[2012] JMCA Civ 60

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 71/2006

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**RUDOLPH WALLACE**	**APPELLANT**
AND	**VIVIAN COHEN**	**RESPONDENT**

RNA Henriques QC, Ian Wilkinson and Miss Shanique Scott instructed by Ian G Wilkinson and Company for the appellant

Mrs Pamela Benka-Coker QC, Charles E Piper and Miss Marsha Locke for the respondent

11- 15 July 2011 and 20 December 2012

DUKHARAN JA

[1] I have read, in draft, the judgment of my sister Phillips JA and I am in agreement with her analysis, reasoning and conclusion on all the grounds of appeal. However, I wish to add some comments of my own as it relates particularly to ground 8, which in my view, could decide the outcome of this appeal one way or the other. My learned sister has set out a commendable and comprehensive background to this appeal and it

is therefore unnecessary to repeat it, save for a brief summary of the salient features as a framework for my comments.

[2] This appeal is against verdicts and an award of damages made in a defamation claim brought by the respondent against the appellant. The claim was tried before Mangatal J and a special jury and at the conclusion of the trial the jury found the appellant liable and gave an award of $8,000,000.00.

[3] At the time when the events giving rise to the claim ocurred, the appellant was a member of the board of management of Kingston College. The respondent was the principal and had held this position since 1987. In 1994, several charges were laid against the respondent by the board of management of Kingston College and the Kingston College Old Boys Association. Of these charges, the ones most relevant to this appeal are that the respondent was alleged to be guilty of:

> "(a) conduct amounting to professional misconduct in that he misappropriated a payment made to Kingston College, to wit, the sum of $800.00 paid to the school in or about February 1989 for the use of 16 schoolrooms on the school's premises, as polling stations during the 1989 General Elections, at $50.00 per schoolroom and
>
> (b) inefficiency and/or conduct amounting to professional misconduct in mishandling, misappropriating and/or failing to account for the sum of £5000 donated to the school, by the Kingston College Old Boys, in or about January, 1989 and delivered directly to the Principal."

[4] A personnel committee, comprising some of the members of the board of management, presided over the hearing in relation to the charges. The respondent was found to be guilty of some of the charges including those stated in paragraph [3] above. As a result of the findings of the personnel committee, in 1995, the board took the decision to terminate the appellant's employment. Thereafter, he appealed to the Appeals Tribunal pursuant to the Education Act and the appeal was allowed on the basis that the personnel committee had not been properly constituted. The board then commenced action in the Supreme Court seeking an order of certiorari quashing the Appeals Tribunal's decision.

[5] There followed discussions between the parties, which led to an agreement that the board would no longer pursue its claim in the Supreme Court. This agreement was reduced to writing. It included the following terms:

> "(b) The parties agree that this agreement is by way of compromise only and shall not be construed as an admission of liability or fault on the part of any of the parties to this agreement.
>
> (c) The parties hereto reserve the right to release this agreement to the news media in relation to the contents of this agreement, save that the plaintiff is permitted to release a statement to the news media relating to the aforesaid sum of £5,000 which statement would not be challenged by the Board."

It was also agreed that the respondent would be allowed to retire from the teaching service as of 11 October 1997, and that he would receive certain payments comprising

salary and notice pay for a certain period as well as the equivalent of eight months' vacation leave.

[6] The respondent prepared a statement in relation to the £5,000.00 which was published in the Daily Gleaner of 11 December 1996. Later that day, he was a guest on the Public Eye, a current affairs programme aired by the Public Broadcasting Corporation of Jamaica (PBCJ). The discussion with the host Reverend Garnet Roper pertained to the statement that had been published in the Daily Gleaner. The appellant was also a guest on the programme that day after the respondent had left. The subject of his discussion with the host pertained to the respondent and his settlement with Kingston College.

[7] As a result of the appellant's appearance on the programme, the respondent commenced proceedings on 21 May 1999 against the appellant and PBCJ, claiming that the appellant and PBCJ had broadcast and published or caused to be published by radio, words which were defamatory of him. In his defence, the appellant pleaded fair comment and PBCJ raised the defence of qualified privilege.

[8] At the trial, in giving her directions to the jury, the learned judge put several questions to them for their consideration. These questions concerned the issues of the meanings of the words complained of in the respondent's statement of case, the defence of fair comment and damages. Upon the jury's return from their deliberations, the foreman indicated that they were all in agreement that the words used bore some

of the meanings contended for by the respondent and that the consensus was that the words were not defamatory. There followed a somewhat brief exchange between the foreman, the learned judge and counsel for the respondent, during which the foreman indicated that there was some confusion in relation to the question. Shortly thereafter, he indicated to the learned judge that having consulted with his fellow jurors, what they had meant was that the meanings were defamatory of the respondent. The foreman also indicated that the jury found that not all the comments amounted to fair comment. The learned judge stated that she found that the publication was on an occasion that was privileged and as a consequence, PBCJ was entitled to rely on the defence of qualified privilege. The jury then retired again to consider the question of damages and made the award mentioned in paragraph [2] above.

[9] Ground of appeal 8 reads as follows:

> "The learned trial judge clearly erred in failing to accept the jury's first verdict that the words complained of were not defamatory of the Respondent. The judge further erred by permitting counsel for the Respondent to invite the judge to reject the jury's first verdict and to give further directions to the jury."

[10] It is necessary to set out what transpired when the jury returned with its first verdict. The dialogue was as follows:

> "HER LADYSHIP: Yes, the first question was really if they bear the meanings and the second question if they do, which means they bear the meanings and you have answered question No. 2.

FOREMAN:	Right
HER LADYSHIP:	No. 3?
FOREMAN:	No. 3
HER LADYSHIP:	Are the meanings defamatory of the claimant?
FOREMAN:	The consensus was no, m' lady. (my emphasis)
HER LADYSHIP:	Just a second, Mrs. Benka-Coker, Mr. Wilkinson, Mrs. Reid-Jones, is it your view that I go on to question, get to the other questions?
MRS. BENKA-COKER:	If the first one is no, I don't think that it makes sense.
HER LADYSHIP:	I just want to ask you what do you think.
MRS. BENKA COKER:	If they are not, I don't think we could go any further.
FOREMAN:	M'Lady, may I just make a comment here. In association with my fellow jurors, there is a statement that I want to make.
HER LADYSHIP:	No, this is not appropriate, but I want to be sure I understand your answers to the question and I am going to repeat that in terms of the words. The meanings which you say that the words used by Mr. Wallace on the Public Eye Broadcast, in terms of those meanings, is it your answer that all of you say that the meanings are not defamatory of the claimant?

FOREMAN: No. Well, we have no that the words themselves were not defamatory. [my emphasis]

HER LADYSHIP: That's what I am asking you.

FOREMAN: Okay.

HER LADYSHIP: Is there something different in the words, the meaning of the words? That is the question. Is the meaning of the words used by the First Defendant defamatory?

FOREMAN: In themselves no, but …

HER LADYSHIP: Well, we don't go on if the meanings are not defamatory.

FOREMAN: I think my fellow jurors have misunderstood the question.

HER LADYSHIP: It is very important that we understand what we are doing here. The first questions, what are the meanings of the words?

FOREMAN: Okay.

HER LADYSHIP: Do you need some more time to think about the matter or you need me to give you any further assistance?

FOREMAN: Yes, Your Honour, I think we need further guidance on it. Though we have come to a consensus on all others, there are matters - - how can I explain? Can I say this.

MRS. BENKA-COKER: May be, m'lady, whatever it is they need guidance on they can indicate to you rather than.

HER LADYSHIP: Yes, Mr. Foreman, consult quietly and tell me what if anything I can assist you with. If you are saying that there is perhaps some things you didn't understand, I don't want to know the details of what you have decided in relation to other matters of the other jurors. What is it that you need to confirm? Confer among yourselves so that I can understand how I can assist you, then you tell me whether you need my assistance in relation to - - remember I gave you certain directions about the law, what is it that you need my assistance with? So just speak quietly and let me know."

[11] Counsel for the appellant, Mr Wilkinson, submitted that the jury's first verdict was in favour of the appellant and this verdict should have been accepted as the jury was now functus. He further submitted that the learned trial judge had acknowledged this fact in the summation via the words, "At first the Foreman indicated that the jury were all agreed that the meanings were not defamatory of the claimant." The learned trial judge, he added, had no discretion to allow the jury to change their original verdict, and had erred in law or in the exercise of her discretion when she allowed the jury to make further deliberations after the foreman had announced their verdict in open court. He further submitted that the subsequent intervention by counsel for the respondent and the further questions and directions by the learned trial judge were material and fatal irregularities that deprived the appellant of a fair trial. Counsel cited the case of **Igwemma v Chief Constable of Greater Manchester Police** [2001] EWCA Civ 953 [2002] 2 WLR 204.

[12] It was submitted by learned Queen's Counsel for the respondent that the jury appeared confused with regard to what was being asked of them at times. Counsel further submitted that what the foreman stated initially was a misunderstanding of the question. It was also submitted that it was in order for a judge to allow an alteration of the verdict in the interest of justice. Learned Queen's Counsel relied on the case of **MacDougall v Knight** (1889) 14 AC 194 and paragraph 35.8 of Gatley on Libel and Slander 10th edn.

[13] It is clear from the transcript that the jury's first verdict was in favour of the appellant. This is confirmed by the affidavits of Rudolph Wallace, Suzan Reid-Jones and Annaliesa Lindsay. The crux of the case was whether the words spoken by the appellant were defamatory of the respondent. The foreman indicated that they were all agreed and the answer was a resounding no. In fact, questions from the learned judge to the jury indicated not once, but three times in favour of the appellant. In my view, the jury was clearly functus officio. There was absolutely no need for any further dialogue. There was no evidence of the jury misunderstanding questions 1, 2 and 3. In fact the jury's answer to question 5 was that all the words pleaded as facts were "all statements of facts" and were true.

[14] The authors of Gatley state (at paragraph 35.8):

> "The jury should give their verdict by their foreman in open court in the presence of the other jurymen. If this is done, and none of the jury protest, there is a presumption that they all assented to it."

In **Igwemma v Chief Constable of Greater Manchester**, it was held by the Court of Appeal of England and Wales that a trial judge in civil or criminal proceedings had a wide discretion to allow alteration to a jury's verdict or answer after it had been given, even if the jury or the defendant had been discharged, where fairness and justice and the integrity of the trial process so required. In determining whether those interests favoured that course, the judge should take into account the following:

(a) the time which had elapsed since the original verdicts or answers had been given;

(b) the reason further assistance from the jury was sought, in particular whether there had been some mistake or misunderstanding; and

(c) whether the jury might have been persuaded to change their view by anything said or done since the verdicts or answers had been given.

[15] In that case the jury had raised the issue of misunderstanding before their members had separated. The judge had been entitled to set aside his order discharging the jury and to allow the jury to retire again to enable it to give the answer which it had originally intended. This case is however distinguishable from the instant case. The jury in the instant case had not indicated that they had made a mistake and

wanted to change their verdict. It was the subsequent intervention by the court and the attorney for the respondent that led to the change in the jury's verdict. In my judgment, ground 8 succeeds and that should be the end of the case.

[16] I agree with my learned sister that no useful purpose could be served in ordering a retrial. I would allow the appeal with costs of the appeal and of the court below to be paid to the appellant, to be taxed if not agreed.

PHILLIPS JA

[17] This is an appeal against the verdicts of a special jury delivered on 28 July 2006 and the judgment and orders of Mangatal J delivered on 31 July 2006. The verdicts relate to certain statements made by the appellant on the Public Eye, a talk show hosted by Reverend Garnett Roper, on 11 December 1996 on the Public Broadcasting Corporation of Jamaica (PBCOJ). The jury found certain of the statements defamatory of the respondent and awarded damages in the sum of $8,000,000.00, with costs. At all relevant times in respect of this rather complicated tale, the respondent was the headmaster of Kingston College (the school) and the appellant was (and still is) a member of Kingston College Old Boys' Association (KCOBA) and KCOBA's then representative on the Board of Governors of the school (the Board). The hostilities between the dramatis personae in the history of the conflict, which included many more persons than those before the court, began as far back as 1991.

Background events

[18] According to the respondent (as set out in his witness statement, and from documentary exhibits submitted), he began having difficulties at the school in September 1991 when he requested the then chairman of the Board of the school, Mr Eldon Forrest, to convene a special meeting to discuss certain serious rumours and allegations relating to financial matters, which were adverse to him, and which were being circulated. At the time he had received an undated letter from the 2nd vice president of KCOBA which had been copied to the chairman of the Board and the president of KCOBA. He attempted to deal with the matter at a meeting of the Board held on 7 October 1991, where he read from a prepared script, and a committee was established to conduct a hearing and deal with specific charges against the then bursar of the school. The hearing was, however, aborted as the bursar walked out of the hearing and resigned between two and three weeks later.

[19] The respondent continued to experience administrative difficulties concerning the payment of monies to suppliers of goods to the school and to members of the school community without his knowledge or permission. He said that there were four signatories for cheques issued by the school, viz, the chairman, the bursar, the registrar and himself. He tried to ensure that cheques, if not signed by the chairman or himself, were referred to him for approval. This did not occur, and on his account, as he was dissatisfied with the outcome of investigations and the rumours persisted, he decided to appeal to the Diocesan Education Board, as the school is an Anglican school. The Diocesan Bishop, the Right Reverend and Hon Neville W de Souza OJ, set

up a committee to investigate the matters. The chairman of the Board and the respondent attended joint and several meetings on the invitation of the committee, but nothing was resolved.

[20] The chairman's report to the Board on these meetings was not well received by most members of the Board, as they viewed the report to the bishop as an indictment on the integrity of the chairman. There were three meetings held by the Board, on 1, 8 and 15 November 1993, and the respondent was asked to submit for a meeting on 31 January 1994, the list of complaints he had with regard to the chairman, which related to the chairman operating as an executive chairman, which resulted, the respondent complained, in undermining his efforts at managing the school. The Board did not find any justification in the respondent's complaints and requested that he withdraw his letter of complaint to the bishop, which he refused to do. Other matters of concern were discussed at the meeting, which were not resolved to his satisfaction, but of note, at that meeting a resolution dated 30 January 1994 signed by the president and secretary of KCOBA was tabled and circulated.

[21] The preamble to the resolution recognized and stated that the paramount purpose of KCOBA was the maintenance or the enhancement of the school; that KCOBA had always supported the headmaster of the school; that the executive and members of the school had noticed the continuing deterioration in the academic performance, sports, school spirit, and physical plant of the school; that the headmaster had over the years been involved in confrontations with members of staff, KCOBA, the Parent Teachers Association, the Board and/or its members, all

contributing to the decline in morale within the school and support for the school; that the headmaster had been guilty of numerous instances of personal misconduct and impropriety; that he had failed to provide moral and spiritual leadership for the school; that the problems mentioned could not be rectified under the headmaster; that KCOBA had no confidence in his ability to administer the affairs of the school; that he was not a proper person to be headmaster of the school; and that in the interests of the school the matter should be expeditiously resolved. The resolution, pursuant to regulation 56 of the Education Regulations, 1980, called upon the Board to convene a meeting no later that 21 February 1994 for the headmaster to respond to the complaints set out.

[22] The situation, such as it was, continued. Newspaper reports which had commenced in 1993 continued into 1994. However, as the respondent told it, in early 1994, there were reports of abusive behavior by students towards members of staff, particularly the female members of staff, most of which, once brought to his attention were dealt with and reported to the Board. Some of these incidents related to possession of weapons, mostly knives, smoking of marijuana and vulgar behavior. There seemed to be a divergence of opinion as to whether these matters should have been reported to the police, as the respondent said he was castigated by some members of the Board for doing so.

[23] The respondent described a particular meeting of the senior staff of the school on 3 May 1994, where the teachers discussed the abuse and the disrespect being meted out to them and called for drastic action. A unanimous decision was taken by

the teachers at the meeting that there would be a "sit in" on Thursday, 5 May 1994. The respondent said that he had written to the vice-chairman of the Board (Neville McCook) on 4 May 1994 informing him of the escalating situation of the students' insolence and vulgarity, and that to mark their disapproval of the behaviour the academic staff would not attend classes on Thursday, 5 May 1994, after registration. He later learnt, however, that the letter was not received by the vice-chairman until the day of the "sit in". Both campuses of the school were involved in the demonstration.

[24] The vice-chairman wrote to the respondent on 6 May 1994 requesting that he attend a meeting of the Board scheduled for 10 May 1994, and that he bring with him all information relative to the incident, and the steps that he had recorded, as having been taken, and of having advised the Board accordingly. The respondent replied by letter dated the same day, addressed to the vice-chairman indicating that it would not be convenient for him to attend the meeting as he had a previous commitment and may not have been at work that day. The vice-chairman responded by letter also dated the same day, indicating that the purport of his letter was for the respondent to instruct the bursar to advise the members of the Board of the meeting that he had summoned, and that at the time of summoning the meeting, he had no intimation of the respondent's wish to be absent from duty on that day, and therefore he expected his presence at the meeting, and also the information requested for it.

[25] The respondent did not attend the meeting, but indicated that he had sent a copy of a memorandum prepared by the vice-principal with a detailed report of the incident to the vice-chairman. He later learned, however, that the vice-chairman had

not received the same. At the meeting on 10 May 1994, a decision was taken to suspend him and he received a letter dated 11 May 1994 from the vice-chairman which indicated the reasons for the suspension, which included his tardy reporting of the intended "sit in", his discussion with the media about the event, the breakdown between himself and the members of his senior staff, the fact that the Board was satisfied that there was a serious breakdown in discipline at the school, and that he had lost control of the situation. The suspension was stated to commence with receipt of the letter and to continue until there was a hearing with regard to the Board's decision. The respondent initiated action in the Supreme Court attempting to discharge the suspension but the court upheld the same.

[26] Subsequent to the suspension of the respondent, the bishop recalled his nominees to the Board which, he said, rendered the operation of the same ineffective and which was reported in the press. By September of that year, however, the Board was reconstituted under the chairmanship of the Hon Mr Justice Boyd Carey (retired), then a sitting judge of appeal, and himself an "old boy" of the school/and a Kingston College Old Boy (KCOB). The Board appointed a personnel committee under the Education Act, comprising Mr Frank Francis (now deceased), Mr Stafford Wilson, (the teachers' representative on the Board) and Carey JA to hear the charges laid against the respondent by KCOBA and the Board. There were 14 charges laid by KCOBA, five of which were found to be proved, and nine charges laid by the Board, all of which were found to be proved. The hearing took place between 16 November and 24 December 1994.

[27] I will try to summarize the charges which the committee found proved, as they played an important part in the general tapestry of events.

KCOBA'S Charges (pursuant to regulation 55 of the Education Regulations, 1980):

Charges 3 and 6: These related to the rude, unseeming or unbecoming manner in which the respondent dealt with the supplier of travel services, coupled with his refusal to honour a debt lawfully owed to the supplier by the school. The committee found the conduct unworthy of any principal of a school, and stated that even in spite of instructions to pay the debt, the respondent had refused.

Charge 9: The committee found that the respondent had misappropriated a payment of $750.00 made to the school for the use of the school's premises as polling stations in connection with the General Elections of 1989. The funds were placed by the respondent into the principal's discretionary account, which was used as his private and personal account, and were never paid over to the school (regulation 55(g)).

Charge 12: The committee found that a cheque for £5000.00, donated to the school by the United Kingdom Chapter of the KCOBA, having been delivered to the respondent, in or about 1989, he had an obligation to account for it, and the charge of inefficiency in failing to account for the cheque of £5000.00 had been proved (regulation 55(c)).

Charge 14: The committee found that the charge of improper conduct by the respondent in sexually harassing a member of staff had been proved (regulation 55 (a)).

The Board's Charges

Charges 1 and 2: These related to the neglect of duty and inefficiency of the respondent in being tardy to report to the vice-chairman, and/or the Board the intention of the academic staff to stage a "sit in" at the school on 5 May 1994.

Charge 3: This related to the failure of the respondent to attend the special Board meeting of 10 May 1994, classified as a neglect of duty.

Charge 4: This related to the professional misconduct of the respondent in conducting an interview with the news media in breach of the Board's injunction forbidding interviews to third parties without the approval of the Board.

Charges 5, 6, 7 and 8: These related to the respondent allowing discipline in the school to deteriorate and failing to be aware of serious breaches of discipline by students, through neglect of duty and inefficiency.

Charge 9: This related to the respondent's neglect of duty in failing to put in place an effective system of communication between his senior staff and his vice-principals.

The committee's report concluded with the following statement:

> "Having regard to the seriousness of the charges and our view of the principal's regard for his role as Chief Executive Officer and professional head of the school, we can only recommend that his appointment as Principal with Kingston College be terminated."

[28] The Board met on 10 January 1995, considered the report and recommendation of the personnel committee, and voted to terminate the appointment of the respondent as principal of the school. On 18 January 1995, the respondent appealed the decision of the Board to the Teachers Appeals Tribunal (Appeals Tribual), which on 18 October 1995, allowed the appeal and quashed the decision of the Board. A reading of the transcript of the verbatim notes of the hearing of the Appeals Tribunal indicates that the decision was made on procedural grounds, in that the appointments of two of the members of the Board, who were present at the Board meeting and voted to terminate the appointment of the respondent as principal, were made late, viz two weeks after the deliberations. The Board challenged the decision of the Appeals Tribunal by way of judicial review in suit no M 97/1995 (between the Board, the respondent, and the Attorney General on behalf of the Ministry of Education), asking the court to quash the decision of the Appeals Tribunal, and on 22 November 1995 an order was made by Malcolm J staying the decision of the Appeals Tribunal, until the hearing of the application for certiorari. The matter came up for hearing on 9 December 1995, and on 10 December 1996 an agreement was reached in the suit.

[29] The preamble to the agreement set out all the facts stated in paragraph [28] above. The six items on which the parties had agreed were also set out as follows, that:

(i) The action would be discontinued.

(ii) The respondent would forthwith tender his resignation and would receive payment of all emoluments as agreed.

(iii) The Board would recommend to the Ministry of Education that the respondent be at liberty to accept any scholarship which may be available to him.

(iv) There was no admission of liability or fault on either side as the agreement was said to be by way of compromise only.

(v) The parties reserved their respective rights as to whether to release the agreement to the news media and agreed not to make any comments to the news media in respect of the contents of the agreement.

(vi) The Board and the respondent in full and final settlement, jointly released each other from any further actions relating to the school, any members of its staff, and in relation to any disciplinary proceedings, arising from or in connection with the contract of employment.

[30] As the respondent told it (in his witness statement), there was a further agreement between the attorneys that he could prepare a statement with regard to the facts surrounding the £5,000.00 which would not be challenged by the Board. This statement, he said, was formulated, agreed upon and dispatched by him to the Daily Gleaner newspaper (the Gleaner) for publishing. It was published on 11 December 1996.

The publication in the Daily Gleaner

[31] The publication was entitled, "**Cohen, KC reach compromise**" and was written by Barbara Gayle. The article indicated that a settlement had been reached, the details of which were not given, but it was stated that the Gleaner understood that the respondent would resign from the school and would obtain all entitlements. The history of the matter was given and then in a statement prepared by the respondent's attorneys, it was said that an agreement had been reached in the interest and welfare of the school, but the respondent continued to proclaim his innocence in respect of the charges laid against him. In particular, the statement dealt with the allegation of the amount of £5000.00 which, it said, had purportedly been delivered to the respondent, as a gift to the school from a branch of KCOBA. The statement continued that the Board had not concluded that there had been any dishonesty on the respondent's part, but merely dereliction in the management of the funds, and bank records which had become available since the hearing "irrefutably establish[ed]" that (a) the money had been lodged timeously into an account operated by KCOBA, and (b) the money had been lodged by KCOBA.

[32] An important paragraph (c), he said, was omitted from the publication, and so he called, and then sent the full text of his statement to Rev Roper, who addressed the text on the PBCOJ's the Public Eye, and who also called him for information and clarification, which he gave. The appellant upon hearing what was being said on air and apparently not agreeing with it, went to the studios of the PBCOJ and spoke to Rev Roper on air on the said programme. It is the context of that latter discussion

which has formed the basis of the lawsuit in the court below and this appeal, as the respondent claimed that the appellant defamed him. I will attempt to summarize below the contents of those conversations, the full transcripts of which were entered in evidence at trial.

Exhibit 27(a) Transcript of conversation between the respondent and Rev Roper

[33] The respondent was adamant that a third item "(c)" in his statement be addressed on air, as it had been omitted from the above-mentioned article published in the Gleaner, and it was very important to him. It read, "KCOBA withdrew the monies subsequently and presumably used it for their own purposes." This, he said, was important to him because:

> "I maintained from the very beginning during the Personnel Committee's Enquiry and before that I Know absolutely nothing about the Five Thousand Pounds (5000). It never came to me. It was never in my possession. It was never delivered. I knew absolutely nothing about it."

He said that the said account was closed and that he did not wish to address it on air, in detail, but he knew that KCOBA had withdrawn the funds and used the same for their purposes. He said that the findings of the personnel committee were inconclusive and that he had not had a fair hearing. He did not accept that he was derelict in the management of the said funds. He said that what had been done to him had been done to him as he "had ruffled some feathers". He said that no-one had proprietorship over the school, save the Board, the principal and chief executive officer, and the senior staff, and although assistance from outside would be welcome, the school could

not be managed from the outside. It was his view that KCOBA wanted to take over the management of the school and he was standing in their way, so it was all "a power play". He stated that the personnel committee had found 14 charges proved, but a witness who had made himself available to give evidence on his behalf on the issue relating to the £5000.00 and the 9 charges laid by the Board, had not been permitted to do so, on the basis, he said, that "the Board cannot testify against itself". He stated what the five charges laid by KCOBA and found to be proved were. He said that the charge in relation to the 5000.00 could be demonstrated to be absolutely false, and he was not prepared to speak on the other charges, although he flatly denied them, and said that "those were ready for the appeal". The Appeals Tribunal, he said, had quashed the earlier decision on procedural grounds.

[34] He was adamant that the charges had been laid by KCOBA in order to give them greater control of the school and to get rid of him. KCOBA, he said, wanted to win the Manning Cup football competition and the Boys' Championship in track and field, and that had resulted in the school having to go before the Issa Committee (the governing body) and his response in relation to that committee, of not allowing past students to return to the school to coach students, had "ruffled feathers". He was not opposed to KCOBA having their say on the Public Eye programme, but he was not prepared to agree to a three–way conversation.

Exhibit 27(b) Transcript of conversation between the appellant and Rev Roper

[35] The appellant indicated that he had not heard the entire conversation that Rev Roper had had with the respondent but he had been driving along and based on what he had heard, he decided that he had to stop at the studio. He was told the conversation was about what had been written in the newspaper and the paragraph (c) which had been omitted. His first comment was his concern that the respondent had been so quick to "start issuing faxes the day after the compromise has been reached". He said that the Board had not met and in his capacity as a Board member he did not know anything about the compromise, only what he had read in the newspapers. He indicated that the Board had been reconstituted to ensure that the respondent had a fair hearing. He mentioned the persons who sat on the personnel committee and stated that their integrity was beyond reproach. He said that although there had been about 50 items to choose from, "we narrowed it down to twenty (20) in all sharing them up between the Old Boys and the Board". He confirmed that the personnel committee had found the respondent guilty of 14 of the 20 charges. His response to the allegation that the respondent had put forward evidence which had not been admitted, was that the witness who was to give evidence was a lodge brother, who was to speak to character, which evidence, at the time, was ruled premature as the respondent had not yet been found guilty of anything.

[36] The appellant said that the conversation between Rev Roper and the respondent had taken on a slant which suggested that what had occurred was a KCOBA conspiracy, and in the absence of any response from the chairman of the Board, he

wished to at least clear up that aspect of the matter from the perspective of KCOBA. He said that the focus of the respondent had been on the one charge relating to the £5000.00, which he stated, the respondent had failed to account for, but there had been far more serious charges. He denied that the Board had belatedly laid charges, or that the charges from the Board had "arrived" on the day of the hearing, as those charges, he said, had been around for a long time. He said that he thought the settlement had been arrived at as the conflict had been going on for a long time, with some members of KCOBA fighting it without reward, and many people, in his view, would wish to see the back of the respondent "any way they can". He indicated that he was unwilling to deal with the other charges, particularly the charge relating to the $750.00, but he would deal with the £5000.00 "red herring", and reiterated that the respondent had failed to account for the £5000.00. He said that at the hearing before the personnel committee, the defence of the respondent was not that KCOBA had received the funds and used them, but that the respondent had never received the monies. However, the appellant indicated, there had been a ceremony at the respondent's house where the funds had been presented.

[37] The appellant stated that KCOBA had started a building fund shortly after that ceremony had taken place, to which funds from various sources had been deposited, and he had heard only recently that the said £5000.00 had been part of the seed money for that fund. At the time, he said, no-one would have thought that those monies would have been in any account of KCOBA, bearing in mind the size of the

fund. It would have been assumed that the funds therein came from the other contributing sources, viz, the church, the school and KCOBA.

[38] He was adamant that, contrary to the respondent's position that the charges had been invented to get rid of him, it was the personnel committee who had found the charges proved, and he reiterated the composition of the committee. He confirmed that the Appeals Tribunal had not considered the charges for which the respondent had been found guilty at all, but had decided the matter based on the fact that two of the members of the Board who had voted to dismiss the respondent, had not yet received their letters of appointment, and so the Appeals Tribunal had held that the Board had not been properly constituted. It was a concern, he stated, that in those circumstances, on the basis of such serious matters, the respondent was to be returned to the school. In his view, the charges dealt mainly with matters of character.

[39] He maintained that the charges had only been accepted as proved if the members of the personnel committee were unanimous with regard to each particular charge. He stated that although the respondent seemed to have intimated on the programme that he had other avenues to pursue, he did not think that they would get off the ground, as there were some charges which the respondent had admitted. With regard to the respondent, pursuant to the settlement, being permitted to speak to the issue of the £5000.00, without challenge, the appellant reiterated that at the hearing of the personnel committee the respondent could not account for the £5000.00, but since he seemed able to do so subsequently, the Board was probably of the view that it was acceptable for him to "go ahead and account for it". He said yet again that it had been

proven that the respondent could not account for the £5000.00, and his defence was that he had not received it. When pressed to respond to the respondent's position that it was KCOBA who had lodged the funds, withdrawn them and used them, he stated:

> "The money went into a building fund and the building fund was something jointly held, and the source of the money to that building fund was not immediately apparent to either party or he would have used it in his defence or if we had known that's where it gone, it went, we wouldn't have brought the charge."

[40] The appellant insisted that KCOBA had not needed to use that charge as they had 50 charges to choose from, but after the long time that had passed, they only wanted then to appoint a new principal.

[41] In answer to whether in hindsight KCOBA had approached the matter in the wrong way, he felt that perhaps if they had taken the matter to the public with greater details, as had occurred in the case of the Electoral Advisory Committee and Major Sutherland, and not gone through the method of laying charges, which were joined with the Board's charges, and with other attendant delays, they might have had a quicker resolution of the matters in dispute.

The pleadings in the action

[42] The writ of summons and statement of claim were filed on 21 May 1999. The respondent claimed against the appellant and the PBCOJ jointly and severally damages in respect of the said broadcast on 11 December 1996, on the basis that the words

published were defamatory of him, and as a consequence, his reputation had been seriously damaged, and he had suffered considerable ridicule, distress and embarrassment.

[43] Paragraphs 1-6 of the statement of claim set out the history of the matter as already set out herein, to wit: the suspension of the respondent (paragraph 1 of the statement of claim); the charges laid against him (paragraph 2); the ones which were proved, and the decision of the Board having been subsequently quashed by the Appeals Tribunal (paragraph 3); the application for judicial review of that decision, and the agreement which settled the suit (paragraph 4); the publication in the Gleaner and the conversations with Rev Roper on air on the Public Eye programme (paragraph 6). The entire transcript of the conversation between Rev Roper and the appellant (summarized above) was set out in paragraph 7, and then the respondent pleaded in detail, in paragraph 8, and as set out below, that the words therein had as their natural and ordinary meanings, and were meant and understood to mean as follows:

> "(a) Despite the decision of the Appeals Tribunal referred to in paragraph 3 hereof, the Plaintiff had been proven to have failed to account for the sum of £5,000 which had been entrusted to him as Headmaster/Principal of the College;
>
> (b) Despite the decision of the Appeals Tribunal referred to in paragraph 3 hereof, the Plaintiff had failed to account to the Board for a sum of $750.00 which was entrusted to him for or on behalf of the College or had otherwise failed to account therefor;

(c) The Plaintiff's character was such that he was unsuited to the position of Headmaster/Principal of the College;

(d) The Plaintiff was guilty of mis-appropriation of funds and/or of failing to account for funds which were entrusted to him as Headmaster/Principal of the College and that by reason thereof he was unfit to hold or to continue to hold the said position;

(e) Despite the decision of the Appeals Tribunal referred to in paragraph 3 hereof, the plaintiff is guilty of 14 of the charges which had been laid against him;

(f) Despite the decision of the Appeals Tribunal referred to in paragraph 3 hereof, the Plaintiff's guilt with respect to the aforesaid charges is such that same could be supported by reference to the Honourable Justice Boyd Carey, then a Justice of the Court of Appeal of Jamaica;

(g) Despite the decision of the Appeals Tribunal referred to in paragraph 3 hereof, the Plaintiff's guilt with respect to the aforesaid charges is such that it was supported by the late Frank Francis, a man whose integrity had been lauded as being beyond question;

(h) The Plaintiff was being untruthful with respect to the number of charges which were proved against him;

(i) The Plaintiff was being untruthful with respect to the opportunity which had been given to him to advance his defence;

(j) The Plaintiff was guilty of mis-leading the public;

(k) The Plaintiff was untruthful as to the basis or was misrepresenting the basis on which the Board had settled Suit No. M79 of 1995;

(l) The Plaintiff's character was flawed and as such he was unfit to be [sic] remain as Headmaster/Principal of the College;

(m) The Plaintiff had admitted to being guilty of some of the charges which had been laid against him by the Board and /or the Old Boys Association of the College; and

(n) The circumstances surrounding the Board's or the Old Boys' Association's difficulties with the Plaintiff were similar to those surrounding the difficulties which the Electoral Advisory Committee had experienced with Major Donald Sutherland."

[44] The respondent further pleaded in paragraph 9 of the statement of claim that as a consequence of the said publication, he:

> "... has been greatly injured in his credit, character and reputation and in his said profession as a Headmaster, Principal, Teacher and Minister of Religion and has been brought into public scandal, ridicule and contempt."

[45] The respondent pleaded, in the alternative, in paragraph 10 of the statement of claim that the words were spoken out of malice or spite or were so spoken with the intention of injuring the respondent's proper feelings of dignity and pride. He relied on the facts set out in paragraphs 3, 4, 6 and 7 of the statement of claim referred to herein, and to those set out below to support that averment:

"(a) The First Defendant refused to ascertain from the Board or the Chairman of [sic] Board, the circumstances surrounding the settlement mentioned and described in paragraph 4 hereof, before attending at the said radio station and uttering the said words, regardless of the consequences of so doing.

(b) As a member of the Board, the First Defendant knew or ought reasonably to have known that the effect of the decision of the Appeals Tribunal mentioned and described in paragraph 3 hereof was to render the prior disciplinary actions of the Board nugatory but uttered the said words publicly so as to create the false impression in the mind of the public that the Board's findings continued to have legal effect.

(c) At a time when the first Defendant knew, or ought reasonably to have known that the Board's findings in relation to the said charges were made in error, and in particular the charges mentioned and described in paragraph 2 hereof, the First Defendant persisted in repeating them and commenting thereon in a manner which suggested that the said charges remained proven and which suggested that the Plaintiff had received a fair hearing in the said proceedings before the Board.

(d) The First Defendant deliberately uttered the said words recklessly knowing them to be false.

(e) By uttering the said words at the time when and in the manner in which it was done, the First Defendant was deliberately seeking to injure the Plaintiff in his said profession and calling, well knowing that the Plaintiff's previous comments on the said radio station were intended to inform the public and thereby seek to correct the false impression which had been created of him by the actions and wrongful decision of the Board."

The respondent claimed damages for libel, "to include aggravated damages".

[46] In the appellant's amended defence he denied that the words had the meanings ascribed to them by the respondent and pleaded, at paragraph 5, that:

> " 5. In so far as the said words consist of allegations of fact, they are true in substance and in fact; in so far as they consist of expressions of opinions, they are fair comment made in good faith and without malice upon the said facts, which are matters of public interest, namely the conduct of the Claimant in his capacity as a Minister of Religion and Headmaster/Principal of Kingston College, a public educational institution of great local and international repute."

[47] In paragraph 6 of the amended defence the appellant pleaded his contention that the words he spoke were opinions and/or fair comment and set out in detail the same as follows:

> "6. The First Defendant contends that the words he spoke that consist of expressions of opinion and/or fair comment are that:
>
> (a) 'My concern is that Major Cohen should have been so quick to starting issuing faxes the day after this compromise has been reached' (page 4 of Amended Statement of Claim)
>
> (b) 'the Bishop wanted to make sure that Major Cohen got fair treatment' (page 5 of Amended Statement of Claim);
>
> (c) 'Mr Boyd Carey who is chairman of the Board, the late Frank Francis whose integrity has recently been lauded has always been above question. He was brought in – I think his fairness would have lent quite a bit of credibility to the ultimate decisions of the Board – and the teacher rep. who was heartily approved by both sides. Mr. Frank Francis, I'll tell you, was not originally sympathetic to the action taken by the Old Boys which was to initiate this action against Major Cohen.' (page 5 of Amended Statement of Claim).
>
> (d) 'He attempted to bring one Board member, a fellow Lodge Brother to testify in what I think was interpreted to [sic] the Board as character evidence,

which Mr Carey pointed out was not necessary at the time because he had not yet been found guilty of anything.' (page 5 of Amended Statement of Claim).

(e) 'I always took it that if Major Cohen went public the chairman, Mr. Carey would then feel an obligation to clarify issues for the public. So, in the absence of Mr Carey, and with the slant he puts on this thing as if it is an Old Boys' conspiracy, I felt it necessary to drive to J.B.C. to, at least clarify it from the Old Boys' perspective." (page 5 of Amended Statement of Claim).

(f) 'There were other far [sic] serious charges, but he keeps harping on this one.' (page 6 of Amended Statement of Claim).

(g) 'I suspect – it's been a long hard grind, right? The school has some loyal Old Boys who fight this thing without reward, you know – it's taken up a lot of their time and energy and I think many people want to see this matter... No! I wouldn't say that at all. I'd hate to make any such suggestion. The point is, if we can see the back of Major Cohen – you know – I think many people would prefer to see the back – any way they can' (page 6 of Amended Statement of Claim).

(h) 'People will probably take his word over mine on the simple matter that I have presented myself as an Old Boy who has an axe to grind, representing the Old Boys' Association. If I can deal with this 5,000 [sic] red herring – because I don't – if you want me to we can deal with some of the other charges as well but he did fail to account for the 5,000.00 [sic]' (page 7 of Amended Statement of Claim).

(i) 'Looking at the size of the funds persons would have assumed that the money in the fund came from one of the other sources: the Church, the School, the Old

Boys' Association were all contributing to that fund' (page 7 of Amended Statement of Claim).

(j) 'I suspect they won't get off the ground. Precisely.' (page 9 of Amended Statement of Claim).

(k) 'With your interview with Major Cohen this morning, one certainly gets the impression that something is hotting up somewhere. Chances are – he can't dangle things like this out there and not expect people whose reputation is now being impugned to respond. It seems to me he has been confined to this one item, the 5,000.00 [sic] ' (page 10 of Amended Statement of Claim).

(l) 'I think – it's been a long haul for everybody. We would like to appoint a Principal. I am sure. Well – I watched how the Electoral Advisory Committee approached the matter of Major Sutherland and I sometimes think that perhaps we could have gone a little more public with a few details and it would have come to a quicker conclusion. Instead we attempted to follow the letter of the law which was to formally bring charges to the Board from the Association and have the Board hear these charges. Along the way, the Board came up with its own charges. Then there was the changing of the guard and everything else. It's been a long protracted thing and, maybe, some parties are tired.' (page 11 of Amended Statement of Claim).

(m) 'Four from the Old Boys and ten from the Board. I don't recall exactly how the Board's charges and the Old Boys[sic] charges – you know, what they added up to come to the twenty.' (page 5 of Amended Statement of Claim).

(n) 'Fourteen of the Charges were proved.' (page 5 of Amended Statement of Claim).

(o) '- not much was said of this brother's testimony' (page 5 of Amended Statement of Claim).

(p) 'Well note carefully that this thing focuses only on one charge – the 5,000.00 [sic] – and the charge, if I remember rightly, said that he failed to account for this 5,000.00 [sic]' (page 6 of Amended Statement of Claim).

(q) 'Fourteen charges.' (page 6 of Amended Statement of Claim).

(r) 'This business of belatedly brought in by the Board – remember that it was the new Board – you know. For Major Cohen to suggest that ten charges arrived on the morning of his hearing – the Board had been changed – those charges were around for a long time. It was a new Board that was hearing the charges so to leave the impression with the public that somehow the Board was partial to finding these charges, to coming down on the side of the Board's charges, makes no sense.' (page 6 of Amended Statement of Claim).

(s) 'How did he explain the $750.00. I'm curious. I am going to leave that particular one to Mr. (Carey) Boyd Carey for the simple reason that he is the chairman.' (page 7 of Amended Statement of Claim).

(t) 'His Defence was not that the Old Boys had gotten it and/or used it well, he said he discovered that – recently. His Defence was that he did not get it but there was a big ceremony at his house where it was presented. You see, the problem was, we started a building fund shortly thereafter. Funds were contributed from various sources and we are now hearing that the 5,000.00 [sic] was part of the seed money for that fund.' (page 7 of Amended Statement of Claim).

(u) 'There is a tribunal in the Ministry of Education consisted [sic] of Mrs. Elorine Walker, a gentleman by the name of Day, and I forget the name of the other person – Cruickshank I think the name of the third person is. They did not look at the charges for which he had been found guilty – they simply looked at the composition of the Board that had voted to dismiss him. They concluded that since two of the representatives on the Board – that is the student rep. and the teacher rep. had not received their letter of appointment from the Ministry of Education – that the Board was not properly constituted. And those are the grounds on which an attempt was made to return Major Cohen to the school. We felt that on a matter as serious as this – you know – he shouldn't be returned.' (pages 7 and 8 of Amended Statement of Claim).

(v) 'As a Principal found guilty of charges of that nature. Character mainly. Right. O.K. It was not a case of guilt or innocence. Charges were there and they – the decision were [sic] proved or not proved and where the three persons on the tribunal or the Personnel Committee were not unanimous, the charge was – Yes. Well he can because the public has no way of knowing, because the Board has not chosen to go public on the details.' (page 9 of Amended Statement of Claim).

(w) 'The point is, at the hearing he could not account for the 5,000.00 [sic]. Since he seems now to be able to account for the 5,000.00 [sic] probably they said 'go ahead and account for it.' I don't want to get into the $750.00. $750.00 is a small sum of money, but it goes to character. Proven. Well 14 of the charges were proven. The 5,000.00 [sic], it was proven that he could not account for it. It is not a question of 'you'. (page 10 of Amended Statement of Claim)."

[48] He also pleaded, in paragraph 7 of the said amended defence, the words which he contended were statements of fact and those were set out as follows:

> "(a) 'The Board has not met yet so... as a Board member... in my capacity as a Board member, I know nothing of the compromise. I only know what I read in the papers. What I do know is about the charges that were brought in the first place. Basically, we had about fifty items to choose from – we narrowed it down to twenty in all sharing them up between the Old Boys and the Board. Eventually, fourteen of these charges were proved and I'd like to just rehash a bit because you remember that there was a change in the composition of the Board.' (pages 4 to 5 of Amended Statement of Claim).
>
> (b) 'The Personnel Committee that heard the charges consisted of new members to the Board.' (page 5 of Amended Statement of Claim).
>
> (c) 'Eventually, he was part of this Personnel Committee that ended up finding him guilty of fourteen of these charges.' (page 5 of Amended Statement of Claim).
>
> (d) 'You see the Board has made a commitment not to get in this publicly' (page 5 of Amended Statement of Claim).
>
> (e) 'Unfortunately, the chairman is not here' (page 5 of Amended Statement of Claim).
>
> (f) 'The Board hasn't had a chance to meet' (page 6 of the Amended Statement of Claim).
>
> (g) 'I was present at the hearing.' (page 7 of Amended Statement of Claim).
>
> (h) 'So that, at the time we would not have had it in any account of ours.' (page 7 of Amended Statement of Claim).

(i) 'No, the Personnel Committee is of the K.C. Board that consisted of Boyd Carey, Frank Francis and the teacher representative.' (page 7 of Amended Statement of Claim).

(j) 'He's been saying, he's been saying he never got it.' (page 10 of Amended Statement of Claim).

(k) 'The money went into the building fund and the building fund...jointly held, and the source of the money to that building fund was not immediately apparent to either party. There is an acting Principal.' (page 11 of Amended Statement of Claim)."

[49] The appellant did not admit that any damages were due to the respondent. No reply was filed.

The evidence before the jury

[50] The witness statement of the respondent, which in the main has been referred to previously, was ordered to stand as partial examination-in-chief, and the various documents also already referred to, were adduced into evidence as exhibits, including the Gleaner publication and, as mentioned above, the full transcripts of the conversations between the appellant and the respondent and Rev Roper. The respondent also tendered as exhibit 24, a draft drawn on a Bank of Nova Scotia (BNS) instrument, bearing address 10 Berkley Square, London, WIX 6DN, made payable to the Kingston College Development Trust Fund (KCDTF) in the amount of £5000.00. There was also a photocopy of the reverse side of the cheque, bearing the stamp of the Jamaica Citizens Bank Limited (JCB), King Street Branch, dated 23 January 1989. It was the respondent's evidence that the cheque had passed through JCB; or the monies

were paid into JCB, but he did not know into which account; and he knew that the Kingston College Trust Fund (KCTF) had an account at BNS. He maintained, however, that he had had nothing to do with the disposition of the cheque.

[51] He was cross-examined vigorously by counsel for the appellant with regard to the cheque. He stated that the cheque had been lodged into a particular account at JCB held by KCOBA. However, he stated that the cheque was made payable to KCDTF. He knew of a trust fund which he had been involved in, which had been established at BNS, which was as far as he knew, the very first bank associated with the KCDTF. He said that the KCDTF had not been established when he became headmaster in 1987. It was established later, for the physical development of the school plant. He accepted that the KCDTF was a different entity from KCOBA, although there was "much cross fertilization between them". He indicated that through research he had learnt that there was more than one account in the name of KCDTF and KCTF and in 1993, he learnt of the account at JCB. He insisted that he knew nothing about the cheque for £5000.00 and that he had not lodged the same into the JCB account. He, however, also insisted that as the cheque was made payable to KCDTF and the fund was operated by KCOBA as the persons who were signatories to the account were all KCOB, it followed, he said, that KCOBA must have lodged the cheque.

[52] He agreed, however, that he had not received any information from JCB in relation to the account, or the source of funds lodged into the account. He admitted that he did not know who had withdrawn the money from the account, and that he was not sure where the funds had gone; he did not know whether the account at JCB

had been closed and the funds withdrawn therefrom and lodged to an account at BNS; whether a new account had been opened at BNS after the account at JCB had been closed.

[53] The respondent recalled the evidence of Mr Leslie Mae given at the hearing of the personnel committee that he, Mr Mae, had come to Jamaica only to attend the ceremony to hand over the cheque which he said that he had given to the respondent at the respondent's home. He agreed that Mr Mae had come to give evidence in support of KCOBA's charge in respect of the said cheque, which evidence the committee had accepted. The committee found, he said, not that he had misappropriated the funds, but that he had received the cheque, but could not say what had happened to it. The committee, he stated, had found him guilty of "not accounting". He maintained, however, that he had not received the cheque. He accepted, having read all the correspondence and having recalled that he had attended the meeting of the KCTF in 1991, that the said funds (£5000.00) had been withdrawn from the JCB account, and lodged into the Bank of Nova Scotia Trust Fund (BNSTF), which, he said, was for the benefit of the school, in which KCOBA had an interest. He acknowledged, however, that his statement in the Gleaner publication and on air to Rev Roper, that KCOBA had used the funds for their own purposes, was not correct. He acknowledged too that the personnel committee had found him guilty of 14 charges, but insisted that that was without hearing evidence on his behalf.

[54] He was equally cross-examined with much intensity by counsel on behalf of the PBCOJ. He deposed that throughout 1993 and 1994 there were reports in the news

relative to the mismanagement and incompetence in the administration of the school which featured adversely on his administrative ability. Some of these reports, he said, focused on the disciplinary problems with the boys at the school, and the problems with KCOBA. He agreed that the reports were carried in the news media because the affairs at the school were of intense interest to the members of the public as the school was one of the foremost traditional high schools for boys in Jamaica. This was so, he said, during 1993 and 1994 and also in 1996 at the time of the broadcast with Rev Roper. He agreed that questions with regard to whether standards were being maintained at the school were also matters of interest to the public at large. Indeed, he stated that questions relating to his tenure at the school and the difficulties being experienced there had already been matters in the public domain since 1993, and had become even more so when the issues became the subject of court cases.

[55] The respondent indicated that he had gone on air to discuss his concerns on the Public Eye programme as he had more faith in that broadcast than he had in the Gleaner, in respect of the publicity. He accepted that he had gone on the air first and that he had mentioned the nature of the charges, although not details of the same, but as he put it, his reputation was at stake. In his view, his matter had been discussed in a fair and balanced manner on the programme, and he said that it was only reasonable that the host of the programme hear the response from a member of KCOBA. He concluded that discussing the matter with the appellant was another example of Rev Roper being balanced.

[56] He confirmed that after the broadcast he had become Rector at Saint Margaret's Church, and stated candidly that he was still a person of very high standing in the Jamaican community.

[57] The respondent was supported by three witnesses: Simon Alonzo Clarke, Weeville Mchervin Gordon and John Ambrose Samuel Hall.

[58] Mr Simon Clarke was a retired educator and justice of the peace for the parish of St James, holding a Doctor of Humane Letters (causa honoris) Central Connecticut State University, a BA (London), a certificate EMA (Edinburgh) and was an honouree of the Order of Distinction. He had known the respondent for 50 years, as an educator and as a priest. He had also been involved with the respondent in several voluntary organizations related to character-building and the development of young people. He described the respondent as an excellent tutor with an exceptional capacity to communicate, one who possessed very strong principles and as such was a good model for students to emulate. The respondent was a man, he said, who "never compromises the truth or general rectitude in conduct, in order to court popularity". Athough he said that he had never heard the radio discussions (on the Public Eye), he appeared to have heard of the charges against the respondent, and he said that his opinion had not changed adversely by reason of the circumstances that he had become aware of, under which the respondent ceased to be headmaster of the school. He had not given evidence before the personnel committee and was not aware of the result of their deliberations. He said that he had read about the reports of the matter and the circumstances were a matter of public knowledge at the time.

[59] Mr Weeville Gordon had been a priest in the Anglican Church for over 53 years and the Custos of Kingston since 1991. He had acted as Deputy Governor-General 49 times and had taught Mathematics and Religious Knowledge at the school. He had known the respondent for nearly 50 years, as he had been the respondent's mentor and someone with whom he had interacted often, as the respondent had been directly under his spiritual care. He had encouraged him in his application for the ordained ministry and found him to be a dedicated priest and educator, whose character was above reproach, and whom he knew to be highly respected. His opinion of the respondent had not changed subsequent to his becoming aware of the allegations leveled against him. He was not present, nor had he given evidence at any of the sittings of the personnel committee.

[60] Mr John Samuel Hall is a registered medical practitioner, consultant neurologist, and the holder of the following qualifications: MBBS (Lond), FRCP (Edin) FRCP (Lond), FACP and FAAN. He said that he had known the respondent for nearly 20 years through his association with him on the Board of the school. He found that the respondent had displayed unequivocal leadership skills and integrity and was a firm disciplinarian while being headmaster of the school. He described him as a solid Jamaican who was committed to his family and to the development of his country. He did not believe the allegations which had been leveled at the respondent as, in his view, they were false. As a consequence, the allegations had not adversely changed his opinion of the respondent’s character.

[61] He amplified his witness statement by indicating that he was very familiar with the issues surrounding the £5000.00 as he had been instrumental in obtaining the same from KCOBA's branch overseas. He recalled the fact that those funds were the subject of much controversy, and he also recalled the function at the respondent's house as he had attended the same, but he stated that he was quite certain that he had not seen the presentation of any cheque made by Mr Mae to the respondent, on that occasion. He stated that he had given evidence at the hearing before the personnel committee, although briefly, and he said that he could not understand why the evidence he was allowed to give had been so brief. He confirmed that he was a KCOB and that he had been a member of the Board for over 30 years. He said that he had not been at the meeting of the Board when the decision was taken to suspend the respondent, but he had been at the meeting when the decision was taken to terminate his employment as principal of the school. He agreed that he must have voted to censure or reprimand the respondent, and in so doing, had therefore voted to punish the respondent. He also indicated that at that Board meeting the findings of the personnel committee were presented and read and that the Board had accepted the findings of the committee that the respondent had been inefficient in failing to account for the cheque.

[62] Rev Roper gave evidence, but I do not think that evidence is relevant for these purposes or that it sheds any particular light on the matters that have to be determined by this court.

[63] The appellant in his witness statement, which was accepted as his partial evidence in chief, indicated that he had become an executive of KCOBA in 1974 and a representative on the Board through that position in 1984. He resigned from the Board in 2004. He deposed to being present at: the respondent's home in January 1989 when Mr Mae presented the cheque for £5000.00 to the respondent; the hearings of the personnel committee when the respondent was found guilty of the 14 charges, including the specific finding in respect of the £5000.00; and the meeting of the Board where it ratified the recommendation of the personnel committee to dismiss the respondent. He was aware of the subsequent decision of the Appeals Tribunal, the suit filed by the Board challenging that decision, and the agreement made settling the issues arising in the suit.

[64] He set out in his witness statement what his statements on the Public Eye programme were meant to convey, and reiterated those meanings with denials and clarifications, in specific response to the meanings pleaded in paragraph 8 of the statement of claim set out previously. In summary, he deposed that the personnel committee had found, at the time of the hearing in December 1994, that the respondent had been guilty of inefficiency in handling, and failing to account for, the cheque of £5000.00, and not of misappropriating £5000.00; that it was not true that KCOBA had used the funds for their own purposes, and that any statement to that effect would have been misleading to the public; that the Appeals Tribunal did not deal with the matter on its merits, but by way of procedural points only; that the respondent had been found guilty of the 14 charges after witnesses had been heard,

and the charges had all been laid timeously; that the persons who comprised the personnel committee were reputable, which therefore lent credibility to the findings of the committee, and also those persons had been appointed in order that the respondent would obtain a fair hearing; that the respondent had admitted to at least one of the charges, viz, that the amount of $750.00 had been received by him and had been intended for the school, but had been deposited into his discretionary account over which only he had control; that he had given no details in respect of the charge relating to the $750.00 on air, as he had preferred to leave the details of the same for the chairman to disclose and clarify; and that the personnel committee had concluded that the respondent's character was flawed, and he was therefore unfit to continue as principal of the school. In the final analysis, he denied that the words spoken by him had injured the respondent's reputation as pleaded or at all.

[65] In amplification of his witness statement he indicated that he had had sight of the settlement agreement at the Board meeting following the broadcast. He denied that he had acted with any spite or ill will toward the respondent, as in the past the respondent had been well respected by KCOBA and there had been cooperation between them.

[66] He was vigorously cross-examined by counsel for the respondent. With regard to KCTF, he knew of one account being established in 1986 at JCB, King Street, but not by KCOBA. The KCDTF was established in 1986 but would have been opened by a separate account. He did not know of an account being opened at BNS, save in relation to the KCTF in 1989. He indicated that he was a life member of KCOBA and since

joining the association in 1974 he had attended meetings. He maintained that the purpose of KCOBA was to support the school in all its endeavours, including sports and the infrastructure of the school, but he denied that KCOBA tried to take over the management of the school, even though 50% of the Board was KCOB.

[67] He gave details of the function at the respondent's home when he said the cheque was presented, and who he recalled was present although he could not recall if the cheque was presented in an envelope. He said that he had seen when the cheque had been tendered at the hearing of the personnel committee but he had not seen the cheque itself or the reverse side of it which he did not think had been presented at the hearing. Subsequent to the hearing a search was conducted and he said it was only recently that he had discovered what had happened to the cheque. He admitted, however, that at the time of the broadcast he was aware that the cheque had been lodged to KCDTF's account at JCB. KCDTF's account had been managed by at least eight persons and all but perhaps one, he said, were KCOB. KCDTF comprised several accounts as there were investments. He indicated that the funds of KCDTF originally held at JCB were transferred to BNS in about 1989.

[68] The appellant gave evidence that he had had a good relationship with the respondent but it had deteriorated. There had been information given to KCOBA, persons had provided statements and KCOBA decided to formulate the resolution, which was prepared with his assistance at a meeting of KCOBA and which was eventually laid by him at the Board meeting in May 1994. He denied that the contents of the resolution appeared in the media, but stated that the problems that existed

between the respondent and KCOBA had appeared in the media often, although he knew little about the media. He agreed that on one occasion the media had reported KCOBA's concern about a $700,000.00 withdrawal from KCDTF by the respondent, but which funds, it was later discovered had been used to construct classrooms. The concern of KCOBA had been that the withdrawal had been effected without the approval of the authorized signatories of the account.

[69] It was the appellant's contention that although KCOBA's charge in respect of the £5000.00 had referred to misappropriation, mishandling and inefficiency, the second and third did not connote financial impropriety, as there could have been a simple explanation. Even failing to account for the cheque, he said, need not have been a serious charge. However, saying that funds in KCDTF had been used by KCOBA for their own purposes was a serious offence, and the moreso if having used the funds KCOBA turned around and charged the respondent for failing to account for the same.

[70] The appellant admitted that he had not contacted the chairman of the Board or anyone else to ascertain what the terms of the settlement were before going on the Public Eye broadcast, nor had he obtained approval from anyone to participate in the programme.

[71] He accepted also that he had not mentioned on the broadcast that the cheque had been lodged into KCDTF's account. He had continuously indicated that the respondent had failed to account for the cheque although he knew what had happened to the cheque at the time that he had gone on the air, but he did so, he said, as the

respondent at the hearing could not account for the cheque and had kept on insisting that he had not received the same. He insisted that he was not motivated by any malice and denied that he had in any way whatsoever defamed the respondent.

Relevant rulings by the learned trial judge in the absence of the jury

[72] (i) With regard to the legal effect on the proceedings of the decision of the Appeals Tribunal, having indicated that it was common ground between both sides, that the decision of the Appeals Tribunal had been made on procedural grounds only, and did not involve a resolution of the merits in respect of the charges heard by the personnel committee, the learned trial judge said this:

> "3. The decision of the Tribunal did not turn on the evidential findings of the Personnel Committee. The Notice of Appeal filed on behalf of Reverend Cohen for hearing before the Education Appeals tribunal had asked for the Appeal to be allowed and had expressly asked that the decision and recommendation of the Personnel Committee in respect of certain numbered complaints of the Kingston College Old Boy's [sic] Association and in respect of all complaints by the Board of Management be wholly set aside, or alternatively, that the recommendation be varied.
>
> 4. However, as the Tribunal did not give any reasons for its decision, and the Chairman indicated that it did not follow that all of the grounds of Appeal confirmed before the Tribunal which were procedural grounds had succeeded, it is not on the face of it, clear what if any effect the decision of the Education Appeals Tribunal had on the findings of the Personnel Committee."

(ii) With regard to the issue of what was the effect of the order made by Malcolm J staying the execution of the decision of the Appeals Tribunal in the judicial review proceedings until the determination of the same, the learned trial judge said this:

> " 4. The grant of the stay did not nullify the fact or nullify the decision of the tribunal to quash the board of Management's Decision. However, the stay had the effect of deferring the implementation of the Tribunal's decision pending determination of the application or until the court otherwise ordered - see R v Secretary of State for Education and Science, ex p Avon County Council [1991] 1 All E.R. 282."

(iii) With regard to the effect of the agreement entered into between the parties dated 10 December 1996, the learned judge had this to say:

> "7. In my view, when parties entered into the compromise agreement, all of their previous rights, or whatever has gone before became subsumed within the ambits of the agreement. This is because in agreeing to a compromise without admission of liability the parties are in effect agreeing not to rely upon any of the previous proceedings in consideration of the compromise reached.
>
> 8. On the date of the Broadcast on 11 December 1996 on Jamaica Broadcasting Corporation's Public Eye Programme all of the proceedings leading up to the compromise set out in the recital of the agreement were solely of historical significance as the parties had agreed to settle the issues between them, on the basis of the Agreement dated 10th December 1996, and none of the proceedings or decisions arising therefrom had priority or operative effect over any other."

[73] The learned judge found that (save and except for the meanings of the words set out in paragraph (h) and (n) in paragraph 8 of the statement of claim, and set out in paragraph [43] herein), all the words complained of in the said paragraph 8, were reasonably capable of bearing the meanings set out therein and were, in her judgment, capable in law of being defamatory of the respondent and should be left to the jury to make that decision.

[74] When all the evidence had been taken, and just before the commencement of the closing submissions of counsel, the learned judge made the following rulings:

(i) The facts proved in the case amounted to a publication in law.

(ii) The words set out in paragraph 7 of the amended defence of the appellant, and which are set out in paragraph [48] herein, were capable of being regarded as statements of fact.

(iii) The words set out in paragragh 6 of the amended defence were capable of being regarded as comments.

(a) It was open to the jury to say whether the comments were fair or unfair and there was sufficient evidence of malice to leave that issue to the jurors.

(iv) There was sufficient evidence of the matters alleged in the amended statement of claim regarding aggravation of damages to leave those matters to the jury also.

It was the judge's view therefore that "in short a number of these matters are for resolution by the jury". She postponed her ruling regarding public interest and the defence of qualified privilege for a later occasion in the trial.

[75] The learned trial judge gave a comprehensive and thorough summation. She outlined the law, and she went through the evidence tendered both verbally and by way of documentation. It was a fairly difficult case, and the fact that it was being tried

by a special jury added to its complexity. The jury were given a document by the judge headed on page one thereof:

"Questions for the jury
Meaning of the words"

They were asked as question no 1 if the words in the transcript, which had been tendered as exhibit 27b, bore the meanings as set out in paragraph 8 of the statement of claim at items (a) to (l), ((h) and (n) had been omitted, as indicated previously). As question no 2, they were asked if they did bear any such meanings, what these meanings were. Question no 3 asked whether the meanings were defamatory of the respondent. Under the heading, "The Defence of Fair Comment", on page 2, the jury were asked as question no 4, which of the sub-paragraphs that followed, if any, as pleaded in paragraph 7 of the amended defence did they find to be statements of fact, and those were set out as paragraphs (a) to (k) as set out in paragraph [48] herein. As question no 5, the jury were asked that if they found that some of the above were statements of fact, then they should indicate, which, if any, had they found that the appellant had proved to be true or substantially true? As question no 6, they were asked which of the sub-paragraphs pleaded in paragraph 6 of the amended defence (see paragraph [47] herein) did they find to be comments. Paragraph 7 of the document handed to the jury set out the contention of the appellant that the words spoken consisted of expressions of opinion and/or fair comment, and the jury was asked as question no 8, which of the comments if they so found were fair or unfair. They were advised that in considering the question of fairness or unfairness, they

should take into account any finding that they may have made in relation to malice as had been explained to them by the judge.

[76] The jury retired initially at 2:03 pm, and when they resumed at 5:06 pm the foreman, in answer to the judge, said that all the words bore the meanings as set out, save paragraphs (b) and (j). This response answered questions 1 and 2 on the document submitted to them by the judge. In answer to question 3, the foreman indicated that the consensus of the members of the jury was that the meanings of the words were not defamatory of the respondent, and this was repeated, confirming that the words themselves were not defamatory, and also that the words were not defamatory of the respondent. However, on queries and directions from the court, and on further consultation among themselves, at 5:20 pm a contrary finding was given by the said foreman on behalf of the jury, that is to say, that the meanings of the words were in fact defamatory of the respondent.

[77] In answer to the question as to whether the words as pleaded were statements of fact, the foreman stated that the jury found that all of the matters pleaded were statements of fact. In answer to the question as to which of them they found to be true or substantially true, the answer was that the consensus was, "all of the above", save a clarification required in relation to one matter stated at letter (c) (see paragraph [48]). The jury retired, reconsidered (c) and found that too to be a statement of fact. The jury reiterated that all the statements of fact were all true or substantially true.

[78] With regard to question no 8, the jury listed those statements which they found to be *either* opinions (11) or comments (12) and then stated that they found only one of the opinions/comments to be unfair, which was the comment stated at letter (a) (see paragraph [47]), although they had stated that to be an opinion. The learned judge then stated that the jury appeared to have misunderstood that the words "opinion" and "comment" should have been used interchangeably and so gave further directions and asked them to look at the matter again. The judge also directed the jury to address their minds to whether the appellant "acted with malice in the sense of spite, malevolence, or ill-will towards the [respondent]". They retired to further consider these directions and decided that 15 of the statements made, whether opinions or comments, were fair and eight were unfair. They returned a majority verdict 5-2 in favour of the respondent in relation to whether the appellant had acted with ill will or spite. The judge accepted those verdicts, gave the jury directions on damages and aggravated damages, and in their absence, while they were contemplating their assessment of damages, made her ruling, which had been promised earlier, that "the matters are matters of public interest. And with regard to the question on the occasion, my ruling is that the publication was on an occasion of qualified privilege". She found therefore that with regard to the issue of liability, the claim against PBCOJ had failed and gave judgment in its favour.

[79] At 8:46 pm, the jury returned and indicated that they had arrived at their assessment of damages in the amount of $8,000,000.00.The judge ordered that the respondent's costs be paid by the appellant.

The appeal

[80] The appellant filed 22 grounds of appeal, but in an effort to make this judgment easier to follow, I have decided to group the grounds of appeal, not necessarily in the way in which they were argued, but in a manner which bears for better comprehension.

Grounds relating to the jury and their deliberations (grounds 1, 7, 8, 9)

> "1. The learned trial judge erred in law in failing to discharge the jury and declaring the trial a nullity upon realizing that the trial should have started with seven (7) jurors and not eleven (11)."
>
> "7. The learned trial judge erred in the manner in which she left the volume of questions to the jury. This clearly caused confusion as is evident from the responses of the jury to the questions and the number of times (five) that the jury had to retire to deliberate on the matter. The jury obviously failed to appreciate the salient issues and consequently eventually came to the wrong verdict(s)."
>
> "8. The learned trial judge clearly erred in failing to accept the jury's first verdict that the words complained of were not defamatory of the Respondent. The judge further erred by permitting counsel for the Respondent to invite the judge to reject the jury's first verdict and to give further directions to the jury."
>
> "9. The learned trial judge erred in law in coercing or putting pressure on the jury to come to a decision the same evening it retired to consider the matter and consequently this deprived the Appellant of a fair trial and resulted in a gross miscarriage of justice."

Submissions and Analyses

Submissions on ground 1

[81] Counsel for the appellant submitted that the trial had commenced with 11 jurors empanelled as a special jury to hear the case. However, after the trial had started and the respondent had commenced giving his evidence, the learned judge discharged four jurors and the matter continued. He submitted that the entire jury should have been discharged as the risk of the remaining jurors having been influenced or tainted by the comments or input of the jurors who were discharged was too high and deprived the appellant of a fair trial. He went on to say that "this point is particularly poignant bearing in mind the eventual verdict of 5-2".

[82] Learned Queen's Counsel for the respondent pointed out that the correct number of jurors for the conduct of a trial with a special jury is seven and not 11, pursuant to the provisions of the Jury Act, and this had been disclosed by the learned judge to counsel in chambers, once discovered by her. Counsel submitted that at that time, only the opening address of counsel for the respondent had been made and the judge had asked counsel whether they would wish to commence anew on another occasion, or for the case to continue before the seven jurors with four of the jurors being released in open court. All attorneys agreed that it would not be necessary to start anew and so, learned Queen's Counsel submitted, the trial continued by consent with the remaining seven jurors, the four jurors having been released in open court. Counsel therefore argued that it was not open to counsel for the appellant to now complain, as the matter had proceeded by consent, and that in any event, the trial had

not proceeded far enough for there to have been any deliberation between the jurors which could have been the subject of any taint or influence. Additionally, Queen's Counsel relied on **Regina v Carter** [2012] 1 WLR 1577 for the principle that the discharge of jurors does not necessarily result in the trial being declared a nullity and having to start de novo.

Analysis – Ground 1

[83] In my view, this ground of appeal has no merit and so can be disposed of summarily. Section 32 of the Jury Act states that in all civil cases the jury shall consist of seven jurors and the verdict shall, even if the numbers are reduced, as permitted, by not more than one, consist of five jurors at the least. Additionally, there is judicial authority for the principle that rather than tainting or adversely influencing the remaining jurors, the views of those whose discharge was not on account of any misconduct or impropriety, may be of assistance to the remaining jurors. In **Regina v Carter** the headnote states quite clearly:

> ".. that while jurors were properly empanelled the views of each of them were entitled to the same careful analysis and respect as those expressed by any juror, including jurors who were later discharged after retirement for good reason not involving misconduct, impropriety or irregularity;.."

In that case, the jury of 12 had retired to deliberate on their verdict, and two jurors were unable to participate further in the matter, in one case, due to a broken shoulder bone, and in the other, due to the illness of his wife who had to attend hospital. In the instant case, the matter had not gone very far and the jurors were not discharged due to any misconduct, impropriety or irregularity, but were discharged so that the trial

could proceed according to the provisions of the Jury Act, which governed the proceedings. But more importantly, the parties proceeded by consent, and as long as they did so within the parameters of the law, as they did in this case, there could be no complaint.

Submissions on grounds 7, 8 and 9

Ground 7

[84] Learned Queen's Counsel for the appellant submitted that the document given to the jury was far too complex and ensured confusion. He argued that the jury should simply have been asked whether the words were defamatory, and whether the issues were of public interest and were spoken with malice. The jury should only have been asked to say "yes" or "no". The judge, he said, gave them too much work to do which is why they gave one response and then another, which was contradictory. That alone showed that the jury was confused, and on that basis, he submitted, the appeal ought to be allowed. The frequent forays between the jury room and the courtroom, and the many directions received from the judge, yet the many omissions and lack of assistance from her, would only, he submitted, have served to deepen the jury's confusion. The fact that the jury had to go out five times was an indication that the entire proceedings were unclear.

[85] Queen's Counsel for the respondent held an entirely different view. She submitted that based on the detailed pleadings, the issues joined between the parties and the evidence as it unfolded, it was the judge's duty to put before the jury all the

contentions on behalf of both parties. The volume of questions, she stated, was necessitated by the pleadings. The fact that the jury retired five times and that the judge gave the jury further directions, was only indicative that as lay persons they needed further assistance from the court. In any event, counsel submitted, there was no objection from counsel for the appellant with regard to the questions as posed, so it would be unfair to argue at this stage, that the questions were onerous and inconsiderate, as the parties had proceeded on the basis that the directions given, and the questions posed were necessary for the determination of the matter. Counsel relied on **MacDougal v Knight** (1889) 14 AC 194) to say that it was the duty of those who suggest that the questions were insufficient or inadequate to have said so. Counsel submitted that there was "absolutely no basis in fact for saying that, after being properly directed, the Special Jury failed to appreciate the salient issues or came to the wrong verdict".

Ground 8

[86] Counsel for the appellant argued forcefully that once the trial judge acknowledged that the jury had through the foreman first indicated, in delivering its verdict, that the words used were not defamatory of the respondent, the verdict should have been accepted as the jury was then *functus*. The subsequent interventions from counsel and further questions from the learned trial judge were, he submitted, material and fatal irregularities and deprived the appellant of a fair trial.

[87] Queen's Counsel for the respondent submitted that there was no doubt that the jury displayed confusion with respect to what was being asked of them at times, and in such circumstances it was the duty of the judge, counsel maintained, to give further directions, which she had done, she argued, with no opposition from the opponents. Counsel again relied on **MacDougall v Knight** and also on paragraph 35 of the leading text Gatley on Libel and Slander 10th edn, for the principle that one must look at the summation as a whole, and on that basis one could only say that the judge had dealt with the questions, her directions to the jury and ultimately their verdict adequately. Counsel submitted that it was clear from a reading of the transcript of the jury's verdict taken as a whole, that what had been said by the foreman initially was based, as stated by the foreman, on a misunderstanding of the question. Queen's Counsel submitted therefore that it would have been unjust of the learned trial judge to ignore what the jury said in explanation and accept their initial response to question 3. It was Queen's Counsel's further contention that although not the facts of the instant case, a judge may allow an alteration of the verdict even after the jury had been discharged if in the interests of justice it was appropriate for him to do so (see Gatley, paragraph 35.8).

Ground 9

[88] Counsel for the appellant argued that it was patent from the evidence that the learned trial judge had made it clear to the jury that their deliberations had to be completed by Friday, 28 July 2006 as one of the jurors had a difficulty with regard to the following week and also it was the end of the Easter Term. He submitted that that

put pressure on the jurors who must have felt compelled to render a verdict that night. Counsel submitted further that the fact that the learned trial judge entreated the jury to retire again and again, put additional pressure on them to render a verdict adverse to the appellant. Counsel set out in tabular format the comings and goings of the jury after they first retired to consider their verdict at 2:03pm, which showed that they would have been deliberating for over six hours, and participating in the day's hearings for over 12 hours. The table submitted by counsel is set out below:

Jury retires	at	2:03pm
Jury returns	at	5:06pm
Jury retires	at	6:04pm
Jury returns	at	6:33pm
Jury retires	at	6:50pm
Jury returns	at	7:25pm
Jury retires	at	7:35pm
Jury returns	at	7:50pm
Jury retires	at	8:15pm
Jury returns	at	8:38pm

[89] Counsel referred to the case of **Regina v McKenna** [1960] 1 QB 411, and reiterated that the fact that the jury did not complete their deliberations until well into the night, would have meant that they were deliberating when they were hungry and tired, which also meant that they would not have been free to adjudicate on the matter properly, which would have deprived the appellant of a fair trial resulting, he said, in a gross miscarriage of justice and a verdict which therefore could not be sustained.

[90] Queen's Counsel argued for the respondent that there was nothing disclosed in the transcript which indicated that there was any coercion and/or pressure by the trial judge on the jury to come to their decision that same evening. Counsel submitted that

an inaccurate characterization had been placed on what had occurred. Counsel argued further that there was no reason to conclude that there was any miscarriage of justice or that the appellant had not had a fair trial. She submitted that the facts of **Regina v McKenna** were clearly distinguishable from the instant case, and the case was therefore not helpful.

Analysis – grounds 7, 8 and 9

Ground 7

[91] This was a difficult case, and civil cases with special juries do not occur often in the civil jurisdiction of the Supreme Court, so it was incumbent on the judge to endeavour to put in as clear and straightforward a way as possible, the issues in the case for the seven lay persons who were the judges of fact. I can see no other way than what was submitted to the jury by way of the eight questions to obtain their verdict on the issues before them. The document is summarized in paragraph [75] herein. As can be seen, questions 1, 2 and 3 of the document given to them referred to the meaning of the words pleaded in paragraph 8 of the statement of claim. Questions 4 and 5 referred to the statement of facts as pleaded by the appellant in his defence, and whether they were substantially true; questions 6 and 7 referred to the expressions of opinion and or comment in paragraph 6 of the defence, and question 8, to whether the comments were fair and in deciding that, reminded them to consider the issue of malice. The learned judge went through the document with them, and asked them to consider it very carefully, and indicated that she had also given them a synopsis of the law in writing as a general guide. Of course, there were 38 exhibits

comprising over 300 pages, but those were tendered as the evidence was taken and the most important ones would have been exhibits 27a and b, which consisted of the full transcript of the broadcast between Rev Roper and the appellant and the respondent. In addition as Lord Halsbury LC put it in **MacDougall v Knight**:

> "Now I think it was the duty of those who are suggesting that other questions ought to have been asked and other issues raised to have intervened at this point, and to have requested Baron Huddleston definitely and distinctly to put the questions that they now insist ought to have been submitted to the jury. But nothing of the sort was done. The parties took their chance of what the jury would do, and I think nothing could be more mischievous than to allow litigants to raise new questions when, under such circumstances, the jury have decided against them. If such a course were permitted no end could possibly be found for litigation."

In my view, the jury were fully aware of what they had to do. The questions were certainly comprehensive, and the responses from the jury, without intervention, confirmed this. Whereas, I would have found that the words in parentheses, in 5 of the questions, viz, "Despite the decision of the Appeals Tribunal" could have caused some confusion as to the true meaning of the words, the jury did not seem to think so. In my view, this was certainly not a matter which could reasonably have been decided on only answers of "yes" and "no", and in any event, the attorneys for the appellant did not object to the questions as posed, or offer any alternatives. This ground cannot succeed.

Ground 8

[92] The authors of Gatley make it clear (paragraph 35.8) that:

> "The jury should give their verdict by their foreman in open court in the presence of the other jurymen. If this is done, and none of the jury protest, there is a presumption that they all assented to it."

On the basis of my findings in respect of ground of appeal 7, it seems clear to me that the jury understood their charge. Their responses were equally clear. When the jury returned for the first time, the foreman was asked if they had arrived at a verdict and if they were all agreed. He responded in the affirmative. All jurors were present and no-one demurred. He said that all the matters had the meanings pleaded, save those stated at (b) and (j) as set out herein at paragraph [76]. The entire dialogue in fact took place in this way:

"HER LADYSHIP:	Yes, the first question was really if they bear the meanings and the second question if they do, which means they bear the meanings and you have answered question No. 2.
FOREMAN:	Right.
HER LADYSHIP:	No. 3?
FOREMAN:	No. 3
HER LADYSHIP:	Are the meanings defamatory of the claimant?
FOREMAN:	The consensus was no, m' Lady.
HER LADYSHIP:	Just a second, Mrs. Benka-Coker, Mr. Wilkinson, Mrs. Reid-Jones, is it your view that I go on to question, get to the other questions?
MRS. BENKA-COKER:	If the first one is no, I don't think that it makes sense.
HER LADYSHIP:	I just want to ask you what do you think.

MRS. BENKA-COKER: If they are not, I don't think we could go any further.

FOREMAN: M' Lady, may I just make a comment here. In association with my fellow jurors, there is a statement that I want to make.

HER LADYSHIP: No, this is not appropriate, but I want to be sure I understand your answers to the question and I am going to repeat that in terms of the words. The meanings which you say that the words used by Mr. Wallace on the Public Eye Broadcast, in terms of those meanings, is it your answer that all of you say that the meanings are not defamatory of the claimant?

FOREMAN: No, Well we have no that the words themselves were not defamatory.

HER LADYSHIP: That's what I am asking you.

FOREMAN: Okay

HER LADYSHIP: Is there something different in the words, the meaning of the words? That is the question. Is the meaning of the words used by the First Defendant defamatory?

FOREMAN: In themselves no, but...

HER LADYSHIP: Well, we don't go on if the meanings are not defamatory.

FOREMAN: I think my fellow jurors have misunderstood the question.

HER LADYSHIP: It is very important that we understand what we are doing here. The first questions [sic], what are the meanings of the words?

FOREMAN: Okay.

HER LADYSHIP: Do you need some more time to think about the matter or you need me to give you any further assistance?

FOREMAN: Yes, Your Honour, I think we need further guidance on it. Though we have come to a consensus on all others, there are matters – how can I explain? Can I say this.

MRS. BENKA-COKER: May be, m' Lady, whatever it is they need guidance on they can indicate to you rather than [sic].

HER LADYSHIP: Yes, Mr Foreman, consult quietly and tell me what if anything I can assist you with. If you are saying that there is [sic] perhaps some things you didn't understand, I don't want to know the details of what you have decided in relation to other matters of the other jurors. What is it that you need to confirm? Confer among yourselves so that I can understand how I can assist you, then you tell me whether you need my assistance in relation to – remember I gave you certain directions about the law, what is it that you need my assistance with? So just speak quietly and let me know..."

The jury retired subsequently and without any further guidance or assistance from the court, the foreman said that what they meant was "that the meanings were in fact defamatory of the claimant". This is what he said:

"FOREMAN: No, Your Honour, it was just a misunderstanding as to the meaning of words and whether it was, in fact, the words themselves were defamatory or were they defamatory to the claimant. The words as used in the context in the transcript, as to the words themselves, the meaning, the words themselves were defamatory, well, in reflection and in consultation with the fellow jurors what we meant, what should be here is that the meanings were, in fact, defamatory to the claimant..."

[93] Kennedy LJ in **Joseph Igwemma v The Chief Constable of Greater Manchester Police [2001]** EWCA Civ 953, in dealing with the question of whether a trial judge ought to permit a jury hearing a civil action, after they had answered all four questions asked of them, to reconsider their answer to the fourth question, and then to return a different answer to that question, canvassed several authorities relating to the role and obligations of jurors and made this statement:

> "34. In my judgment it is important not to lose sight of what, in any jury trial, criminal or civil, the court is attempting to achieve. The object is to do justice between the parties, without unnecessary delay or expense. The function of the jury is to make findings in relation to those issues which the jury are asked to resolve, and it is important that the jury's findings should then be effectively transmitted to and understood by the court. If there has been, or may have been, some misunderstanding, that must be investigated and put right, if that can be done without injustice to either party. So, in one sense, a judge does have a wide discretion. He can allow an alteration to be made in a verdict which has been returned or an answer which has been given, even after the jury has been discharged, but only where the interests of justice make it appropriate for him to do so. In considering whether or not the interests of justice favour that course the judge will necessarily look carefully at-
>
> (1) The time that has elapsed since the original verdicts or answers were returned:
>
> (2) Why it is said to be appropriate to seek further assistance from the jury. It will, for example, be easier to seek further assistance from a jury where, as here the jury itself raises the possibility of a misunderstanding in circumstances where there was scope for misunderstanding, as opposed to the situation where there seems to be no misunderstanding and no obvious scope for

misunderstanding or other apparent acceptable reason to alter what has already been said.

(3) Whether the jury may have been persuaded to change its view by anything said or done since it gave its original verdicts or answers, especially if anything has emerged which would not normally be heard by a jury during a contested trial."

[94] The question in relation to whether the words spoken were defamatory of the respondent had been answered not once but three times in favour of the appellant. I agree with counsel for the appellant, that at that time after the third response, the jury was *functus officio.* I am unclear as to why there was further dialogue between the judge, counsel and the jury when they had indicated that they were in consensus. Even counsel for the respondent appeared to have accepted that the matter should have gone no further. The court accepted the complete *volte-face* of the jury. The question which must arise is: Was that in the interests of justice?

[95] In the present case, the time was short in which the contrary answer was given, but the transcript does not disclose that the jury had any misunderstanding, with regard to questions 1, 2 and 3, which were asked of them, and the "misunderstanding" only seemed to arise when their answers did not appear to be, nor were they, accepted by the court. In my view, they should have been, and if the words by themselves were not defamatory nor were their meanings defamatory of the respondent, that would have been the end of the case.

[96] But that was not the end of it. There was more. What took place, which is set out below, was very unfortunate (page 106):

"FOREMAN: We have found that all of these are statements of fact.

HER LADYSHIP: And by all of these...

FOREMAN: We are looking at A to K.

HER LADYSHIP: And question number five, you say you find that all of these are statements of fact, which, if any, do you find that the First Defendant has proved to be true or substantially true?

FOREMAN: The consensus is, all of the above.

HER LADYSHIP: Would you please tell me what you have found that they...

FOREMAN: They are true and substantially true..."

[97] The jury found, therefore, in answer to question 5 that all the words pleaded as facts were "all statements of facts", and were true or substantially true. The jury having considered questions 6 and 7 on the document referred to them, then set out those statements which they found to be comments, and those which they found to be opinions. Question 6 asked, which, if any, of the sub-paragraphs they found to be comments. The sub-paragraphs were set out (numbered 7 in the document submitted to the jury) as pleaded in paragraph 6 of the amended defence of the appellant, stating that, "the words he spoke that consist of expressions of opinion and /or fair comment are ...". The jury found in answer to that question that sub-paragraphs a, c, e, f, g, h, j, k, l, t, and w were all opinions, and b, d, i, m, n, o, p, q, r, s, u, and v were all comments. Then this is what occurred (see page 121):

"HER LADYSHIP: Yes, and what are your findings, are they comments, if any, which you so find fair or

	unfair having regard to the issue of malice as I have explained it to you?
FOREMAN:	We only found, m' Lady, an unfair comment in A.
HER LADYSHIP:	An unfair comment in A which you have described as opinion?
FOREMAN:	Yes, m' Lady.
HER LADYSHIP:	And you say you find that is an unfair comment?
FOREMAN:	Yes, mi Lady...
HER LADYSHIP:	Have you then gone on to consider the matter of damages?
FOREMAN:	Yes, m'Lady, ahm, we are asking –-
HER LADYSHIP:	Just a second, Mr Foreman."

The judge then sent the jury out, had further dialogue with counsel in their absence and when the jury was recalled, directed them to review their previously stated held opinions, indicating that in the pleadings, opinions and comments were the same. The jury was then asked to examine again those matters which they had said were opinions and decide, as the appellant was saying they were comments, whether they were fair or unfair. They were also asked to consider whether the appellant had acted with malice in the sense of spite or ill will towards the respondent. The jury decided that there were then eight unfair comments, made up as follows: sub-paragraphs a, f, g, h, j, k, t, and w.

[98] The jury had only found an unfair comment in "a", which is set out previously in paragraph [47] herein, and which indicated that the appellant was concerned that the

respondent had been so quick to issue faxes the day after the compromise had been reached. In my judgment, that was also the end of their deliberations on that score. The question which had been posed to them by the learned judge was whether the comments were fair or unfair having regard to the issue of malice which she indicated she had already explained to them. The comments found to be fair would have meant that the jury was of the view that the appellant had an honest belief in them. Thus, it would only have been in relation to the one comment that the jury had found to be unfair, meaning that the appellant had no honest belief in the same, that the jury would then consider the question of damages, which they had (as seen from above), and in the circumstances which obtained, any damages could only have been nominal.

[99] In my view, the judge should not have pursued the course that she did, and the results cannot be sustained. The jury did not say that there was any misunderstanding. The words were to them, either opinions or comments, which was the manner in which the defence was pleaded and was so stated in the document before them for consideration, and only one was found by them to be unfair. The words therefore were either expressions of opinion and/or fair comment. However, the learned judge having directed them to review their previously stated held opinions, they concluded that eight of the opinions, which were comments, were unfair. There was no explanation for this second *volte face* save unnecessary intervention. On this occasion, there was vigorous objection by counsel for the appellant, and in my view understandably so. The jury's first verdict in relation to this aspect, that the matters which had been pleaded as facts were all statements of facts and which were all true or substantially true, and those

expressions of opinion and/or fair comment of which only one was unfair, should have been accepted by the learned trial judge.

[100] In my view, it was inappropriate for the jury to have been sent out for further consideration on a matter which they had again stated that they were in consensus. Additionally any further directions on the question of malice, were also inappropriate as the jury had already decided, having considered malice, that only one comment was unfair. However, the jury was also directed on the question of malice relative to the expressions of opinion and at the same time, given directions to provide an answer to the question: "Do you find that the first Defendant acted with malice in the sense of spite, malevolence or ill-will towards the Claimant?" This was done without any clear direction that malice in the latter context could have related only to the issue of aggravated damages and not to whether any of the opinions which could be found to be comments were unfair. The jury returned with a verdict that five of their members found that the appellant had acted with spite, malevolence or ill-will towards the respondent, and two found that he had not. In my view, these directions were misleading as the jury may have been under the impression that malice in its ordinary meaning of spite, malevolence or ill-will would have been applicable to their deliberations as to whether the comments were fair. That would have been prejudicial to the appellant, and I do not see how that could have been in the interests of justice. The result in relation to the eight comments being unfair, for all the above reasons, in my view, cannot stand. In my judgment, this ground succeeds and that should be the end of the case, in that the verdict would be a nullity, but in case I am wrong on this, I

have addressed the other grounds, as in the main, they relate to matters of law, and would also speak to the question of whether there should be a retrial.

Ground 9

[101] In **Regina v McKenna**, Cassels J made these powerful oft-cited statements, which although the first is stated to be referable to the criminal law, both are applicable to all juries considering their verdicts:

> "It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat."

and

> ".. it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement."

These principles have been endorsed in cases in this court, namely **R v Tommy Walker**, SCCA No 105/2000, delivered 20 December 2001, and **R v Junior Edwards and Vassell Davis** [2012] JMCA Crim 50. It is true that the facts in **R v McKenna** are entirely dissimilar to the facts of this case as the judge in **R v McKenna** in the court below, told the jury at one stage that he had already disorganized his travel arrangements out of consideration for them, and he was not minded to do so again. So he told them that he intended to leave the building in 10 minutes, and if they had not concluded their deliberations by then, they would be kept all night, and the case would resume at a quarter to 12:00 on the following day. He then directed them to go back into the jury room and use their common sense and arrive at a verdict, which the jury

did in six minutes, with guilty verdicts which were, of course, quashed on appeal. That was clearly pressure being placed on the jury. There was nothing of that sort in the instant case.

[102] The jury in this case simply tried to do what they were called on to do. But certain difficulties did exist. The jury retired five times. When they returned after retiring three times, it was 7:25 pm and the learned judge had this to say:

> "Mr Foreman and your members, I know you must be very tired and all the parties here really do appreciate your countenance, your manner and your obvious patience in dealing with this matter, it is however, my duty to give you some further directions and to ask you to answer some other questions."

They were then asked to look again at their "misunderstanding" between opinions and comments, and to recall the judge's earlier directions with regard to the question of malice as it affected whether the comments were fair or unfair. The jury at one stage told the judge that they had "sort of preempted the situation and went ahead", to which the learned judge had to remind them that they had been given new questions while they were allegedly forging ahead. She therefore said:

> "Well, I have given you these new questions and you need to consider them, I don't think you could have considered the identical question already, so even if it is for a short time, I am sorry to have you going back and forth, it just cannot be avoided at this time, but I think--... ."

It was then that they returned with the verdict of 5-2 in respect of the question of malice, having retired to consider this. Subsequent to that, when they were asked if they had arrived at a figure on the matter of damages to be awarded, their response

was, "M'lady no. M'Lady we are of the opinion that you will be doing those calculations." Did this suggest that they had had enough and preferred that any calculations remaining to be done should be left to the trial judge? Was that an indication that the jury was feeling pressured? I think the more appropriate question one would have asked at that time was how could the jury have been asked whether they had arrived at a verdict in respect of damages, if the issue of whether damages or aggravated damages were due, and the amount, if any, was subsequently ventilated by the judge? Suffice it to say, they received further directions thereafter, in order for them to make such an award.

[103] It is clear on the transcript that the jury had to go back and forth several times between the court room and the jury room. They were being asked to concentrate on fairly complex and unusual issues at a time when they would have been participating in the process over several hours. However, there is nothing on the transcript which indicates that they were threatened to arrive at a verdict or that they should arrive at a particular verdict. The situation was not ideal, and there is no question that all persons participating in the process would have been tired, even exhausted (indeed, the transcript would seem to suggest that the constables on duty had simply abandoned their respective posts). Nonetheless the jury did not say at anytime that they were unable to arrive at a verdict, and there is nothing on the transcript to suggest that they were requested to continue deliberating in the face of opposition from them. They were, it seems to me, uninfluenced by any promise or unintimidated by any threat. They merely endeavoured to arrive at a verdict based on the evidence that they had

heard and the directions which had been given to them by the trial judge. This ground therefore must fail.

Grounds relating to the judge's failure to deal with the issues which fell distinctly within her purview as judge as against those to be decided by the jury (grounds 2- 6)

> "2. The learned trial judge did not give the jury the assistance necessary by failing to deal with the issues or matters properly so that it was clear which issues or matters were for the judges as distinct from those of the jury.
>
> 3. The learned trial judge erred in failing to rule as to whether the words complained of were reasonably capable of bearing the meanings alleged.
>
> 4. The learned trial judge failed to rule, prior to the jury retiring to deliberate on its verdict, as to whether or not the subject matters or comments were capable of being a matter of public interest.
>
> 5. The learned trial judge erred in failing to rule as to whether or not some of the words complained of were capable of being statements of facts or comments.
>
> 6. The learned trial judge erred in failing to rule as to whether or not a defamatory inference could be drawn from the stated facts."

Submissions on grounds 2-6

[104] Queen's Counsel submitted that although the learned trial judge gave general directions with regard to the respective functions of judge and jury, she did not deal with the relevant issues properly. The judge must, he said, decide on and define the issues; in this case, they were: (i) Were the words defamatory? (i) Were they fair

comment made in the public interest, and on an occasion of qualified privilege? (iii) Were they motivated by malice? (iv) Were damages payable in the circumstances? Counsel submitted that it was the duty of the learned judge to say whether the words were capable of being defamatory. In this case they were not, and she ought to have said so and taken the matter away from the jury. The words, he said, should not have been taken out of their context. The appellant had not said anything new on the programme. He had been responding to inaccurate statements made by the respondent and reporting on findings made by the personnel committee. It was counsel's contention that when in her directions to the jury, the learned judge addressed the issue of whether the words were capable of being defamatory, the question of malice ought not to have arisen, and in doing so, that could only have operated to confuse the jury.

[105] Queen's Counsel submitted that the trial judge had to rule whether the comments were capable of being matters in the public interest, which she did not do. There was an abundance of evidence, he argued, that in this case the matter was of great public interest or importance. Indeed, the public was "glued to finding out what was happening". He pointed out that the respondent rushed to the talk show to clarify a matter that he did not feel that the Gleaner had done justice. He went to the programme to "open up" the whole issue of the contents of paragraph "c" which had been omitted from his statement reported in the Gleaner. The appellant responded to "give the other side". "If one puts it all in the proper context", Queen's Counsel posed the question, "where is the defamation?" He submitted that the judge dealt with the

issue of public interest only in the context of whether the occasion was one of qualified privilege, and found that it was, and gave judgment for the PBCOJ. He submitted that it was wrong not to address the issue of public interest when dealing with the issue of fair comment, particularly as in this case the parties were discussing matters relating to one of the best educational institutions in the country, and the fate of its headmaster, who was an eminent priest. There was no doubt, and the learned judge was right to hold, that these were matters of public interest, but she so held in relation to the issue of qualified privilege only, and counsel maintained that she should have so held in respect of fair comment also.

[106] Counsel submitted that the learned judge should have indicated to the jury whether the matters pleaded as facts were capable of being accepted as facts and as comments those pleaded as comments. Counsel stated that the learned judge did not do this, nor did she indicate if any defamatory inference could have been drawn from the stated facts, which as counsel had already submitted, was not so in this case, but, he argued, her failure do all that was required of her in law, highlighted the lack of assistance rendered by the learned trial judge to the jury in these crucial areas, which, he submitted, deprived the appellant of a fair trial.

[107] Queen's Counsel for the respondent in response to ground of appeal 2 submitted that the summing up of the learned trial judge was fair and balanced and there had been no misdirection and therefore no miscarriage of justice. Counsel submitted further that the real problem that the appellant faced was that he had not

pleaded and therefore could not rely on the defence of qualified privilege, and there was therefore no need for the learned trial judge to address that issue in relation to him. She referred to paragraph 27.8 of Gatley for support of this submission. Queen's Counsel submitted further that matters not raised in the court below ought not to be permitted to be argued on appeal, and referred to **Lord William Nevill v the Fine Art and General Insurance Company Limited** [1897] AC 68.

[108] It was Queen's Counsel's contention that the learned judge had in her summation ruled that the words were capable of being defamatory, and pointed the court to page 87 of the notes of evidence. She submitted that cumulatively grounds of appeal 3,4, 5 and 6 were wrong in fact and law, in that it was the function of the jury and not the judge to determine whether, as a matter of fact the words complained of were defamatory of the complainant, whether they had the meaning(s) alleged, whether they were capable of being statements of fact or comments, all of which questions, she stated, the jury had unequivocally answered in favour of the respondent.

[109] Queen's Counsel submitted with particular reference to grounds of appeal 4 and 5 that they were relative only to the defence of fair comment which, she argued, must be based on proven facts. Counsel maintained that the learned judge did deal with the ingredients relative to the defence of fair comment, and if there was an omission to deal with the issue of public interest relative to the defence of fair comment, that would not materially have affected the verdict, as it was not every non-direction which gave one the right to overturn the verdict of the jury. But counsel asserted that the

learned judge had given adequate directions to meet the case and neither the law nor the transcript of the notes of evidence supported these grounds of appeal. Counsel also submitted that even if there had been a misdirection in the learned judge's summation, the findings of the jury on the uncontroversial areas of her summation would result in there being no miscarriage of justice to justify a discharge of the jury's verdict.

Analysis - grounds 2-6

[110] It is trite law that in any trial, the judge decides questions of law and the jury questions of fact. In a defamation action, however, the distinction between questions of law and fact is sometimes not so clear. Nonetheless, the rule remains and is stated, in paragraph 36.2, Gatley (11th edn), thus:

> "The rule generally applicable is well known: that whether there is any, or any sufficient evidence of a fact in issue for the jury's consideration is a question of law upon which the judge will rule, and, if there is, whether that fact has been established by the evidence, is a matter for the jury."

[111] Although generally the meaning of words is a matter of law, in defamation the meaning of words is a question of fact, which involves two elements, that is, what the words mean and whether the words are defamatory. It is the sole role of the judge, however, to determine whether the words are capable of bearing a defamatory meaning. In this case, as indicated earlier in paragraph [73] herein, the judge ruled that all the words complained of in paragraph 8 of the statement of claim (set out in paragraph 28 herein) were capable of bearing the meanings set out therein and were

capable in law of being defamatory of the respondent. It is the modern practice that the ruling by the judge should be made promptly in the proceedings, certainly during the course of the trial, and in this case the judge ruled at the end of the appellant's case. In this case, I find drawing the line as to whether the words were capable of being defamatory a difficult one. That notwithstanding, I am unable to see how the following sub-paragraphs could have been so considered by the judge, viz, b, e, f, g, j, and m as sub-paragraphs b, e, f, and g, contained statements of fact, referable to the decisions of the personnel committee, which the respondent accepted had been made; in respect of sub-paragraphs j and m, the respondent had also ultimately accepted those to be accurate. The remaining sub-paragraphs, (a, c, d, i, k, and l) related to dishonesty, untruthfulness and unsuitability of character, which are per se, capable of being defamatory, although explicable, having been found to be so by the personnel committee (save and except k), and I would agree that they would all be matters of fact for the jury, which as already indicated, the jury found, initially, not to be defamatory of the respondent.

[112] It is a defence to a claim for libel or slander that the words complained of are fair comment on a matter of public interest. It is definitely a matter solely for the judge to decide whether the matter commented on is one of public interest. Matters of public interest are numerous, but as the authors of Gatley put it, there are two different approaches: one is that matters of public interest are "matters which are expressly or impliedly submitted to public criticism or attention" (per Cantley J in **London Artists v Littler** [1968] 1 WLR 607); or on the other hand, "the public has a

legitimate concern in matters or events which the claimant might even be seeking to keep from the public gaze, or which have taken place in contexts formerly regarded as private". However, Lord Denning, in his classic simple style has also stated in **London Artists v Littler**:

> "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at what is going on or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment."

[113] To succeed in the defence of fair comment, the defendant must show (i) that the words are comments and not statements of facts; (ii) the basis for the comments contained in the words complained of, or an indication that they are indeed comments; and (iii) that the comments are on a matter of public interest.

[114] It is also incumbent on the trial judge to determine whether the words are capable of being facts or comments. As indicated previously in paragraph [74] herein, the learned judge did so, at the close of the case for the appellant. She, however, did not determine whether the matter was in the public interest in the context of the appellant's defence of fair comment. This was a matter on which there was no dispute that the issues surrounded an educational institution of some repute and the fate of its headmaster, himself a person of some eminence as an educator and as a well-respected priest. The matters discussed on the programme were already in the public domain and the respondent indicated that he took the matter to the station as he expected to, and did get, fair treatment from the broadcaster, in respect of his problem. The judge ruled that the matters were of public interest, but she did so in

the absence of the jury, with reference only to the defence of qualified privilege pleaded by PBCOJ and she did not inform the jury of this decision. In fact, this ruling was only made after the jury had retired for the fifth time to consider damages and aggravated damages.

[115] In my view, failing to give the directions on the issue of the matters being of public interest deprived the appellant of being able to succeed on his defence, as the judge must first indicate that the matter is one of public interest and depending on other findings, judgment may have been entered for the appellant right away also, as had been done in the case of PBCOJ. In any event, the jury would have deliberated within a different framework. It is for the appellant to show that the words were comments, which the jury accepted, and the basis for them when they were made, which the jury must also have accepted, as initially, they viewed only one comment as being unfair. This suggested that they had accepted that the appellant had gone on the air to give his side of the story relative to the events as they had unfolded relating to the respondent and the charges against him, and the outcome of those charges, particularly as the respondent had made a statement about KCOBA which he honestly believed was clearly inaccurate, and which was accepted to be so by the respondent. Indeed, the respondent had indicated that he knew what had happened to the funds before he went on air, in that they had been placed into KCDTF and had not been used by KCOBA for their own purposes. So, the appellant had said that he felt compelled to participate in the broadcast to give clarity to the issues which were matters in the public interest. In my view, this was a material defect in the proceedings which was

very prejudicial to the appellant. On the basis of all that I have said, nothing more need be noted in respect of ground of appeal 6. These grounds cumulatively therefore succeed.

Grounds relating to the judge's treatment of malice and the factual issues pertinent to that issue (grounds 11 – 12 and 17 – 21)

> "11. The learned trial judge misdirected the jury on the question of malice. The learned trial judge failed to appreciate that where there is a defence of fair comment or qualified privilege, then a Claimant is to rebut this/these by serving a reply to the effect that the Defendant was actuated by express malice and must in such a reply give particulars of the facts and matters from which malice is to be inferred. In the instant matter there was no such reply by the Respondent that the Appellant was actuated by express malice nor were any particulars thereof given.
>
> 12. The learned trial judge failed to give any adequate or proper directions to the jury on the issue of malice. For instance, the judge failed to direct the jury as to the effect of the decision of the Personnel Committee on the issue of malice, particularly where it was evident that the Appellant was relying on its content to justify his comments or opinions."
>
> "17. The learned trial judge failed to direct the jury as to the effect of the Respondent's admission (that he did not speak the truth when he said that the Five Thousand Pounds were used for the KC Old Boy's [sic] Association 'own purposes') vis-à- vis the Appellant's contention that he was not actuated by malice but went on the "Public Eye" programme to correct untruths being spoken by the Respondent.
>
> 18. The learned trial judge erred in law in failing to direct the jury on the effect of the decisions and recommendations of

the Personnel Committee in relation to the facts on which the Appellant relied to base his comments.

19. The learned trial judge erred in law in failing to direct the jury as to how to deal with or treat the fact that the ruling by the Education Appeals Tribunal ('EAT') that set aside the Board's decision to terminate the Respondent's employment did not set aside the decision of the PC or go into the facts or merits of the hearing before the PC.

20. The learned trial judge erred in law in failing to direct the jury as to the effect of the Agreement between the Respondent and the KC Board in the judicial review proceedings brought by the KC Board of Management in the Supreme Court to challenge the decision of the Education Appeals Tribunal and which proceedings were pending when the said Agreement was reached.

21. The learned trial judge erred in law in failing to direct the jury as to the effect of the Order made by the Supreme Court staying the decision of the Education Appeals Tribunal ('EAT').”

Submissions on grounds 11-12; 17-21

[116] Queen's Counsel relied on Gatley, which though based on the English rule, he submitted, our courts have adopted, that is, the principle that the judge must rule on whether there is evidence of malice, and leave actual express malice to the jury as, he submitted, there is a presumption in law in a defendant's favour if he has pleaded fair comment. The respondent ought therefore to have filed a reply, pleading and particularizing the specific facts on which he intended to rely from which malice could be inferred. Failing that, counsel submitted, the respondent ought not to have succeeded. Counsel relied on a case from this court, **The Gleaner Company Limited**

and Eric Sibblies v Rainford Smart (1990) 27 JLR 577 to support these submissions. Counsel also submitted that the learned judge failed to direct the jury properly in respect of the law regarding fair comment and qualified privilege and the application of the defences in the instant case.

[117] With particular reference to ground 12 counsel submitted that although the learned trial judge gave general directions on the issue of malice she failed to relate her general directions to the specific facts of the case. Counsel submitted that the parties had given their respective views in a public forum. The appellant, it was submitted, had at all material times been referring to the findings of the personnel committee, which were factual and admitted by the respondent as having been made, and it was therefore the duty of the learned trial judge to put these findings in the context of the statements made by the appellant on the programme.

[118] Counsel for the appellant complained in respect of grounds of appeal 17-21 that the learned trial judge failed in not giving directions to the jury in relation to the fact that the respondent had admitted that he had not spoken the truth with regard to the omitted paragraph (c), which was the reason that he had commenced the conversation on the broadcast in the first place. Additionally, counsel submitted, the statement with regard to his not being able to adduce evidence on his behalf at the hearing of the personnel committee was equally false, and as the appellant's efforts were made to correct these inaccurate statements made by the respondent, the judge's directions should have adverted the jury to this. Counsel also challenged the directions of the learned trial judge in failing, having made certain rulings, to give adequate or giving no

directions, with regard to the relevance of the events as they occurred, and the decisions as they were made, specifically the effect of the findings and recommendations of the personnel committee that the respondent was guilty of 14 charges and unsuitable to continue as principal of the school, and the effect all this could have had on the comments made by the appellant on the broadcast. She had also failed to direct the jury adequately or at all on the fact that the Appeals Tribunal had not set aside the findings of the personnel committee, and that in any event that order had been stayed by the court. There had been, he submitted, no directions given as to the possible effect of that and of the agreement between the parties on the comments made by the appellant.

[119] Queen's Counsel for the respondent asserted forcefully that with regard to ground of appeal 11, the statement of the law by counsel for the appellant was incorrect. The respondent had complied with the law as it obtains in Jamaica as rule 69.2(c) of the Civil Procedure Rules (CPR) provides that the allegations of malice must be set out in the particulars of claim together with the particulars in support of the allegations. This had been done in paragraph 10 of the amended statement of claim (see paragraph [43] herein). She asserted that there was no need to file a reply and none had been filed. Counsel warned against reliance on cases which predate the CPR as they are no longer helpful, and took issue with the submission that the judge had not instructed the jury correctly as to the law on the defence of fair comment and its application to the appellant. Counsel asserted that the issue of malice as a rebuttal to the defence of fair comment related to the lack of honest belief as against spite or ill

will, and it was not the duty of the judge, she maintained, to give advice to the jury as to what facts could amount to malice. Further, she submitted, the judge had given an accurate exposition on the law in respect of the defence of fair comment and the malice required to defeat it. Any omissions, counsel claimed, were immaterial as the summation was, as always, to be viewed as a whole.

[120] In further answer to ground 12, Queen's Counsel said that the appellant could claim no protection through his reference to the findings of the personnel committee, as he had dealt with the matter of the £5000.00 differently from how the committee had dealt with it. Their finding related to inefficiency in respect of the handling of the cheque, but the appellant, counsel stated, had repeatedly on the broadcast referred to the respondent failing to account for the £5000.00, when he had been at every hearing of the committee and was therefore aware of the facts. It was reasonable, counsel submitted, for the jury to have inferred malice.

[121] Queen's Counsel conceded that in respect of ground of appeal 17, the respondent had made an error with regard to the statement he made on air about KCOBA using the monies for their own purposes, but submitted that the failure of the judge to point this out to the jury was immaterial. In any event, counsel submitted (inaccurately as it turned out), there was no evidence that the respondent knew before going on the broadcast that the sums had been paid into KCDTF.

[122] With regard to grounds of appeal 18-21, Queen's Counsel submitted that the decisions of the personnel committee, the Board and the Appeals Tribunal had no

impact on the case as it actually evolved, and so there was no duty on the judge to give any directions with regard to those decisions. This was even moreso, counsel stated, in respect of the agreement (ground 20) as the terms of the agreement, counsel maintained, were inimical to the case that the appellant had been positing, and any reference to the same through directions by the judge, could only have prejudiced his position. Counsel submitted that it had been reckless of the appellant not to ascertain the terms of the agreement before going on the programme, and any failure of the judge to direct the jury about the terms of the agreement could only enure to his benefit. Equally, counsel stated, the fact that the trial judge did not mention the stay of the decision of the Appeals Tribunal in the judicial review proceedings (ground 21) could not have adversely affected him. In any event, counsel argued, it was not the duty of the judge in the summing–up to direct the jury with respect to the effect of any facts or how they were to deal or treat with any fact. That, she stated, was "in the realm and judgment of the jury". She relied on an excerpt from Gatley, paragraph 35.2, which reads thus:

> " … The Judge will direct the jury as to the relevant law, will identify and explain the issues of fact which are for the jury's decision, will inform the jury as to the party upon whom is placed the burden of proof on such issues and as to the standard of proof, and will indicate the nature of the evidence directed to those issues. The judge may express his opinion on the facts provided he leaves the decision to the jury:"

She also relied on the dictum of Scrutton LJ in **Hobbs v Tingling** [1929] 2 KB 1, 33 where he stated:

> "… the judge is entitled to make such comments on the facts as he thinks right, either during the trial, or in the summing-up provided he makes it clear to the jury that they are judges of the fact, and not the judge, and that his observations are only submitted for their consideration and guidance and may be disregarded if the jury does not agree with them."

Counsel submitted that the learned judge's summation fell within those guidelines.

Analysis - grounds 11 & 12; 17-21

[123] With regard to ground of appeal 11, I agree with Queen's Counsel for the respondent that the rules of the CPR are quite clear. Rule 69.2 reads as follows:

> "69.2 The particulars of claim (or counterclaim) in a defamation claim must, in addition to the matters set out in Part 8 -
>
> (a) give sufficient particulars of the publications in respect of which the claim is brought to enable them to be identified; and
>
> (b) where the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, give particulars of the facts and matters relied on in support of such sense; and
>
> (c) where the claimant alleges that the defendant maliciously published the words or matters, give particulars in support of the allegation."

There is no mention that a claimant is required to file a reply and as Queen's Counsel for the appellant submitted, "plead and particularize the specific facts on which he intended to rely from which malice could be inferred". The respondent pleaded the facts relied on to show that the words were spoken "out of malice or spite or were so

spoken with the intention of injuring the respondent's proper feelings of dignity and pride" (see paragraph 10 of the statement of claim – paragraph [45] herein). Whether the facts referred to and the evidence adduced in relation thereto could amount to malice to defeat the defence of fair comment, and should have been so found by the learned trial judge is a different complaint entirely. This ground must fail.

[124] With regard to ground of appeal 12, it is the law that the defence of fair comment can be defeated by malice, in that a comment which falls within the general ambit of "comment", that is, a view held on a proved fact, may lose its immunity if it is proved that the defendant did not genuinely hold the view that he expressed. The learned authors of Gatley (11th edn) at paragraph 12.25 refer to the oft-cited passage from **Sugar v Associated Newspapers** (unreported) 6 February 2001, for the clear statement of that principle:

> ".. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred."

The modern approach therefore is that the ordinary meaning of spite and ill will will not defeat a defence of fair comment.

[125] It is also accepted that whether the defendant was actuated by malice is a question of fact for the jury, but whether there is evidence from which that malice can be inferred is a question of law for the judge. 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.

[126] In this case, the learned trial judge in her summation, gave the jury general directions with regard to the issue of malice. She detailed the law as set out in the case referred to above (paragraph [124]), and then re-emphasized the same by saying the following:

> "In other words, if you find that there is evidence of spite or ill-will on the part of the first defendant towards the claimant, you can look at that to see whether it affects your view as to the genuineness or lack thereof, of his beliefs in the views expressed on the broadcast.
>
> If the Claimant satisfies you that there is lack of honest belief on the part of the First defendant in the opinions that he has proffered, then you would find the comments unfair as the defence of fair comment is defeated by malice as I have explained it to you."

As indicated (and as set out in paragraph [74] herein), the learned trial judge had already ruled, at the close of the evidence, and before the closing submissions of counsel, that having found that the words about which there was complaint, were capable of being comments, that it was open to the jury to say whether the comments were fair or unfair. She then added, "There is sufficient evidence of malice to leave

that issue to the jurors." The question is, in the circumstances of this case, was what was said at that time, and in the summation sufficient? I think not.

[127] The factors pleaded in paragraph 10 of the statement of claim and set out in paragraph [45] herein, were not specifically addressed by the judge to the jury, as to the issue of the sufficiency of evidence necessary to support the probability of malice. The factors are in some instances inaccurate. With regard to paragraph 45(a), there is no evidence that the appellant refused to obtain information about the settlement from the chairman or the Board. In respect of paragraph 45(b), there was no basis on which the respondent could claim that the decision of the Appeals Tribunal rendered "the prior disciplinary actions of the Board nugatory". Further, the claim that the appellant's actions were to create the false impression that the Board's decision continued to operate, had been ruled on by the learned judge, but in the absence of the jury. In respect of paragraph 45(c), there is no evidence that the Board's findings in relation to the said charges were made in error. The decision of the Board was based on the findings of the personnel committee which were never specifically overturned, as the Appeals Tribunal had not dealt with the matter on its merits, but on procedural points raised before it with regard to the defective appointment of two of the members of the Board. This was not in dispute. Indeed, the learned judge had specifically made her rulings in respect of the "legal effect of certain documents/proceedings" stated at page 43 of the transcript, all set out in paragraph [72] herein, but as indicated, were made in the absence of the jury.

[128] The findings made by the learned trial judge, in my view, should have informed her directions in respect of malice to the jury. As the learned judge was of the view that it was "not on the face of it clear what if any effect the decision of the Education Appeals Tribunal had on the findings of the Personnel Committee", that conclusion should have been given to the jury to reflect on, when considering the question as to whether the appellant's comments, to the extent that they referred accurately to the findings of the personnel committee, could honestly have been believed by him. This would have been particularly helpful with regard to the issue of the mishandling of the £5000.00, as the appellant's statements were all referring to the fact that at the time of the hearing before the personnel committee the funds could not be accounted for, and which charge the committee had found proved. It is true that the committee specifically found the respondent guilty of inefficiency in failing to account for the cheque in the amount of £5000.00, which had been delivered to him, but, the appellant did say on the broadcast, that it had been subsequently discovered that the funds had been placed as seed money for the building fund, and had the parties known of it at the time, it would have formed a part of the respondent's defence and KCOBA would not even have brought the charge.

[129] The effect of the learned trial judge advising the jury of her ruling on the status of the findings of the personnel committee would also have been equally applicable to the matters pleaded at sub-paragraph (d) and e) in paragraph 10 of the statement of claim and set out in paragraph [45] herein, as they relate to the actions of the appellant, whose comments related to the specific findings of, and matters before the

personnel committee and his reasons for going on the broadcast to air them. Of course, these specific directions to the jury could only have been relevant if the jury could properly have been required to review their earlier findings on, firstly, whether the words were defamatory of the respondent, but specifically with regard to the issue of malice, whether they could review their initial findings on expressions of opinions and fair comments, to ascertain if those stated to be opinions, were fair or unfair comments, that is, whether they had been activated by malice, or, as stated using the modern approach, whether the comments were not honestly believed. As indicated earlier (paragraph [100]), it was inappropriate to give the jury the direction concerning malice in its ordinary meaning of "spite, malevolence or ill-will" without qualification, at the time when the jury was considering whether the opinions which were comments were unfair. In the light of all the above, in my opinion, this ground of appeal must succeed.

[130] I would also agree with Queen's Counsel for the appellant, in respect of ground of appeal 17, that the learned judge should have directed the jury to the fact that the respondent had accepted that he had not been correct when he stated that KCOBA had used the funds for themselves, particularly in the light of the evidence as stated previously that he had known where the funds had gone before going on the air, because the appellant also had known this. It was a direction crucial to the jury's consideration of the actions of the appellant as to whether he really felt impelled to immediately attend the station before having dialogue with the chairman of the Board or the Board, in order to dispel a position which he viewed as wrong, and as to

whether that was a view which he honestly held. Additionally in paragraph 10(d) of the statement of claim, the respondent claimed as a factor evidencing malice and spite that the appellant had uttered the words recklessly knowing them to be false. The judge's directions, if given as indicated, would have brought clarity to this particular issue. In my view, this ground also succeeds.

[131] With regard to grounds 18-21, not much more needs be said than has been stated in respect of ground of appeal 12, in that the rulings of the learned trial judge relative to these matters were stated with clarity (see paragraph [72]) but the rulings were made in the absence of the jury and, in my view, her directions to the jury should have indicated: that it was unclear that the decision of the Appeals Tribunal had any effect on the findings of the personnel committee; that the stay of the judicial review proceedings deferred the implementation of the Appeals Tribunal's decision until the determination of the application; that the agreement between the parties resulted in the previous rights being subsumed within the ambits of the agreement and none of the proceedings or the decisions arising from them had any priority or operative effect one over any other. In my view, the rulings made by the learned trial judge, as I have indicated above, would have assisted the jury in their deliberations on the issues for their determination, that is, whether the words which were capable of being defamatory of the respondent were defamatory of him, and whether the words were comments but unfair having been activated by malice. These grounds also succeed.

Grounds relating to the defence of qualified privilege (grounds 10, 16)

> "10. The learned trial judge erred in law in failing to direct the jury as to how to treat different verdicts against the respective Defendants, the Appellant and PBCJ."
>
> "16. The learned trial judge erred in law in having held that the PBCJ had established qualified privilege, failed to appreciate that the qualified privilege applied to the occasion of the publication and as it was the publication of the words by the Appellant at the same time it must have been an occasion of qualified privilege. Although not pleaded by the Appellant, the Appellant was entitled to benefit from the finding of the said qualified privilege."

Submissions on grounds 10 and16

[132] Counsel submitted, in support of ground of appeal 10, that in the summation there was no reference to PBCOJ (the 2nd defendant), and in fact the case was made to appear as if the only combatants were the appellant and the respondent. Counsel further submitted that it also appeared that the learned trial judge had made up her mind to rule in favour of PBCOJ in respect of the defence of qualified privilege, and therefore left it to near the end of the case, when she gave judgment for PBCOJ. The judge should, he stated, have given the jury directions on the defence of qualified privilege before the jury first retired, and directed how the ruling that she eventually gave that the *occasion* was one of qualified privilege should be construed in respect of the appellant, and certainly, he submitted, she should have directed the jury that that finding should not be viewed prejudicially against the appellant.

[133] Queen's Counsel for the appellant argued in support of ground of appeal 16 that once the appellant comments on an occasion of qualified privilege, he is entitled to the benefit and protection of the occasion. Counsel submitted that had the learned judge ruled on the issue timeously, she should and would have directed the jury *before* they first retired that the occasion was one of qualified privilege, and the issue of malice should not have arisen, particularly in circumstances where the parties were speaking on a public programme giving their respective views on matters of public interest, which the learned judge also found. Counsel reminded the court that the appellant and PBCOJ were joint tortfeasors, but the manner in which the issue of qualified privilege was dealt with by the judge would suggest that the liability could only be that of the appellant, particularly since the judge did not direct the jury on the issue of the relevance of the matters being matters of public interest in respect of the defence of fair comment. Counsel submitted that in those circumstances the jury could never have found that the appellant was activated by malice, and the verdict therefore, he asserted, cannot be sustained.

[134] Queen's Counsel for the respondent submitted that ground of appeal 10 had no merit. The learned judge, she stated, was entitled to give separate directions in respect of different defendants and she was therefore under no duty as contended for by the appellant. The learned judge dealt with the submissions on the defence of qualified privilege in the absence of the jury and "properly dealt with same as a matter of law in a manner that could not reasonably be said to have been detrimental to the appellant".

[135] With regard to ground of appeal 16, Queen's Counsel dealt with the same succinctly and summarily. She said that the appellant had not raised qualified privilege as an issue in the case. He had not pleaded it as a defence and therefore could not rely on it, nor could he get the benefit of it.

Analysis – grounds 10 and 16

[136] In **Adam v Ward** [1916-17] All ER Rep 157 Lord Findlay LC stated nearly 100 years ago, with his usual clarity, that the law of privilege was well settled! Even in a dynamic developing area of the law, viz defamation, his statement on this aspect is oft cited as the cornerstone principle and is still applicable today. It has been endorsed by the Privy Council in **Edward Seaga v Leslie Harper** Privy Council Appeal No 90/2006, on appeal from this court, delivered on 30 January 2008. This is what Lord Findlay said:

> "Malice is a necessary element in an action for libel, but from the mere publication of defamatory matter malice is implied, unless the publication were on what is called a privileged occasion. If the communication were made in pursuance of a duty or on a matter in which there was a common interest in the party making and the party receiving it, the occasion is said to be privileged. This privilege is only qualified and may be rebutted by proof of express malice. It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury. It is further for the judge to decide whether there is any evidence of express malice fit to be left to the jury – that is, whether there is any evidence on which a reasonable man could find malice. Such malice may be inferred either from the terms of the communication itself, as if the language be unnecessarily strong, or from any facts which show that the defendant in

> publishing the libel was actuated by spite or some indirect motive."

Earl Loreburn gave this caution:

> "But the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected."

He explained the rationale for that qualification in this way:

> "For a man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his doing so or when there is no occasion for his publishing it to the person to whom he in fact publishes it."

Lord Dunedin gave further assistance on the issue of the protected communication. He stated:

> "Strictly speaking, it is the occasion on which a statement is made that is privileged, and the phrase that such and such a statement is privileged, would be more accurately though perhaps more clumsily expressed by saying that the statement, having been made on a privileged occasion, malice cannot be implied from defamatory expressions therein, but must be proved as a real fact. The malice to be proved must be real malice, and is generally called express malice to distinguish it from the malice which is implied from the defamatory words themselves. The duty of deciding whether the occasion is privileged is cast upon the judge alone, and the jury has no hand in it."

Lord Atkinson, at page 170c-d, in his judgment, endorsed the definition of the "privileged occasion" which has survived the years, but which was first stated by Willes J in **Henwood and Harrison** (1872) LR 7 CP 606 viz:

> "It was not disputed in this case on either side that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal or social, or moral, to make it to the person to whom it is made, and that person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential".

[137] Lord Carswell in **Seaga v Harper**, confirmed the importance of the reciprocity of interest by stating this:

> "It is the occasion on which the statement is made which carries the privilege, and under the traditional common law doctrine there must be reciprocity of duty and interest."

He also endorsed the statement of the development of the law as posited in Duncan and Neill on Defamation 2nd edn (1983) at paragraph 14.04, which reads:

> "From the broad general principle that certain communications should be protected by qualified privilege 'in the general interest of the society', the courts have developed the concept that there must exist between the publisher and the publishee some duty or interest in the making of the communication."

[138] In **Jameel (Mohammed) v Wall Street Journal Europe Sprl** [2007] 1 AC 359, Lord Hoffmann made it clear in paragraph 43 of his judgment that:

> "A defence of privilege in the usual sense is available when the defamatory statement was published on a privileged occasion and can be defeated only by showing that the privilege was abused. As lord Diplock said in a well-known passage in **Horrocks v Lowe** [1975] AC 135, 149:
>
> > "The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has

> nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognizes that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused."

[139] Of course, misuse of the privileged occasion is what is known as malice, and in **Horrocks v Lowe** Lord Diplock set out several bases on which the immunity can be lost through malice, viz, if the statement is made through improper motives, for example to injure the claimant, or in the absence of honest belief. So, the law is clear that once a statement is published which is defamatory and untrue, it is presumed to have been made with malice, but if made in circumstances which create a qualified privilege, then the presumption of malice can be rebutted by the privilege, and the claimant must then prove express malice to defeat the privilege. The occasion remains a privileged occasion, but the defence of privilege is lost. So the defence of qualified privilege puts the burden on the claimant to prove express malice.

[140] In the instant case, as already indicated, the learned trial judge found that the occasion was a privileged one. This is what she said at page 158 of the transcript:

> "..And with regard to the question on the occasion, my ruling is that the occasion, having regard to the facts proved and facts not in dispute, my ruling is that

> the publication was on an occasion of qualified privilege."

There was no appeal from this ruling, and judgment was given to the PBCOJ on the basis of it. Having ruled, however, that the occasion was one of privilege and the matters were matters of public interest, in my view, it was incumbent on the learned judge to indicate to the jury how these findings would have impacted on each defendant in the case before the court, bearing in mind that the appellant and PBCOJ were joint tortfeasors in the action.

[141] It is true that if a defendant alleges that the words complained of were published on a privileged occasion, he is obliged to plead it, and to set out the specific circumstances on which he intends to rely, in respect of that contention (see paragraph 27.18 of Gatley, 10th edn). In this case, PBCOJ pleaded its intention to rely on the defence of qualified privilege, but the appellant did not do so. However, both the appellant and the respondent spoke to Rev Roper on the broadcast, and the statements made by the appellant, in my view, cannot be divorced from the occasion, although not pleaded by him. The respondent confirmed in evidence that all the problems facing the school and his administration of it, were matters of interest to the public at large. It was also his evidence that his having gone on the air, it was only reasonable for the host of the programme to obtain a response from KCOBA. He expected that to occur and he considered it to be a balanced and fair approach by the broadcaster to have done so. There certainly was reciprocity of interest in the situation which obtained. The matters discussed were all relevant to the issues

between the parties and the statements of facts on which the comments were made by the appellant were all found by the jury to be true or substantially true.

[142] In this case, there was no plea of malice by the respondent against PBCOJ and so once the occasion was found to be one of privilege, there was no question of liability, as only express malice could defeat that defence. As the respondent had pleaded malice against the appellant, it was necessary, once the learned trial judge had accepted that the occasion was a privileged one, for her to rule whether there was any evidence of express malice by the appellant to be left to the jury. This was not done, and based on all that I have said before, I do not think there was any evidence of express malice fit to be left to the jury in this case. As a consequence, once the statements made by the appellant could have been considered to have been made on a privileged occasion, they would have been protected and the appellant would not have been liable for uttering the same. Grounds 10 and 16, in my view therefore, would also succeed.

Grounds in relation to damages (grounds 13 – 15)

> "13 The learned trial judge erred in law with her directions to the jury on damages particularly as (a) the Respondent called no witnesses who heard the broadcast on the 11th December 1996 which formed the basis for the claim; (b) none of the three witnesses called by the Respondent gave evidence of having heard the said broadcast; (c) the witnesses called by the Respondent purported to give evidence of the Respondent's general character; and (d) the Respondent adduced no evidence to support an award of damages.

14. That the sum awarded by the jury for damages is manifestly excessive having regard to the facts in the matter and ought to be set aside. There was no evidence of ill-will, spite or malice or circumstances on which an award of that magnitude could be made, especially as the Respondent adduced no evidence as to the effect of the broadcast to support any injury to feelings or reputation or to character. Further, there were no aggravated matters.

15. The learned trial judge misdirected the jury on the question of aggravated damages by dealing with it and stating what ought to be taken into consideration when this was not specifically pleaded neither were particulars advanced or specifically pleaded to support a claim for aggravated damages."

Submissions on grounds 13-15

[143] It was the appellant's contention that the learned judge gave several misdirections on the issue of damages. She failed firstly to direct the jury that the damages were to be awarded on the basis of the effect that the words spoken on the broadcast had on the reputation of the respondent, as considered by persons who heard the words, and their view of the respondent's character and integrity subsequent to having heard the same. In this matter, there was no evidence from anyone who had heard the broadcast. There was no evidence of the extent of the listenership of the programme. The respondent himself did not give any evidence of the effect of, and/or any damage to him, by way of injury to him personally or to his feelings. As a consequence, counsel submitted, the respondent had failed to establish any damage to his reputation, integrity, or otherwise. He further submitted that evidence by the three witnesses as to the respondent's general reputation was not permissible generally for

the purpose of assessing damages, and in any event certainly not enough, as it was incumbent on the respondent to show the impact of the alleged defamation on right-thinking members of the society. Additionally, counsel submitted, there had not been any evidence that the respondent had lost his employment at the school or was unable to obtain employment as a result of the broadcast. Indeed, the information was to the contrary as the termination of his contract with the school was by virtue of the agreement, and he had received all emoluments up and until 1997.

[144] It was also the appellant's contention that the damages awarded were manifestly excessive, particularly in the light of the fact that there were no aggravating factors and all the witnesses spoke highly of the respondent. Counsel submitted that this court can overturn the award if it is of the view that no jury reasonably directed could have fixed such a sum for damages, as the court could conclude that they had taken into account matters which ought not to have been in their consideration, and in this case there was no evidence, counsel submitted, to support an award of $8,000,000.00.

[145] Counsel submitted that the learned judge directed the jury on the question of aggravated damages and certain factors which they could consider for instance, distress, hurt and humiliation, and also included the question of malice. Counsel challenged this approach, and submitted that the learned judge was wrong, as, there was no evidence of these factors. The respondent, he said, had not specifically pleaded with any particulars that aggravated damages were due, and he referred to and relied on Gatley and **Seaga v Harper** SCCA No 29/2004, delivered on 20 December 2005

and **Rantzen v Mirror Group Newspapers (1986) Limited et al** [1994] 4 All ER 975.

[146] Queen's Counsel for the respondent submitted that the appellant's position on the law was incorrect. There was no need for the respondent to prove actual or financial loss. Proof of injury to his reputation, she submitted, was enough. Damages were presumed. It was therefore not necessary to give evidence that the three witnesses who gave evidence of his good character had heard the broadcast. She conceded that the respondent could have given evidence of the effect of the broadcast on him, but that was not fatal. The learned judge's directions, she maintained however, were quite adequate, consistent with the law, and could not be faulted. Counsel relied on the judgment of **Jameel (Mohammed) v Wall Street Journal Europe Sprl**.

[147] With regard to aggravated damages, Queen's Counsel referred to the words stated by the appellant in the broadcast and said that the jury clearly accepted the evidence of the respondent over that of the appellant and awarded the damages based on the appellant's conduct, which was motivated by malice. Counsel submitted that the appellant had never had an honest belief in what he had stated on the programme and the respondent's statement with regard to KCOBA using the funds for their own purposes was explicable as the appellant knew what had happened to the funds before he went on the programme. Counsel insisted that aggravated damages had been pleaded and particularised in the amended statement of claim (paragraphs 10 and 11) and the court ought not to interfere with the award of damages assessed by the jury.

Analysis – Grounds 13 -15

[148] An appellate court will be slow to interfere with an award of damages, and will do so only where it can be said that a reasonable jury could not have thought that this award was necessary to compensate the claimant and to re-establish his reputation. The appellant's challenge is not only to the amount of the award, but also to the legal basis upon which a substantial award in general damages as well as aggravated damages could have been made.

[149] The law of defamation presumes that a person has a good reputation until the contrary is proven. Evidence of a claimant's good reputation is therefore not necessary. However, if the claimant does lead evidence of his good reputation, this may be relevant to damages (Gatley 10th edn). In actions for libel, or slander actionable per se, it is also presumed that some damage will flow in the ordinary course of events from the mere invasion of a person's reputation. On this basis, the claimant is entitled to an award of such damages as the court may properly award irrespective of whether he had pleaded or proven damages or actual loss (Gatley 10th edn). Injury to his reputation must, however, be proven. In **Jameel (Mohammed) and Another v Wall Street Journal Europe Sprl**, Lord Bingham said at paragraph 12:

> "The tort of libel has long been recognized as actionable per se. Thus, where a personal plaintiff proves publication of a false statement damaging to his reputation without lawful justification, he need not plead or prove special damage in order to succeed. Proof of injury to his reputation is enough….There need be no evidence of particular damage."

Then at paragraph 24, he said:

> "The tort of defamation exists to afford redress for unjustified injury to reputation. By a successful action, the injured reputation is vindicated. The ordinary means of vindication is by verdict of a judge or jury and an award of damages. Most plaintiffs are individuals, who are not required to prove that they have suffered financial loss or even that any particular person has thought the worse of them as a result of the publication complained of. I do not understand this rule to be criticised."

Although the court was dealing with libel, it is well accepted that the principles in relation to damages awarded for libel apply equally to slander which is actionable per se.

[150] The learned authors of Gatley 10th edn in relation to general damages state the following:

> "General damages serve three functions: to act as a consolation to the claimant for the distress he suffers from the publication of the statement, to repair the harm to his reputation (including, where relevant, his business reputation); and as a vindication of his reputation…. It has been said that the most serious defamations are those that touch the core attributes of the plaintiff's personality, matters such as integrity, honour, courage, loyalty and achievement and in these cases it is most unlikely that he will be able to point to provable items of loss flowing from the words."

The learned authors also state that the award should be sufficient to vindicate the claimant's reputation according to the seriousness of the defamation, the range of publication and the extent to which the defendant has persisted with the charge. The jury is entitled to consider the conduct of the claimant, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any

retraction or apology and the conduct of the defendant from the time of the libel until the verdict. Compensatory damages may include aggravated damages (Gatley 10th edn paragraph 9.2). The authors also make reference to the dicta of Pearson LJ in **McCarey v Associated Newspapers** (No 2) [1965] 2 QB 86 that damages may be awarded for actual pecuniary loss or any social disadvantages which result as well as natural injury to the claimant's feelings, that is, natural grief and distress. The learned authors of Clerk and Lindsell on Torts 17th edn, at para 21-211 state also that even though a claimant is entitled to damages "by reason of the mere probability that consequences injurious to him may ensue from the defamation", he may strengthen his case by proving that such consequences have in fact occurred.

[151] It would seem then that though the claimant is entitled, without actual proof of damages, to an award for injury to his reputation where the defamatory words are not protected by any of the available defences, the award may not be substantial where there is no evidence of the effect of the defamation. Since the object of damages is to compensate for the injury done, the jury must be put in a position to award a sum that is appropriate according to the extent of the injury. It is therefore necessary, I think, for there to be evidence of the effect of the defamation on the claimant's reputation in the nature of the factors mentioned in Gatley as well as those mentioned by Pearson LJ in **McCarey v Associated Newspapers**.

[152] The learned judge directed the jury on damages very early in her summation after she had given them directions on the law and before she recounted the evidence

to them. She directed them that they should consider damages only if they found the words to be defamatory. At page 27 of the summation, she said:

> "In cases of libel the Claimant need not prove actual damage because the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation. It is in respect of the issue of damages that the evidence of Canon Weevil Gordon, Mr Simon Clarke and Doctor John Hall as to Reverend Cohen's general good character and reputation will be relevant.
>
> So, as I said, it is not correct for anyone to say that the Claimant has to prove actual damage and you must follow my directions in relation to that because the law presumes damages."

In my view, other than relating her directions to libel, instead of slander that is actionable per se, which occurred in this case, there is nothing objectionable about these directions.

[153] The learned judge told the jury about the purpose of compensatory damages. She told them that they should also consider the level of seriousness of the libel, pointing out to them that the most serious libels are those that touch the core attributes such as integrity. She instructed the jury to have regard to the extent of the publication, which would be informed by the size of the listenership. She also pointed out to the jury that there was no evidence of this. The judge directed the jury that they should take into account the distress, hurt and humiliation which the alleged defamatory publication caused. She told them that they should consider the conduct of the claimant and the defendants from the time of the broadcast right down to trial, the claimant's position and standing and the absence of any apology. Later, when it was

time for the jury to consider damages only, having given their verdict on all the other issues, she told the jury that the damages they would be assessing would only arise in relation to the matters which they considered to be unfair (which had been one comment at first, but on further deliberation were eight comments). She repeated for the most part the directions that she had given previously, also telling the jury that she had not traced any evidence from the claimant in relation to the effect of the alleged defamation on his reputation.

[154] In my view, in assisting the jury in its assessment of the effect of the defamation on the respondent, it was not necessary for the judge to tell the jury specifically that they needed to consider the impact of the defamation on the view that right-thinking members of the society had of the respondent. The directions, which followed very closely the guidance given by Lord Pearson and the authors of Gatley, were sufficient to cause the jury to understand that what they were required to assess was the effect of the defamation on the respondent and his reputation, and as such it was necessary for them to assess all the factors outlined. The judge also directed them on the absence or presence of evidence relating to some of those factors, although having directed them to consider the hurt, humiliation and distress the respondent suffered, she did not avert their attention to the absence of any such evidence. This notwithstanding, I am of the view that this was not fatal and that the judge's directions on general damages were adequate, although not entirely accurate. Ground 13 therefore fails.

[155] Like her directions on general damages, the learned judge directed the jury on aggravated damages shortly after she began her summation. She told them:

> "Aggravated damages – I mention that because, as a part of the claim, clearly the conduct of the First Defendant, his conduct of the case and his state of mind are all matters which the Claimant may rely on as aggravating the damages….
>
> You can take into account the motive and conduct of the First Defendant where you find that they aggravate the injury done to the claimant. There may be malevolence or spite, or the manner of committing the wrong may be such as to injure the Claimant's proper feelings of dignity and pride. Here malice is used in its ordinary meaning, as opposed to the meaning it has in relation to the defence of fair comment. It's ticklish, I trust that I am coming home through to you.
>
> You look at what the Claimant is saying and you just heard it from his attorney that the First Defendant has been malicious in the way he made – in heated remarks made. His active participation in alleging guilt, laying of charges persistence in maintaining that particular instance, the Claimant is relying on these matters, so as to say that there has been an aggravation of aggravated damages; it is not a separate damage."

When the jury was about to retire to consider specifically the question of damages, she again directed them on aggravated damages in terms similar to the above and also pointed out that the respondent was claiming that the damage had been aggravated by the fact that the appellant had acted recklessly, not stating whether the statement was true or false.

[156] It is well-established that in cases where damages are at large, it is open to the jury to take into account the motives and conduct of the defendant where they aggravate the injury. This will sound in an award for aggravated damages. In **Rookes**

v Barnard [1964] AC 1129, Lord Devlin in speaking to the motives and conduct of the defendant said that "there may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride". The malice which aggravates damages is not merely the absence of right motive as in the case of privilege but the presence of some bad motive (Clerk and Lindsell on Torts 17th edn, paragraph 21-208). The claimant must, however, include pleadings which can give rise to this award. A claimant is "accordingly required to give details of any matters on which he will rely in aggravation of damages, such as malicious conduct on the part of the defendant, that the publication complained of was a violation of his privacy or personal life or that the defendant has failed to retract or apologise for the defamatory allegation" (Gatley 10th edn at paragraph 28.28).

[157] In his claim at paragraph 10 (paragraph [45] herein), the respondent pleaded that "the words were spoken…out of malice or spite or were so spoken with the intention of injuring the Plaintiff's proper feelings of dignity and pride". It is to be noted that these pleadings mirror in part, the words of Lord Devlin in **Rookes v Barnard**. In my view, in doing so, the respondent was alluding to the aggravation of the defamation and relying on the factors or circumstances outlined in that paragraph to show that there was some bad motive in the appellant's actions in participating in the broadcast and stating all that he had. As I have indicated in my analysis of grounds 17-21, the pleadings in paragraph 10 of the amended statement of case were relevant to the issue of whether the defence of fair comment could avail the appellant, but in my view, this did not preclude them also being relevant to the question of whether the

appellant's manner in carrying out the slander in the circumstances outlined would have aggravated the defamation. This was sufficient to raise the issue of aggravation of damages. I therefore do not think that the learned judge erred in giving the jury directions on aggravated damages. The question as to whether these circumstances amounted to aggravation of damages is another matter altogether, which I will deal with shortly.

[158] The pleadings therefore served a dual purpose and it was necessary for the learned judge to avert the jury's attention to the distinction between malice which could defeat the defence of fair comment and malice which aggravated the defamation resulting in aggravated damages. She did direct the jury on this distinction, but this was at the point when the jury was not yet required to consider damages. While she may not have formulated her directions using the definition of "bad motive" as stated by the authors of Clerk and Lindsell on Tort, it cannot be said that her direction was so at odds with that definition that it should be regarded as misdirection. It appears that the absence of these directions at the point when the jury were about to retire to consider damages only was due to the fact that the judge had already instructed them to consider whether malice existed in the sense of "spite, malevolence or ill-will" in relation to damages, and they indicated a verdict of 5-2 in favour of a finding of malice. This is apparent from the fact that she told the jury that "you by your findings have indicated that you have found that there is malice [sic] that sense [sic] I have explain [sic] it to you in relation to damages" (page 154). This, in my view, may have been confusing to the jury for the reason I have given in paragraph [109] and should

have been left for the point when they had only damages to consider. Furthermore, at no point in her directions did she instruct the jury in relation to the effect of her rulings concerning the factors pleaded in paragraph 10 of the statement of case and malice, that is, the question of whether the appellant was actuated by bad motives. It seems to me that though she was correct in giving directions on aggravated damages, the directions were inadequate. Ground 15 therefore succeeds.

[159] It is now necessary to consider whether the jury's award was one which a reasonable jury could have thought would be necessary to compensate the claimant and to re-establish his reputation based on the evidence that was before them. In relation to general damages, evidence was adduced as to the respondent's position and standing. There was also, in my view, evidence from which a conclusion could be reached as to the seriousness of the defamation. Although the allegations giving rise to this matter concerned comments in relation to the respondent's handling of £5000.00, the seriousness of the defamation must be looked at in the context of the eight unfair comments. A close examination of those comments indicates that the appellant did not assert that the respondent had misappropriated the £5000.00. In fact, in one of the comments, he indicated what had happened to those funds and stated that had the parties known of this, no charge would have followed. Although he made reference to more serious charges being proferred before the personnel committee, he did not go into detail. These comments could hardly have been said to affect his integrity or any of his "core attributes", and, in view of that, can hardly be said to be serious. Further, as the judge pointed out, there was no evidence as to the extent of the publication.

Nor was there any evidence of the effect of the slander on the respondent's feelings from which the jury could have ascertained the distress which it caused him. The learned judge did state at page 151 that the respondent had given no evidence of the effect of the slander on his reputation. There was no evidence of any actual pecuniary loss that he suffered or how it affected his career, especially in view of the fact that the slander concerned his calling or profession as a headmaster. In fact, as the learned judge pointed out, he admitted that he had left the school because of the settlement and not because of the alleged slander. Although he gave evidence that he had not been able to secure employment in that capacity thereafter, he was unable to establish the causal link between this and the alleged slander. There was, therefore, no evidence that this had impacted his employment prospects. There certainly appeared to be no effect on his reputation in the religious community of which he was a part as the evidence was that he was still highly respected and was promoted to Rector in St Margaret's Church and Canon in the Anglican Diocese.

[160] In relation to the factors pleaded in support of aggravated damages, as I have indicated in my analysis of grounds 17-21, the factors relied on subparagraphs 10(a) to (c) were incorrect. The factors in subparagraphs 10(d) and (e) appear to have been based on these three subparagraphs, particularly subparagraph (e) which refers to the "wrongful decision of the Board". The judge mentioned other factors, but these were advanced by counsel even though they did not form a part of the pleadings, and in that regard, ought not to have been mentioned by the judge. I therefore do not think there was sufficient basis upon which a jury properly directed on the facts in relation to

the findings of the personnel committee and the effect of the decision of the Appeals Tribunal thereon could properly have concluded that the appellant was actuated by malice or bad motive so as to entitle the respondent to an award for aggravated damages based on this evidence. In any event, the jury having concluded that the words were not defamatory by their first verdict, the respondent would not have been entitled to an award. Further, they having been asked to reconsider that verdict and having found one comment to be unfair, the respondent would have been entitled to damages only in relation to that one comment. In the light of the non-egregious nature of that comment, the damages awarded would have been nominal. Ground 14 would therefore succeed.

Verdict unreasonable (ground 22)

> "The verdict in favour of the Respondent against the appellant is unreasonable having regard to the evidence."

Submissions

[161] Counsel for the appellant submitted that in all the circumstances, the verdict was unreasonable having regard to the evidence. Queen's Counsel for the respondent submitted to the contrary and stated that the verdict ought not to be disturbed.

Analysis of ground 22

[162] I am aware that this court ought not to interfere with the verdict of the judge and the jury in a defamation action save and except on very strong grounds, but I am of the view that this is such a case. In my view, the jury's first verdict ought to have

been accepted by the court. That verdict indicated that the words complained of were not defamatory of the respondent. Then the jury's next first verdict was that if the words were defamatory, the facts on which they were based were true, or substantially true, and the expressions of opinion and or comment made were fair save one, which comment was fairly innocuous, and which therefore meant that the appellant, substantially, honestly believed in the words uttered. The question whether any damages could be due in those circumstances has already been dealt with in paragraphs [160] above. In the final analysis therefore, the verdict in favour of the respondent is unreasonable in all the circumstances, and there are strong grounds for setting it aside. In my view, if the verdict were not set aside, a miscarriage of justice would have occurred.

[163] I do not think that in these circumstances any useful purpose could be served in ordering a retrial, as the occasion would still remain one of privilege, and, in my opinion, there is no evidence in this case which a judge could find sufficient to leave as express malice for the consideration of a jury.

Conclusion

[164] The appeal should be allowed with costs of the appeal, and of the court below to be paid to the appellant, to be taxed if not agreed.

McINTOSH JA

[165] I have had the privilege of reading the judgments of Dukharan and Phillips JJA and agree with their conclusion that this appeal should be allowed. I wish, however, to add a few comments of my own in relation to grounds 8 and 9 and, in so doing, I need do no more than to set out below the two grounds and those portions of the transcript with which my comments are concerned, in light of the comprehensive background provided by Phillips JA in her judgment.

Grounds 8 and 9

> **"8. The learned trial judge clearly erred in failing to accept the jury's first verdict that the words complained of were not defamatory of the Respondent. The judge further erred by permitting counsel for the Respondent to invite the judge to reject the jury's first verdict and to give further directions to the jury.**
>
> **9. The learned trial judge erred in law in coercing or putting pressure on the jury to come to a decision the same evening it retired to consider the matter and consequently this deprived the Appellant of a fair trial and resulted in a gross miscarriage of justice."**

[166] In my opinion these two grounds are focused on what the jurors were required to absorb in a sitting which lasted more than 12 hours; their understanding of the matter as exposed in the exchanges that took place between the jury foreman and the learned trial judge; and what must be described as the consequences of those factors.

Ground 8

[167] The transcript discloses that on their return from their initial deliberations the foreman of the jury, when asked, responded that the jury had arrived at a unanimous verdict. The registrar then sought to relate that response to "the meaning of the words" and the judge, specifically, to question one, which was whether the words in the transcript bore the meanings as set out in paragraph 7 of the statement of claim. The foreman then replied:

> "**I have to explain**, **what we had in fact done here is to respond yes or no to the various questions**." (emphasis supplied)

Then this is what followed:

> "FOREMAN: As to being in agreement with the words.
>
> HER LADYSHIP: As to one question was, do you – the first defendant used words which the complainant complained about in paragraph seven of the Statement of Claim were the words –

FOREMAN: What is [sic] referring to, if it is the complaint in paragraph seven in the Statement of Claim or the words in the Public Eye Transcript 27B, bear the meaning set out in the paragraph seven of the Statement of Claim and to those decisions we have answered that yes they bear the same meaning or law. I don't know if we were a moving ---

HER LADYSHIP: They bear the meanings that are set out in the questions, A, B and C. Well, you tell me, is it in relation to A?

FOREMAN: In relation to all of them

HER LADYSHIP: All, A to L. We had, we had – there were two. I am sorry, A to M. You know what sir, just give me the letters let me just note it, because we did have a letter thing now.

FOREMAN: … there were one or two which we did not and may be in ignorance we don't know, for example B, where it says that despite decisions of the tribunal the claimant has failed to account to the Board for the sum of the [sic] 750, which was entrusted to him on behalf of the college and the other side fail to decide; therefore, we are not in agreement in that one.

HER LADYSHIP: You do not find that it bears this meaning.

FOREMAN: Yes, because in Mr Wallace ---

HER LADYSHIP: It is alright. It does not bear the meaning, the meaning set out at B of this question?

FOREMAN: When compared paragraph 7 with paragraph 27B with paragraph 8

HER LADYSHIP: Let us – paragraph – Mr Foreman let us backtrack. Answer me with A, B going down the line since you say B is not just [sic] answer.

FOREMAN: So only B and J we were not in agreement with. In fact we …

HER LADYSHIP: Just a second. So your decision is that, the meanings set out in question No. 1 that are set out at A, C, D, E, F. G. H. I.

FOREMAN: I, K

HER LADYSHIP: I, K and L are the meanings

FOREMAN: Right

HER LADYSHIP: Yes, the first question was really if they bear the meanings and the second question if they do, which means they bear the meanings and you have answered question No 2.

FOREMAN: Right

HER LADYSHIP: No. 3.

FOREMAN: No. 3.

HER LADYSHIP: Are the meanings defamatory of the claimant?

FOREMAN: The consensus was no, m'lady.

HER LADYSHIP: Just a second

Mrs Benka-Coker, Mr Wilkinson, Mrs Reid-Jones, is it your view that I go on to question, get to the other questions?

MRS BENKA-COKER: If the first one is no, I don't think that it makes sense.

HER LADYSHIP: I just want to ask you what do you think.

MRS BENKA-COKER: If they are not, I don't think we could go any further."

[168] After this exchange the foreman then said:

"FOREMAN: M'lady, may I just make a comment here. In association with my fellow jurors, there is a statement that I want to make."

However he was not permitted to do so, the judge responding:

"HER LADYSHIP: No, this is not appropriate, but I want to be sure I understand your answers to the question and I am going to repeat that in terms of the words. The meanings which you say that the words used by Mr Wallace on the Public Eye Broadcast, in terms of those meanings, is it your answer that all of you say that the meanings are not defamatory of the claimant?

FOREMAN: No. Well, we have no that the words themselves were not defamatory.

HER LADYSHIP: That's what I am asking you

FOREMAN: Okay

HER LADYSHIP: Is there something different in the words, the meaning of the words? That is the question. Is the meaning of the words used by the First Defendant defamatory? In themselves no,

but …

HER LADYSHIP: Well we don't go on if the meanings are not defamatory."

Whereupon the foreman immediately said:

"FOREMAN: I think my fellow jurors have misunderstood the question."

[169] At this point the learned trial judge asked:

> "Do you need some more time to think about the matter or you need me to give you any further assistance?"

The foreman then responded:

> "Yes Your Honour. I think we need further guidance on it. Though we have come to a consensus on all others, there are matters --- how can I explain? Can I say this."

In light of this exchange and on the intervention of counsel, the learned trial judge asked them to retire and consult, and then tell her what need there was, if any, for further assistance from her.

[170] There was an administrative problem involving court personnel which delayed their retiring and, while the learned trial judge sought to have that addressed, the foreman spoke:

> "FOREMAN: I have consulted with my fellow jurors and, in fact, what we were looking at is the …"

whereupon the learned judge asked that she be told what assistance was needed from her to which the foreman responded:

> "FOREMAN: No Your Honour it was just a misunderstanding as to the meaning of words and whether it was, in fact, the words themselves were defamatory or were they defamatory to the Claimant. The words as used in the context in the transcript, as to the words themselves, the meaning, the words themselves were defamatory, well, in

> reflection and in consultation with the fellow jurors, what we meant, what should be here is that the meanings were, in fact, defamatory to the claimant.
>
> HER LADYSHIP: Are you sure?
>
> FOREMAN: Yes."

They had not left the jury box and had received no further instructions from the judge. The consultation and the reflection seemed to have taken place while the judge was trying to resolve the administrative problem that had arisen.

[171] The words of Kennedy LJ extracted from paragraph 34 of his judgment in **Joseph Igwemma v The Chief Constable of Greater Manchester** [2002] 2 WLR 204 and set out below, seem to me to be applicable to the circumstances of this case:

> "In my judgment it is important not to lose sight of what, in any jury trial, criminal or civil, the court is attempting to achieve. The object is to do justice between the parties, without unnecessary delay or expense. The function of the jury is to make findings in relation to those issues which the jury are asked to resolve, and it is important that the jury's findings should then be effectively transmitted to and understood by the court. If there has been, or may have been, some misunderstanding, that must be investigated and put right, if that can be done without injustice to either party. So, in one sense, a judge does have a wide discretion. He can allow an alteration to be made in a verdict which has been returned or an answer which has been given, even after the jury has been discharged but only where the interests of justice

> make it appropriate for him to do so. In considering whether or not the interests of justice favour that course the judge will necessarily look carefully at –
>
> (1) The time that has elapsed since the original verdicts or answers were returned;
>
> (2) Why it is said to be appropriate to seek further assistance from the jury. It will, for example, be easier to seek further assistance from a jury where, as here the jury itself raises the possibility of a misunderstanding in circumstances where there was scope for misunderstanding as opposed to the situation where there seems to be no misunderstanding and no obvious scope for misunderstanding or other apparent acceptable reason to alter what has already been said.
>
> (3) Whether the jury may have been persuaded to change its view by anything said or done since it gave its original verdicts or answers, especially if anything has emerged which would not normally be heard by a jury during a contested trial."

[172] It seems to me that the course which the learned trial judge adopted was in an effort to put right misunderstandings which were expressed by the foreman and which she herself had detected. Given the complexity of the issues in this case which the learned trial judge told them "was not a straight forward case" there was scope for misunderstandings, and in my view, the highlighted extracts from the transcript showed a need for the learned trial judge to seek further assistance from the jury.

[173] However, it is arguable that those efforts went beyond what was appropriate in the interests of justice and may well have taken the matter within the third

consideration formulated by Kennedy LJ. The foreman was not permitted to give the explanations he sought to give in relation to the critical questions and as the matter unfolded, the jury may well have been led to conclude that they had given the wrong answer initially. The words used by the foreman before the jury's altered position was announced seem to reflect this as he spoke of their "reflection" and "consultation" which would have taken place in the courtroom, after the exchanges between Bench and Bar in their presence. The learned trial judge may well have been expressing some concern in this regard when she asked if they were sure of what in effect was the new answer they gave. Therefore, to that extent there is merit in ground 8.

Ground 9

[174] This case involved a very technical area of the law which presents difficulties even to those trained in the law. The jurors were lay persons and to me it was therefore very necessary that they should have been afforded the proper atmosphere conducive to concentration, reasoning and decision-making on complex issues. Although at no time in the course of the proceedings as reflected in the transcript, did the jurors express that they were experiencing any pressure in arriving at their decision that night, they had been engaged in this mental activity for in excess of 12 hours. They seemed willing to give it their best efforts and did not even take a lunch break opting to "stay and deliberate". They never complained of being fatigued but the circumstances made that a factor to be considered by the learned trial judge. From my perspective, all participants in those proceedings would have been affected by the long

hours and the "extra mile" that was undertaken in an effort to bring the proceedings to a conclusion.

[175] I am of the opinion that the jury ought not to have been required, in the circumstances which obtained, to return a verdict that night. Justice must not only be done but must manifestly appear to be done, and in these circumstances, I am unable to accept that justice was done. Even if it is accepted that the learned trial judge was entitled to seek further assistance from the jury in clearing up misunderstandings, I have a problem with the timeframe and the conditions in which this was undertaken.

[176] At 5:30 on that Friday afternoon the learned trial judge gave further directions to the jury. At 6:04 they retired for the second time and on their return at 6:33 pm there followed exchanges as to whether expressions of opinion and fair comment were used interchangeably in the pleadings. At this point the learned trial judge said she had to send the jury out as she had to hear some legal submissions. In her words: "I am sorry that we have to do this but this is not a straight forward case…" They were about to be required to retire for the third time. Before retiring, however, the foreman sought to indicate what the jury considered in relation to opinion and comment saying, "M'lady we had looked at...," but the judge interrupted him saying:

> "…I don't want to hear about that. It appears that there is not a clear, there was not a clear understanding that the opinions or comments were being used interchangeably and therefore the question of fair comment or unfair comment covers opinion as opposed to the facts, comments and opinions being treated in the same way."

The learned trial judge thereafter spoke with counsel on the matter in the absence of the jury. One attorney expressed the view that "the continual going back and forth for them maybe very frustrating".

[177] I am of the view that the learned trial judge fell into error when she failed to recognize that since a need had arisen for further assistance from the jury when they first returned and that further questions had to be asked and further directions given, she ought to have brought the proceedings to a halt. There was no need for concern that the end of the term was fast upon them. It would not have been the first time that a jury trial would have had to be continued after the close of the scheduled term.

[178] Whether or not the jurors complained, the reality of the situation in which they were being asked to deliberate and arrive at a just decision was oppressive by any standard. There need not have been any complaint from the jurors about pressure, coercion or the like. The record showed that the learned trial judge had commenced her summation at 11:48 am and, without a lunch break, at 7:25 pm, after retiring three times, the learned trial judge said to them:

> "Mr Foreman and your numbers, I know you must be very tired and all the parties here really do appreciate your countenance, your manner and your obvious patience in dealing with this matter. It is, however my duty to give you some further directions and to ask you to answer some other questions."

When the foreman tried to say that they had already addressed the issue being referred to them, that they had "sort of preempted the situation and went ahead", the learned judge told them that they had been given new questions and were obliged to retire for further consideration. This, to me, was way beyond anything contemplated by Kennedy LJ in **Igwemma**. In my humble opinion, this was wholly unacceptable.

[179] I do not find the case of **Regina v McKenna** [1960] 1 QB 411 helpful as it was not a matter of the jury taking such time as they felt they needed in their deliberations. They even at one stage tried to shorten the process by preempting the judge in the further question being put to them. They were not being forced to shorten the process. In fact the process was prolonged. It seems to me that there is ample basis for the appellant's complaint that he was deprived of a fair trial. I am firmly of the view that ground 9 also has merit and should succeed and, for my part, that disposes of the matter as it would be unjust to allow any verdict arrived at in the circumstances to stand.

DUKHARAN JA

ORDER

1. The appeal is allowed and the verdicts of the special jury adverse to the appellant are set aside;

2. The judgment of Mangatal J delivered on 31 July 2006 is set aside SAVE and EXCEPT for the judgment in favour of the Public Broadcasting Corporation of Jamaica against the respondent;

3. Judgment entered for the appellant against the respondent;

4. Costs of the appeal and the proceedings below to the appellant to be taxed if not agreed.