful in a claim for damages in this tort, the claimant must prove that the agreement between the combiners has as its predominant purpose, the injury of the claimant. The test is subjective. Viscount Simon LC so stated at page 149 of **Crofter Hand-Woven Harris Tweed v Veitch**. He said, in part:

> "The question to be answered, in determining whether a combination to do an act which damages others is actionable even though it would not be actionable if done by a single person, is not: 'Did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action?' It is: 'What is the real reason why the combiners did it?' Or, as Lord Cave LC puts it: 'What is the real purpose of the combination?' **The test is not what is the natural result to the plaintiffs of such combined**

> **action, or what is the resulting damage which the defendants realise, or should realise, will follow, but what is in truth the object in the minds of the combiners when they acted as they did**. It is not consequence that matters, but purpose." (Emphasis supplied)

[244] In applying, to the present case, the three-way test formulated by Cooke JA in **American Jewellery Co Ltd and Others v Commercial Corporation Jamaica**, and by Viscount Simon in **Crofter Hand-Woven Harris Tweed v Veitch**, it may easily be said that there was an agreement between the respondents, hence requirement (a) has been satisfied. There may be reasonable disagreement as to whether Jentech and Dr Wayne Reid may be treated as separate entities for this purpose, but the issue is not so important as to warrant a dilation. There was at least an agreement between C&W and Jentech. Requirement (b) will be discussed later.

[245] Mr Reid may also, arguably, say that he has proved that he has suffered damage, by way of the loss of his job and that he has therefore satisfied requirement (c). Even taking that as being so, what he has not shown is a link between the respondents' agreement and the injury that he has suffered. At best, what Mr Reid has advanced is conjecture.

[246] In assessing the issue of the agreement, Mr Braham's submission that it is only agreement in respect of the Coopers' Hill project, which is relevant, cannot be accepted. Mr Reid's statement of claim complains about both reports. This is demonstrated in:

a. paragraph 25, in which Mr Reid complains about allegations in the Jentech reports that he had allowed TechEnt to increase its fees at the end of certain projects and allowed given drawings prepared by Architect Dawkins, to TechEnt; and

b. paragraph 32, in which Mr Reid outlines the alleged motive behind C&W's actions with regard to him and linking them to the complaint against Mr Weise in respect of the Coopers' Hill project.

Other paragraphs address this issue. Both agreements will, therefore, be treated with below. They will, together, continue to be referenced as "the Jentech report".

[247] The agreements that have been put into evidence show that Dr Wayne Reid and Jentech agreed with C&W to inquire into projects done by TechEnt for C&W and to report to C&W on the results of the inquiries. Those were matters which affected C&W's operation. The terms of reference of the Cooper's Hill enquiry are set out in a letter dated 17 July 1998 from C&W to Dr Wayne Reid at Jentech:

> "To investigate the technical and financial details appertaining to:
>
> 1. a project proposal designed and submitted by Technical Enterprises Limited for the construction of a building at our Coopers' Hill Radio Relay Station to house a diesel driven engine generating plant; and

2. a review of said project and a new design and report by Director Milton Weise indicating the technical merits or otherwise of both and to submit a comprehensive report of your findings." (See page 238 of Bundle 1 of the record of appeal.)

[248] The terms of reference of the review of the concluded projects are set out in a letter dated 20 July 1998 from C&W to Dr Wayne Reid at Jentech:

> "Such a review should seek to ascertain the reasonableness of:
>
> - the overall costs of these projects including variations;
> - the fees charged by Technical Enterprises.
>
> In addition, your opinion regarding the quality of the designs and any intellectual property rights violation is solicited.
>
> Any issue identified during your review which constitutes a breach of or a deviation from standard or acceptable industry norms should be brought to our attention." (See page 312 of Bundle 1 of the record of appeal)

[249] The agreements, not only do not make any reference to Mr Reid, but do not contain any indication of an intent to injure him or anyone. Indeed, Dr Wayne Reid testified that before receiving the letters he did not know and had not spoken to any of the relevant individuals at C&W. He also testified that, prior to embarking on the project, he did not know Mr Reid. To Dr Wayne Reid's knowledge he was not related to Mr Reid, despite the fact that they had a surname in common and they both hailed

from the northern climes of the parish of Manchester. Dr Wayne Reid also denied having "colluded or conspired with [C&W] to conduct an investigation or prepare my report falsely accusing anyone" (see page 141 of Bundle 1 of the record of appeal).

[250] The Coopers' Hill report is dated November 1998, while the report on the completed projects is dated December 1998. Having received the reports, it appears that C&W decided to terminate relations with TechEnt and to dismiss Mr Reid. There is no evidence of any agreement between C&W with either Dr Wayne Reid or Jentech as to either of those steps, particularly the dismissal of Mr Reid. The Jentech report did criticise the handling of the projects by both TechEnt and Mr Reid's department, but its recommendations did not include any termination of any relationship.

[251] There was therefore no evidence of an agreement to achieve an unlawful purpose, in fulfilment of requirement (b). The evidence is that, in dismissing Mr Reid, C&W took unilateral action. The above review of the dismissal has shown that it was in accordance with his contract of employment. The learned judge was correct in finding that Mr Reid had failed to show that the predominant purpose of the combination was to injure him.

[252] The fact that C&W did not adduce evidence by a witness cannot detract from the learned judge's findings. Firstly, the onus of proof lay on Mr Reid and secondly, there was documentary evidence and the evidence of Dr Wayne Reid concerning the nature

of the agreement between the respondents. The learned judge's findings of fact cannot be faulted.

[253] These grounds must also fail.

Conclusion

[254] Mr Reid has failed to show that he was wrongfully dismissed or that C&W entered into any agreement with Dr Wayne Reid and Jentech to secure his dismissal. In the result, his grounds of appeal, in respect of these two matters, must fail.

Costs

[255] In relation to the question of the costs of this appeal, I agree that they should also be dealt with in the manner proposed by Morrison P (Ag) at paragraph [157] above.

F WILLIAMS JA (AG)

[256] I have read, in draft, the judgments of Morrison P (Ag) and Brooks JA. I agree with the reasoning and conclusion arrived at in both judgments. There is nothing that I wish to add.

MORRISON P (AG)

ORDER

(a) The appeal by Dr Wayne Reid and Jentech Consultants Limited in respect of the judgment against them for defamation is allowed, and the verdict of the jury and the award of damages are set aside.

(b) The appeal by Mr Curtis Reid in respect of the judgment against him in his claim for wrongful dismissal and conspiracy to injure is dismissed, and the judgment of the court below is affirmed.

(c) The parties in both appeals are to file written submissions with respect to costs within 14 days of the date of this judgment. Upon receipt of the parties' submissions, the court will make a ruling on costs within a further period of 14 days.