JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO 99/2005

BETWEEN	**KINGSLEY THOMAS**	**APPELLANT**
AND	**COLLIN INNIS**	**RESPONDENT**

Neco Pagon instructed by Vaccianna & Whittingham for the appellant

Lenroy Stewart instructed by Wilkinson Law for the respondent

24 November 2023 and 21 February 2025

Civil Law - Defamation - Whether words defamatory - Meaning words capable of bearing - Separate and distinct charges - Whether a case was advanced on the actual words forming the charge as determined by the court - Analysis of the sting of the libel - The Defamation Act section 7 and the defence of justification - Damages sought for libel – Adequacy of damages - Whether interest not awarded by the trial court should be granted by the appellate court

F WILLIAMS JA

[1] I have read the draft judgment of G Fraser JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

D FRASER JA

[2] I, too, have read, in draft, the judgment of G Fraser JA (Ag) and agree with her reasoning and conclusion.

G FRASER JA (AG)

Introduction and Background

[3] On 1 December 1999, a meeting was held at which Mr Kingsley Thomas ('the appellant'), in his capacity as chairman of the board of the National Housing Trust ('NHT'), and Mr Collin Innis ('the respondent'), in his capacity as the director of projects of the Sugar Industry Housing Limited ('SIHL'), were both in attendance. The meeting was convened to address the funding of housing for sugar workers. The appellant announced that the NHT would no longer fund houses developed by SIHL.

[4] After the meeting concluded, a verbal interaction ensued between the appellant and the respondent, which was initiated by the respondent. The parties admitted that they were unfamiliar with each other before that occasion. The appellant proceeded to express his displeasure with the decision taken by the NHT to terminate its funding to SIHL. Both parties' accounts of the words spoken during that exchange differ. The appellant recalled that:

> "…a gentleman (who was also at the meeting) and whom I did not know, approached me in a menacing and threatening manner, and said in a loud and angry voice, 'what kind of bullshit you talking in the meeting?'
>
> Both his tone and his approach to my person I considered hostile and threatening. This caused me to fear that he would commit an assault upon my person, and particularly since I did not know who he was, I felt fearful and threatened."

The following, however, was the respondent's account:

> "I was standing outside the meeting hall and the Defendant approached me and greeted me. We shook hands and I said to him '**you know Mr. Thomas, I am really surprised that for a big man like yourself you could sit in a room with all these people and feed them with such utter garbage. You know that what you were saying was a lot of rubbish and you continued to say it as though you believed it**'. At this point the Defendant pulled his hand away…" (Emphasis as in the original)

[5] Following that interaction, the appellant complained about the conduct of the respondent to the managing director of SIHL by way of a letter ('the impugned letter') dated 13 December 1999. The impugned letter was copied and distributed to 19 other individuals, including board members in the sugar industry, representatives from the University and Allied Workers Union and the Bustamante Industrial Trade Union, and NHT personnel. In the impugned letter, the appellant stated as follows:

> "At the end of the December 01, meeting a Mr Innis, who accompanied you to the meeting, approached me in a threatening and menacing manner. I wish to place on record my very strong objection to his behaviour. In light of what I consider to be Mr Innis' foul and threatening language, I have found it necessary to take certain precautions in the interest of my personal safety."

[6] The respondent believed that the reference to him was vilifying and, subsequently, on 12 June 2000, he filed a claim no CL 2003 1-053, suing for damages arising from an alleged libel based on the contents of the impugned letter. The respondent asserted that the appellant's complaint in the impugned letter was false and malicious, causing injury to his reputation. Further, he stated that he was put through considerable anxiety, expense, and inconvenience and suffered mental and physical anguish due to the assertions made.

[7] The appellant contested the respondent's claim. In his defence, he denied liability for libel, asserting that the statements in question, which were published to Mr Gary Turnbull (the respondent's superior at SIHL), were neither false nor malicious. Instead, he maintained that the statements were true in substance and fact, relying on the defence of justification under section 7 of the Defamation Act ('the Act'). Notably, the appellant acknowledged that the words in the impugned letter, along with the respondent's actions, could reasonably be interpreted to convey the imputations outlined in paras. 5(a), (c), (d), and (e) of the respondent's statement of claim filed on 12 July 2000. These paras. will be set out in this judgment anon (see paras. [49] and [50]).

[8] The claim was tried in the Supreme Court before L Pusey J (Ag) (as he then was) ('the learned judge'), sitting without a jury. The learned judge heard evidence on 19 and 20 April 2005. The learned judge found the impugned letter distributed by email to the respective individuals (mentioned in para. [5] above) to be defamatory of the respondent. By his decision, the learned judge entered judgment in favour of the respondent, the then claimant, in the following terms:

> "…I award the sum of $150,000.00 as general damages. There is judgment for the claimant against the defendant and cost to the claimant to be taxed if not agreed."

The appeal

[9] This appeal and counter-notice of appeal emanated from the learned judge's decision delivered on 29 July 2005.

[10] Following the learned judge's decision, the appellant filed a notice and grounds of appeal on 16 September 2005, challenging the learned judge's decision on liability, requesting that this court set aside the judgment and, instead, enter judgment in his favour. On 19 October 2005, the appellant also filed a notice of application with supporting affidavits, wherein he petitioned for a stay of the execution of the judgment of the learned judge until the determination of the appeal. The application was heard by K Harrison JA, who, on 14 February 2006, in the exercise of his discretion, granted the order sought in the application.

[11] The respondent, who was the successful party in the court below, was contented with the learned judge's decision as to liability and concurred that the words complained of were defamatory. Accordingly, the respondent maintained that the learned judge's decision on liability ought to stand. He, however, was dissatisfied with the quantum awarded. He asserted that the learned judge erred in principle in assessing damages and that the sum of $150,000.00 awarded was, in the circumstances, inadequate to compensate for the injury caused to his reputation by the appellant's libellous words.

[12] On 16 February 2007, the respondent filed a counter-notice of appeal arguing that the learned judge erred in concluding that the libellous statements did not seriously impact his character. He also challenged the finding that the appellant genuinely believed, or had reasonable grounds to believe, that the respondent's approach was threatening or menacing.

The challenged findings

[13] The appellant stated that the learned judge erred in making his findings of fact and law. Challenged are the following findings of fact:

> "(i) That it was the Appellant who approached the Respondent at the end of the meeting on December 1, 2004 rather than the reverse.
>
> (ii) That the Respondent's account of what he said to the Appellant on the said occasion was more accurate than the Appellant's account."

The findings of law challenged are:

> "(i) That the words complained of contained three distinct charges.
>
> (ii) That the common law test of substantial truth was not met.
>
> (iii) That s.7 of the Defamation Act did not apply."

[14] On the other hand, the respondent's counter-notice of appeal sought to challenge the following findings of fact:

> "(i) That the libelous words did not have a serious impact on the Claimant's character.
>
> (ii) That the sum of One Hundred and Fifty Thousand Dollars ($150,000.00) as general damages is an adequate sum to compensate the Claimant for the damage to his reputation by the libelous words.

(iii) The Appellant/Defendant sincerely believed that the Respondent's/Claimant's manner was threatening and menacing.

(iv) The Appellant/Defendant had reasonable grounds for the sincerely held belief that the Respondent's/Claimant's manner was threatening and menacing."

[15] The finding of law challenged by the respondent was that "the words complained of did not mean or could not be understood to mean that the Claimant was a threat/danger to society at large".

The issues

[16] Counsel for the appellant proffered four grounds of appeal, whereas the respondent advanced seven. It is unnecessary to traverse these grounds in detail, as they essentially restate the legal and factual findings challenged by both parties. It is my observation that two primary issues emerged from the arguments and submissions presented on behalf of the parties. These issues, in my view, are pivotal to resolving the appeal and will be determinative of the court's decision. Therefore, my analysis is centred on the following key issues:

Issue 1: Whether the learned judge erred in law in his interpretation of the authorities and/or in his application of the law to the facts as he found them to be.

Issue 2: Whether the award of $150,000.00 as general damages was reasonable.

Issue 1: Whether the learned judge erred in law in his interpretation of the authorities and/or in his application of the law to the facts as he found them to be.

Appellant's submissions

[17] The appellant's counsel, Mr Neco Pagon ('Mr Pagon'), urged on this court that the learned judge erred when he failed to give sufficient weight to the context in which the respondent's words were uttered in determining whether, in the circumstances, the appellant's response was substantially true. The learned judge stated that there was no

dispute between the parties as to whether the words used were defamatory; the issue was whether the appellant was justified in uttering those words. Consequently, in the circumstances of their usage, the learned judge found that the words were substantially true, with context being essential.

[18] Mr Pagon further submitted that the learned judge placed an unduly restrictive interpretation on the term foul language. In support of his submission, he relied on section 7 of the Act as he contended it would have been pertinent to the learned judge's determination of the issues. Counsel further submitted that for a defence of justification to succeed, it must be proven that (i) the defamatory statement contained two or more distinct charges; (ii) the truth of each charge, as a matter of course, had to be proven, contingent on (iii); and (iii) having regard to the truth of the remaining charges, the words not proven must not materially injure the plaintiff's reputation. He submitted that on the interpretation of the Act, it was clear that the statutory requirement of truth was satisfied where the defendant proved that the words uttered were true or substantially true (see **Gleaner Co Ltd v Wright** (1979) 16 JLR 352).

[19] Relying on the decision of **P&S Used Car Traders Limited v CVM Television Limited and others** [2018] JMSC Civ 114, Mr Pagon submitted that the standard of proof required was objective, and as such, the defendant's honest belief was not sufficient to answer the question. Counsel also argued, as per the authority of **Jamaica Observer Ltd and Anor v Gladstone Wright** [2014] JMCA Civ 18 ('**Gladstone Wright**'), that a rigid approach must not be adopted by the courts when assessing the defence of justification. Additionally, in the determination of what amounts to the sting and whether the words used were justifiable, an examination must be made of the context in which they were said. Mr Pagon cited the authorities of **Polly Peck (Holdings) plc and others v Trelford and others** [1986] 2 All ER 84 ('**Polly Peck**') and **Stocker v Stocker** [2019] UKSC 17, in support of this submission.

[20] Mr Pagon posited that the United Kingdom Supreme Court in **Stocker v Stocker** did not favour the restrictive approach adopted by the learned judge in the instant appeal. The favoured approach was enunciated in that case at paras. 15 and 16 as follows:

> "15. It is clear from this passage of his judgment that the trial judge had confined the possible meaning of the statement, 'he tried to strangle me' to two stark alternatives. Either Mr Stocker had tried to kill his wife, or he had constricted her neck or throat painfully. In the judge's estimation, the fact that Mrs Stocker had said that her husband 'tried' to strangle her precluded the possibility of her statement being taken to mean that he had constricted her neck painfully.
>
> 16. This approach produces an obviously anomalous result. If Mrs Stocker had said, 'he strangled me', she should be understood to have meant that her husband had constricted her neck or throat painfully, on account of her having survived to tell the tale. But, because she said that he had 'tried' to strangle her (in the normal order of things and in common experience a less serious accusation), she was fixed with the momentous allegation that her husband had tried to kill her. On this analysis, the use of the verb, 'to try' assumes a critical significance. The possible meaning of constricting the neck painfully was shut out by what might be regarded as the adventitious circumstance that Mrs Stocker had said that her husband had 'tried' to strangle her rather than that he had strangled her."

[21] Mr Pagon highlighted that at para. 25 of the said **Stocker v Stocker**, Lord Kerr explained the rationale for not approving of the restrictive approach in applying the dictionary meaning, where he expressed the following:

> "Therein lies the danger of the use of dictionary definitions to provide a guide to the meaning of an alleged defamatory statement. That meaning is to be determined according to how it would be understood by the ordinary reasonable reader. It is not fixed by technical, linguistically precise dictionary definitions, divorced from the context in which the statement was made."

[22] It was further contended, by Mr Pagon, that the learned judge espoused the disapproved approach addressed in **Stocker v Stocker** when he relied on the dictionary meaning of the word foul. Moreover, his interpretation of the word was void of contemplation in keeping with its stated context.

[23] According to Mr Pagon, the learned judge's treatment of the evidence was inconsistent. On page 9 of the judgment, the learned judge indicated that he found the respondent's evidence of what was said to be credible. However, the respondent, in his evidence, did not admit to the use of the word "bullshit". Rather, it was the appellant who averred that the utterance was made by the respondent. The learned judge, however, proceeded to make findings of whether the word "bullshit" was foul language. A further submission in this regard was that if the word "bullshit" was foul, then the defence of justification was satisfied on that charge.

[24] Mr Pagon submitted that the learned judge appeared to have accepted that the respondent's approach was made in a threatening and menacing manner. Nonetheless, he found that the language used was not threatening. According to counsel, those findings were inconsistent and contradictory. In any event, even if it could be said that the respondent's language was not threatening, his gesture was; and both language and gesture are an integral part of the execution of an act of threat.

[25] The appellant argued that the respondent had not relied on nor advanced his case regarding what the learned judge referred to as charge two (foul and threatening language). It was contended that even if the learned judge had found three distinct charges, the issue of foul and threatening language should not have been addressed, as no complaint had been raised about charge two. Mr Pagon submitted that the judge should have considered foul and threatening language as part of the overall context, but by making a finding on the matter, the learned judge fell into error. Mr Pagon submitted that this undoubtedly influenced the learned judge's thinking and his final conclusion. He argued this point based on the earlier indication from the learned judge that the third charge stemmed from the first two charges.

[26] In relation to the ultimate decision to be made by this court, Mr Pagon argued that there would be a significant difference if charge two was removed. In that case, the learned judge's conclusion would have focused solely on charge one. Counsel used a mathematical analogy, suggesting that if there were three items, and items one and two were stand-alone (as the learned judge had found), with the third being a subset of the first two, removing charge two would leave a complete set of charge one and part of charge three proven. Counsel reiterated the section 7 defence of justification, emphasising that what matters is that the averments were substantially true, and not every detail needed to be proven. He argued that two-thirds of the overall defence would be established since charge one was fully proven and part of charge three was also proven.

[27] Following in that vein, Mr Pagon further submitted that there were really only two charges in the impugned letter. The first concerned the threatening and menacing manner, including the language used, and the second regarding the precautions necessary for personal safety, which the learned judge found flowed from the first. The common sting of the case, he said, was the respondent's threatening behaviour towards the appellant, which led the appellant to believe his safety might be at risk. Mr Pagon urged this court not to separate the words averred by the appellant into two separate charges as the learned judge had done. He submitted that, when viewed in context, the respondent's threatening and menacing behaviour would have led any reasonable person to take precautions to avoid potential physical harm. It was counsel's view that the learned judge failed to consider the sting of the words, which he argued was proven, and there was no need to add another layer to the interpretation of the language used.

[28] In support of the appellant's case, counsel argued that the learned judge failed to properly address the core sting of the words, which justified the appellant's actions to safeguard himself. Counsel maintained that the words clearly conveyed that the respondent posed a threat to the appellant, and there was no need to introduce additional interpretations. Whilst not conceding the point, counsel on the appellant's behalf argued

that even if the words implied the respondent was a danger to society, this did not negate the threatening nature of his actions and language. Based on this reasoning, counsel concluded that the defence presented before the learned judge should not have been dismissed.

Respondent's submissions

[29] Counsel for the respondent, Mr Glenroy Stewart ('Mr Stewart'), in response, submitted for the court's consideration the cases of **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 and **Paulette Richards v Orville Appleby** [2022] JMCA Civ 33 ('**Richards v Appleby**'), in which the former addressed the appropriate approach to be adopted by an appellate court. In **Richards v Appleby**, at para. [6] Brooks P enunciated that the appellate court:

> "…will only disturb an award of damages if the court below has erred in principle…
>
> > '7. An appellate court will not, in general, interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong….'"

[30] Mr Stewart also relied on **Gladstone Wright** at para. [82], where Morrison JA (as he then was) expressed that "[w]hether a defamatory statement is separate and distinct from other defamatory statements in the publication is a question of fact and degree in each case...". Mr Stewart, therefore, maintained that the words in the impugned letter supported the learned judge's finding of three separate charges. He argued that further support of this finding can be found from the other material that was before the learned judge, such as the agreed statement of issues, filed on 6 April 2004. In that document, it was agreed that the following were issues for the court's determination:

> "i. Was the Respondent's approach menacing and threatening
>
> ii. Whether the Respondent's words were threatening

> iii. Did the Appellant in fact fear for his safety and take precautions for his safety as a result of the Respondent's words and actions"

[31] Mr Stewart argued that the letter, written on 28 February 2000, suggested that there were three charges. Further, the appellant's written submissions in the court below and his witness statement also pointed to there being separate charges. Counsel highlighted para. 17 of said statement.

[32] Mr Stewart contended that there was copious material before the learned judge on which he could have found, as he did, that there were three distinct charges. In this regard, he argued that the appellant failed to prove to this court that the learned judge was plainly wrong. Moreover, the words complained of by the respondent did not support a single sting.

[33] The issue of foul language, according to Mr Stewart, arose as well in the appellant's case, when he admitted at para. 17 of his witness statement that he intended to refer to the respondent's actions of using foul language to him. In his defence, the appellant admitted publication of the words complained of. The remit of the learned judge was, therefore, to determine whether any foul and threatening language was used and whether such words were libellous.

[34] Mr Stewart contended that the section 7 defence of justification could not avail the appellant for the following reasons:

> "a. Arguendo even if (which is not admitted) the words contained a single sting, the words found to be true did not meet that sting;
>
> b. The learned Judge's acceptance that the Appellant sincerely believed that that [sic] the Respondent's manner was threatening and menacing did not tell the rest of the story; and
>
> c. The rest of the story embraced the "foul and threatening language" allegedly spoken by the Respondent which was so serious to the Appellant that even after learning the identity

> of the Respondent, and that he was not a "contractor" it still led him to take precautions in the interest of his personal safety."

[35] In addressing the learned judge's findings that the words were neither foul nor threatening and whether the appellant considered it necessary to take precautions for his safety, Mr Stewart argued that the appellant failed to demonstrate that the learned judge's conclusions on those points were plainly wrong. Consequently, the learned judge's findings on the remaining two charges should not be overturned. Furthermore, the appellant did not present any evidence to the learned judge regarding the alleged precautions taken for his safety, and the failure to provide such evidence, counsel submitted, was a critical flaw in the appellant's case.

[36] Mr Stewart stated that contrary to what Mr Pagon submitted, it was not true that the learned judge's reasons expressed that the appellant had proven the major allegations. Accordingly, counsel directed the court's attention to page 13 of the judgment, where the learned judge said as follows:

> "A final word needs to be said about the seriousness of the allegation. Having conceded the meaning of the words it is no small matter to impute criminal acts and the possible use of physical violence against the defendant who was a professional in a senior management position and to whom is imputed a good reputation in law."

The learned judge could not, therefore, overlook the lack of evidence to support the charge concerning the appellant's safety.

[37] For the foregoing reasons, Mr Stewart submitted that most of the charges remained unproven, and the learned judge could not be faulted for rejecting the defence of justification. Therefore, no sting within the communication was established, and the substantial truth test was not met.

Discussion and analysis

Findings of fact made

[38] In their respective applications, both parties asserted that the learned judge erred in various findings of fact made. A main contention by the appellant, as gleaned from the grounds of appeal, was that the learned judge was wrong in his ruling that the common law test of substantial truth was not met and, as such, section 7 of the Act did not apply.

[39] This first issue relates to the learned judge's findings of fact. Therefore, the appellate court's approach when dealing with an appeal against the findings of fact by a judge at first instance is relevant. The approach of this court is to proceed cautiously and only interfere if satisfied that the judge erred in his analysis of the evidence and thus was plainly wrong in arriving at his decision (see the authorities of **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21, **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 and **Capital Solutions Limited v Marietta Rizza (who claims by her attorney, Roberto Rizza) et al** [2020] JMCA Civ 39).

[40] The role of this court is to determine whether or not the words complained of are capable of the defamatory meaning found by the learned judge. If the words are found to be capable of the meaning deduced by the learned judge, his finding binds this court. The learned judge, I find, correctly identified that what he needed to determine was, did the "words lower him [the respondent] in the eyes of the ordinary reasonable man". The learned judge, in his assessment of the circumstances, concluded that:

> "There is a presumption at law that the claimant is of good reputation therefore a charge that he is likely to do violence and has caused the defendant to take measures to protect himself would lower him in the eyes of the ordinary reasonable man. The question of whether the words are defamatory can therefore be answered in the positive."

Meaning words capable of bearing

[41] In keeping with the authority of **South Eastern Regional Health Authority et al v Dr Sandra Williams-Phillips** [2020] JMCA Civ 51, and as observed by the learned

judge, when deciding whether a statement made was defamatory, the question is whether the statement complained of is capable of a defamatory meaning. The learned judge, therefore, was required to assess whether the words complained of conveyed a defamatory meaning to the persons to whom it was distributed, when consideration is given to the natural and ordinary meaning of such words.

[42] To resolve the meaning to be ascribed to the words complained of, a trial court's paramount function is to determine how the "ordinary reasonable reader" would construe the words used. The words must be taken together to ascertain what the "ordinary reasonable reader" would appreciate them to mean. Moreover, regard must be given to the context in which the words were spoken. In **Stocker v Stocker** at para. 38, Lord Kerr of Tonaghmore JSC stated that:

> "All of this, of course, emphasises that the primary role of the court is to focus on how the ordinary reasonable reader would construe the words. And this highlights the court's duty to step aside from a lawyerly analysis and to inhabit the world of the typical reader of a Facebook post. To fulfil that obligation, the court should be particularly conscious of the context in which the statement was made, and it is to that subject that I now turn."

[43] In **Lucas-Box v News Group Newspapers Ltd** [1986] 1 ALL ER 177, Ackner LJ underscored the settled practice that, if the words a claimant complains of are not plain and explicit, he must plead the denotations he asserts the words carry. "Such a practice is, further, of considerable assistance to the court since it thus clearly provides to the trial judge the meaning on which he must rule in deciding whether the words published are capable of being so understood". Further assistance as to a trial court's approach is offered in the case of **Skruse v Granada Television Limited** [1993] Lexis Citation 3931, [1996] EMLR 278, as to the court's approach when deciding whether words are capable of a defamatory meaning. Sir Thomas Bingham stated that:

> "For that reason it is appropriate to summarise the principles upon which we have approached the task:

(1) **The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer** watching the programme once in 1985.

(2) '**The hypothetical reasonable reader [or viewer] is not naive but he is not unduly suspicious. He can read between the lines.** He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking. But he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.'

…

(3) While limiting its attention to what the defendant has actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue.

…

(4) The court should not be too literal in its approach.

….

(5) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right thinking members of society generally (Sim v Stretch [1936] 2 All ER 1237) or would be likely to affect a person adversely in the estimation of reasonable people generally (Duncan & Neill on Defamation, 2nd edition, paragraph 7.07 at p 32).

(6) In determining the meaning of the material complained of the court is 'not limited by the meanings which either the plaintiff or the defendant seeks to place upon the words' (Lucas-Box v News Group Newspapers Ltd [1986] 1 All ER 177, [1986] 1 WLR 147H of the latter report).

(7) The defamatory meaning pleaded by a plaintiff is to be treated as the most injurious meaning the words are capable of bearing and the questions a judge sitting alone has to ask himself are, first, is the natural and ordinary meaning of the words that which is alleged in the statement of claim and, secondly, if not, what (if any) less injurious defamatory

> meaning do they bear? (Slim v Daily Telegraph Ltd, above, at p 176.)
>
> (8) **The Court of Appeal should be slow to differ from any conclusion of fact reached by a trial judge.** Plainly this principle is less compelling where his conclusion is not based on his assessment of the reliability of witnesses or on the substance of their oral evidence and where the material before the appellate court is exactly the same as was before him. But even so we should not disturb his finding unless we are quite satisfied he was wrong.
>
> (9) **The court is not at this stage concerned with the merits or demerits of any possible defence** to Dr Skuse's claim." (Emphasis added)

[44] The respondent, at para. 5 of his statement of claim, pleaded that the words meant and were understood to mean:

> "...
>
> (a) That the Plaintiff has threatened physical violence to the Defendant;
>
> (b) That the Plaintiff is a danger to society;
>
> (c) That the Plaintiff is likely to use physical violence against the Defendant in the future;
>
> (d) That the Plaintiff is likely to commit a criminal offence by injuring the Defendant;
>
> (e) That the Plaintiff has so terrified the defendant by threats of physical violence that the Defendant has found it necessary to take precautions to protect himself against the Plaintiff."

[45] The appellant, who pleaded justification, was required to assert the denotations he sought to justify and prove. In his defence at para. 5, he admitted that the words complained of could denote and were meant to bear the imputations stated in the respondent's statement of claim (paras. 5 a, c, d and e) in their natural and ordinary meaning. Save and except for para. 5b that the respondent was a danger to society, the appellant accepted the meaning asserted by the respondent in his pleadings.

[46] In ascertaining the meaning of the word foul, the learned judge, while he considered the dictionary meaning of the word, did not strictly rely on the dictionary definition as contended by the appellant. He went on to consider whether the word had a wider connotation and found that it did. His acceptance of that wider connotation and the approach taken in determining the meaning of the words used can be discerned on page 6 of the judgment. There, the learned judge considered two possible interpretations of the words "that the defendant was a danger to society", and ultimately rejected the meaning that counsel for the respondent urged him to accept. His reasoning was as follows:

> "…Miss Steadman has encouraged the court to find that by necessary implication of [sic] Mr. Innis had threatened the claimant and was likely to commit a criminal offence against him causing him to have to take measures to protect himself then the claimant was a danger to the society at large. This assertion can be countered in two ways, Firstly, it seems apparent that a person can be a danger to another individual or group of individuals yet not threaten any other members of society. Secondly, the words complained of did not admit to a wider context than the discussion between the complainant and the defendant and therefore ought not to be seen as holding any imputation as to the claimant's attitude to society in general."

[47] The learned judge further contemplated the meaning of the use of the words "foul language" and whether the word "bullshit" fell within its meaning. He found it prudent not only to consider its dictionary meaning but also to consider whether it had a wider definition. On page 11 of the judgment, the learned judge stated that he considered the word in keeping with the social context and evidence, as well as the perception of the hearer. The learned judge focused attention on the importance of determining foul language within the said social context. He found it to be grossly inappropriate to a high degree, as well as, based on the perception of the listener. He, however, was of the view that the language used was not foul language. The learned judge also indicated that the evidence before him did not show that either the appellant or another hearer (Mr

Samuels) suggested that they found the word offensive to such a high degree. But rather, they found the word "bullshit" to be "impolite and perhaps rude". Additionally, he found that nothing in the language of the respondent was threatening or implied a physical threat.

[48] The learned judge sought to establish a link between his finding of the meaning of the words and what each party urged him to find its meaning to be. He considered what the respondent averred the words meant to him, alongside the meaning ascribed by the appellant's admittance in his defence and plea of justification, and concluded that the words used could bear the meaning urged by the respondent. The learned judge went on to identify what in the evidence he accepted and why. In addition, he stated the implication of this acceptance in arriving at his decision. It was clear that while the learned judge accepted the respondent's account of the words used during the interaction, he was precise in his conclusion that despite this finding, he did not believe there was any great difference in substance. The learned judge made a finding of fact as to the credibility of witnesses and reliability of the evidence before him.

[49] Since the appellant admitted the meanings suggested in the respondent's statement of the case, save and except for the imputation that the respondent was a danger to society, the learned judge was well within his competence to make the finding that the words expressed in the impugned letter were defamatory. The approach of the learned judge in determining what the words meant was to put himself in the shoes of a reasonable reader, being mindful of the professional context in which they were said. Therefore, he employed the correct approach. He did, in fact, as Mr Stewart pointed out to this court, consider the context in which the words were said.

[50] It is my view that Mr Pagon's criticism that the learned judge limited his reliance to the dictionary meaning of the words was misplaced and inaccurate. Accordingly, this court sees no justification for deviating from the learned judge's decision regarding the meaning of the impugned words.

Did the respondent advance his case on what was designated "charge two" by the learned judge?

[51] Before proceeding to analyse the issue of the sting, and whether it left only two charges before the learned judge, one proven and the other unproven, I will first address whether, as contended by Mr Pagon, the respondent did not advance his case regarding foul language, designated as charge two by the learned judge. This panel queried whether counsel's argument was that the learned judge created pleadings on which he then made a finding. Counsel for the appellant answered in the affirmative. Lord Wolfe at pages 792 to 793 of **McPhilemy v Times Newspapers Ltd and others** [1999] 3 ALL ER 775, made clear what is required for pleadings. He stated:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. **Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.** This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction—Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required. As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historic interest." (Emphasis added)

[52] The key question before this court is whether the respondent "mark out" or clearly defined the scope of his case, making the nature of the dispute evident to the appellant

and all parties involved. In his writ of summons and endorsement, filed on 12 June 2000, the respondent explicitly stated his claim for libel against the appellant. He then proceeded to reproduce page 2 of Mr Thomas' (the appellant's) impugned letter, where the defamatory statement was made (see para. [5] above for the reproduced statement). Furthermore, in his statement of claim filed on 12 July 2000, the respondent reiterated the same statement in para. 3, identifying it as defamatory.

[53] Through his pleadings, the respondent advanced his case by referencing the foul and threatening language contained in the appellant's defamatory statement. Heedless of the respondent's pleadings referring to foul and threatening language, Mr Pagon's assertion that the learned judge created his own pleading on which he then made a finding is illogical. The respondent's pleadings clearly outlined the issue of foul and threatening language as an integral part of his case.

[54] In response to the claim presented by the respondent, the appellant, in his defence at para. 3 stated that he "admits that the words complained of in paragraph 3 were published to Mr. Gary Turnbull but denies that they were false or malicious as alleged and avers that they are true in substance and in fact". Further, the appellant, in his "[p]articulars of threatening and menacing [m]anner displayed by the Plaintiff", itemised at number 3. what he considered a threatening and menacing manner and expressed the following "[a]ddressing the Defendant in a **hostile and threatening manner** in the **following terms** '**What kind of bullshit** you talking in the meeting?'" (emphasis supplied). From these pleadings, it is pellucid that the appellant knew very well, the case that was being advanced by the respondent and the case that he needed to meet. It, therefore, lies ill in his mouth to now argue that he was at any point taken by surprise or was prejudiced in any way. In fact, the appellant fully demonstrated his awareness of the respondent's case when, in his defence, he averred that he was addressed by the respondent in a hostile and threatening manner when the word "bullshit was used".

[55] I disagree with Mr Pagon's argument that the respondent did not advance a case in respect of charge two. The respondent had distinctly raised this issue in para. 3 of his

statement of claim, by reiterating the appellant's claim that he had used foul and threatening language. The matter, therefore, did arise for the learned judge's assessment, entitling him to make a finding as he did.

[56] I will, therefore, proceed to consider the case at bar on the basis that the learned judge had before him a case advanced in respect of charge two.

Section 7 defence of justification

[57] Having determined the meaning of the words, the learned judge then went on to determine whether the impugned utterances made by the appellant "contained three distinct charges". Since, in this case, there is much discourse on the provisions and implications of section 7 of the Act, it is perhaps useful at this point to reproduce the section. Section 7 provides that:

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

[58] The law as it relates to defamation and the application of section 7 of the Act, is well settled. The provision in section 7 is limited and obtains only where a defendant is faced with two or more separate and distinct charges that he seeks to justify as substantially true. However, if the statement as alleged by the appellant contains only a single charge then the appellant cannot cloak himself by reliance on the section 7 defence. In contemplation of whether there are distinct charges, in **Gladstone Wright,** Morrison JA (as he then was) stated at para. [80] that:

> "As an example of the operation of this rule, Gatley instances the following (at para. 11.13): 'If, therefore, the article alleges that the plaintiff (a) committed murder, (b) committed adultery and (c) on one occasion falsified his expenses and the plaintiff sues only in respect of imputation (c), then the section has no application'."

[59] The enunciation of Lord Justice O'Connor in the decision of **Polly Peck** at page 94 is instructive in this regard:

> "The first principle is that where a plaintiff chooses to complain of part of a whole publication the jury are entitled to see and read the whole publication; this is unchallenged and has been the law for well over 150 years. **What use are the jury permitted to make of the material now in evidence?**
>
> **There is no doubt that they can use it to provide the context to the words complained of when considering whether any, and if so what, defamatory meaning is disclosed.** A classic example of the context deciding the meaning of words to be different to their face value meaning is found in *Thompson v Bernard* (1807) 1 Camp 48, 170 ER 872, a slander action where the plaintiff complained that the defendants said of him: 'Thompson is a damned thief; and so was his father before him; and I can prove it.' The evidence was that the defendant added: 'Thompson received the earnings of the ship, and ought to pay the wages.' Lord Ellenborough CJ directed a nonsuit on the ground that it was clear from the whole conversation that the words did not impute a felony, but only a mere breach of trust.
>
> **What other use can be made of the material depends on its nature and on the defences put forward by the defendant.**
>
> **The second principle is that where a publication contains two distinct libels, the plaintiff can complain of one and the defendant cannot justify that libel by proving the truth of the other. The difficulty with this apparently self-evident proposition is in deciding whether the two libels are indeed distinct in the sense that the imputation defamatory of the plaintiff's character in the one is different from the other.**
>
> The third principle is that it is for the jury to decide what the natural and ordinary meaning of the words complained of is. This simple proposition has become enmeshed in the question how far the plaintiff can, by his pleading, limit the meanings which may be canvassed at the trial.

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

[60] In determining the question to be answered, the learned judge considered whether the statement gave rise to three separate and distinct charges, thereby affording the appellant the defence of justification. The learned judge reiterated that the appellant admitted in his defence that the words and actions of the respondent could bear the imputation in paras. 5a, c, d & e. Considering that the appellant's defence to the defamatory claim was one under section 7, it could reasonably be inferred that the appellant, in essence, conceded the point that his statement supported more than one charge. This is also evident in how the issues were crafted for the learned judge's consideration. In the agreed statement of issues, filed on 6 April 2004, the parties agreed *inter alia*, that the court was to consider and determine the following:

1. The manner in which the respondent approached the appellant, after the meeting of 1 December 1999.

2. Whether the words written and circulated by the appellant were libellous.

3. Whether the words admittedly spoken by the respondent to the appellant, (or words the appellant claimed were spoken) would cause the appellant to fear for his personal safety.

4. Whether the respondent, at the meeting on 1 December 1999, behaved in such a manner towards the appellant to cause the appellant to fear for his personal safety.

5. Whether there was the threat of physical violence likely to be caused.

6. Whether the respondent was likely to commit a criminal offence by injuring the appellant.

7. Whether the appellant, being terrified by threats of physical violence, found it necessary to take precautions to protect himself.

[61] Additionally, as highlighted by Mr Stewart, the appellant, by his own words and admission in his witness statement agreed that there were multiple charges arising from his defamatory statement. In para. 17, he admitted that in the impugned letter, he intended to refer to the respondent's actions as follows:

> "…I do admit that in the last three (3) sentences of that letter in which I refer to Mr. Innis, that I intended to refer to the actions of the Claimant in: -
>
> (a) unexpectedly and unnecessarily approaching and accosting me;
>
> (b) speaking to me in a loud, angry and menacing voice;
>
> (c) using foul language to me;
>
> (d) causing me to fear for my personal safety because of the menacing way in which he approached me;
>
> (e) that I feared that he would use physical violence upon me;
>
> (f) that I was so fearful that I found it necessary to take certain precautions to protect myself against any possible attempt by him subsequent to his outburst."

[62] Consequently, the appellant's admissions also support, as was discerned from the language of the learned judge, that the defamatory words in their clear implication were that, firstly, the appellant was approached in a threatening and menacing manner, secondly, that foul and threatening language was used to the appellant and thirdly, that as a result of the first and second, the appellant had to take precautions for his safety.

[63] I, therefore, agree with Mr Stewart that the learned judge's findings were supported by the evidence and material submitted by the parties, which he utilised to give context to the words complained of (see **Polly Peck**). It is my view that there was indeed ample material before the learned judge to support his findings of three separate

and distinct charges. Therefore, the appellant failed to convince this court that the learned judge was plainly wrong.

[64] The learned judge also considered whether a common sting would justify the allegations as substantially true. He conducted this exercise by minutely examining the appellant's allegations made in the impugned letter and the circumstances giving rise to the confrontation between the parties on the 1 December 1999. In particular, the learned judge dissected the evidence proffered by the appellant at the trial in support of the defence of justification. The learned judge had commented that it was surprising that the appellant admitted that the imputation ascribed by the respondent's words and action could bear the imputation as pleaded by the respondent and that the "…line of defence is significant as it narrows the issues quite sharply". Ultimately, at page 12 of the judgment, the learned judge found that the word "bullshit" did not qualify as foul or threatening language, accordingly, "[i]n the premises the defence of justification fails in relation to this allegation". The learned judge also enunciated that no evidence was put before him in relation to the allegation that the appellant found it necessary to take measures to ensure his personal safety. Therefore, "[i]n this matter once the [appellant] has admitted that the words complained of could mean the imputations set out in sub-paragraphs a, c, d & e of paragraph 5 then any failure of the defence is decisive in the question of liability".

[65] On query by this court, as to which side could it be said that the learned judge favoured concerning the words used and his interpretation of them, Mr Pagon submitted that, ultimately, he found in favour of the appellant. This was so since he acknowledged that the respondent in discourse between the parties was forceful. Given the context within which the words were spoken, the learned judge found that it was done in a threatening manner. It then meant that the respondent's entire conduct, including his discourse, was threatening. Consequently, he used foul and threatening language, forming part and parcel of the one matrix.

[66] Having regard to the foregoing arguments, Mr Pagon submitted that the learned judge erred by taking into consideration whether or not the defence of justification was established. Counsel maintained that he ought to have applied the objective standard in determining whether "bullshit" was foul language. He advanced that the learned judge, instead, considered whether the parties found the word offensive on the face of the evidence. Counsel relied on paras. 61 and 62 of **Stocker v Stocker,** where the court expressed:

> "61. In light of my conclusion as to the correct meaning to be given to the words, "tried to strangle me", section 5 of the Defamation Act 1952 must occupy centre stage. It is beyond dispute that Mr Stocker grasped his wife by the throat so tightly as to leave red marks on her neck visible to police officers two hours after the attack on her took place. It is not disputed that he breached a non-molestation order. Nor has it been asserted that he did not utter threats to Mrs Stocker. Many would consider these to be sufficient to establish that he was a dangerous and disreputable man, which is the justification which Mrs Stocker sought to establish. Mitting J considered that the meaning of the statement that the claimant was arrested on numerous occasions, in the context of the other statements, was that he represented a danger to any woman with whom he might live. I see no warrant for adding that dimension to the actual words used by Mrs Stocker in her various Facebook postings.
>
> 62. Even if all her allegations were considered not to have been established to the letter, there is more than enough to satisfy the provision in section 5 of the 1952 Act that her defence of justification should not fail by reason only that the truth of every charge is not proved, having regard to the truth of what has been proved."

[67] In keeping with the authority of **Stocker v Stocker**, Mr Pagon submitted that relevant to the interpretation of the meaning of the word was the context within which it was made. Therefore, the context was a vital issue for the learned judge's consideration. Counsel submitted that the authorities had cautioned against the use of dictionary meanings as the "definition of a word is not fixed by a technical and linguistically precise meaning divorced from the context in which it was made". There was, he contended, an

inescapable conclusion that "bullshit" was foul language. This submission was further developed in his written submissions at para. 38 which outlined the following:

> "…
>
> i. The word bullshit on the face of it is accepted to be derogatory;
>
> ii. The professional setting in which the word was uttered;
>
> iii. The use of the word was meant to convey an impression that the appellant was speaking 'utter garbage'. It was meant to be understood as offensive especially in circumstances where at the time the two men did not know each other.
>
> iv. This was not a casual conversation between friends where the use of the word could be understood to have been used as the punchline of a joke; and
>
> v. It was accepted that the words were spoken by the respondent in an aggressive or rather 'forceful manner'."

[68] If Mr Pagon's argument on this point is accepted, charges one and three would effectively merge for consideration. In that case, could the learned judge's conclusion that the appellant may have perceived the respondent's approach as threatening and menacing also imply a finding that the appellant felt compelled to take precautions for his personal safety under the circumstances? If so, this raises the further question of whether the remaining charge (charge two) caused material harm to the respondent's reputation. This issue needed to be addressed, as the learned judge determined that charge two did not meet the requirements for the defence of justification.

[69] In the case of **Alin Turcu v News Group Newspapers Limited** [2005] EWHC 799 (QB), Justice Eady at para. 111 stated:

> "**In other words, one needs to consider whether the sting of a libel has been established having regard to its overall gravity and the relative significance of any elements of inaccuracy or exaggeration.** Provided these criteria are applied, and the defence would otherwise succeed, it is no part of the court's function to penalise a

> defendant for sloppy journalism – still less for tastelessness of style. I must set all that to one side, including what Mr Price described as the 'orgy of self-congratulation', and focus only on substance." (Emphasis added)

[70] The common sting, suggested by Mr Pagon, was that the threatening behaviour of the respondent directed at the appellant led to the appellant's belief that his safety may be compromised. The context of the words was to be taken from the entire publication since the context may have a bearing on the meaning attributed to the words complained of. Counsel's argument to this court, that when taken within its proper context, a party who behaves in a threatening and menacing manner would cause any reasonable person to find it necessary to take measures to avoid any physical violence being meted against him, is flawed. It is flawed because taking steps to secure his safety, if, indeed, he had undertaken any such recourse, was an afterthought. This occurred after the confrontation had long passed; this is the reasonable interpretation, given the context.

[71] As the learned judge found, I, too, do not consider the charge of the respondent acting in a threatening and menacing manner and that the appellant found it necessary to take certain precautions for his safety, as having the same effect, in essence, or imputing the same gist concerning the respondent's actions. The charge that the respondent approached the appellant in a threatening and menacing manner does not impute the likelihood of the respondent causing future physical harm or the criminal implication of an assault. Considering one's approach to be threatening and menacing conveys that the attitude or body language when the individual is coming nearer to you is forceful. The learned judge found as follows:

> "…
>
> 4. When the defendant greeted persons at the end of the meeting he approached the claimant and the claimant confronted the defendant about the statements that he made in the meeting.

> 5. On a balance of probabilities I find that the words reported by the claimant are the most accurate reflection of what the claimant said to the defendant. I am not of the view that [t]here is a great difference in substance between the words that Mr. Innis said that he used and those Mr. Thomas thought he used.
>
> 6. The claimant spoke in a strong and forceful manner to the defendant. In evidence the claimant said he intended it to be a forceful statement."

[72] The learned judge found that what the appellant perceived as a threatening and menacing manner, was the strong and forceful way in which the respondent decided to voice his displeasure about the decision relayed at the meeting. Then, the parties were not acquainted with each other. However, on 1 December 1999, the appellant subsequently became aware of who the respondent was and, on 13 December 1999, wrote in his impugned letter to the respondent's managing director about the respondent's conduct on the previous occasion. In so doing, he stated his objection to the respondent's behaviour. He then, at that point, voiced that "[i]n light of what I consider to be Mr Innis' foul and threatening language, I have found it necessary to take certain precautions in the interest of my personal safety". The forceful manner in which the respondent chose to voice his opinion that he disapproved depicts how strongly he felt, but that was not part and parcel of the likelihood of physical harm. Furthermore, nothing in the words stated, or any evidence before the court, supported the appellant's belief that he was in fear of any physical harm being meted out to him. What strengthened this perspective was the fact that it was almost two weeks later that the appellant put words to paper, conveying fear for his personal safety, his alleged fears, therefore, rung hollow.

[73] Charge three, in my view, clearly imputes that the appellant, based on the respondent's actions on 1 December 1999, felt it necessary to take precautions to secure his person. In no uncertain terms, he had expressed that the respondent's action had him apprehending physical harm. Taken within context as urged by Mr Pagon, charge three was a serious allegation to make of someone within a professional setting. The

suggestion was that an individual, such as the respondent. who had been employed in a senior management position, was likely to commit physical violence and commit the criminal act of assault. This allegation was likely to cause harm not only to the respondent's reputation as an individual but also to his professional reputation, which the learned judge assumed in law to be good.

[74] Consequently, while charges one and three may be related, they are discrete charges. The appellant was not entitled to justify charge three by relying on proof of charge one. The statement in question was not interpreted solely to suggest, as the appellant argued, that the respondent's threatening behaviour led to a belief that the appellant's safety might be at risk. Instead, the clear implication of the statement was that the respondent was not only capable of approaching the appellant in a threatening manner but also of using abusive or threatening language and committing physical harm or the criminal act of assault.

[75] What, then, was the implication of the sting analysis on the three charges found by the learned judge? As more than one charge was clearly established on the evidence, it was, therefore, incumbent on the appellant to satisfy the court that the charges not proven and which remained unjustified, did not materially injure the respondent's reputation. But did the appellant attempt to substantiate his claim that the respondent's actions led him to consider taking precautions for his personal safety?

[76] As Mr Stewart correctly noted, the appellant could have demonstrated or provided evidence of steps taken to protect himself. However, no evidence was presented to show that he had done so. Even if the appellant argued that charge one was proven and part of charge three was also established, amounting, as counsel suggested, to two-thirds of the claim, it would still be challenging to argue that the unproven portion of charge three did not significantly harm the respondent's reputation. This is particularly true, given that, as the learned judge rightly observed, the imputation involved suggested criminal behaviour.

[77] Accordingly, it is my view that the learned judge was correct to hold that this defamation claim had three distinct and separate charges, for which the appellant failed to establish the plea of justification, as it related to the second and third charges that caused injury to the respondent's character.

Whether the learned judge's decision was plainly wrong

[78] The learned judge, mindful of the inconsistencies in both parties' evidence of what transpired, found that on the agreed facts and the conceded meaning of the words, it was apparent that criminal actions and physical violence could be imputed against the respondent. He had also given due weight to the professional standing of the respondent as a senior manager. On these bases, he ultimately found the respondent's evidence more credible and opined that the respondent had provided a better explanation of what transpired at the relevant time.

[79] Regarding whether Mr Pagon's mathematical analogy fails in terms of quantum, he argued that it does not, as establishing justification did not require every charge to be proven, only that they are substantially true. He identified two key aspects: first, that substantial truth is sufficient for justification, and second, that if the charges share a common sting, the defence is satisfied if proven. He contended that charges one and three shared a common denominator, thereby establishing the sting. Alternatively, he suggested that by fully proving one charge and partially proving another, the learned judge could and should have determined that the impugned statements were substantially true.

[80] Having pronounced on whether the learned judge could have found there to have been three separate and distinct charges on the evidence before him and that the sting analysis was of no aid to the appellant, Mr Pagon's submission to this court, therefore, fails. As the learned judge found that the defence failed for two out of three charges, what was left before him was to decide the severity of the impact of the unjustified defamatory statements on the respondent's reputation. To what end could Mr Pagon's mathematical analogy have assisted the decision of the learned judge and its effect on

the ultimate determination to be made? In my view, that analogy would only have been useful when considering quantum, since it may affect how severe the defamatory statement was on the respondent's reputation.

[81] Even if, as argued on the appellant's behalf, what remained was charge one proven and a portion of charge three proven, which was, at most, two-thirds of a whole, it would be difficult to establish that the words for charge three (not proven to be true) did not materially injure the respondent's reputation, especially with the criminal imputation as rightly identified by the learned judge.

[82] Having considered the evidence, the reasons for the judgment of the learned judge, and the submissions of both counsel and authorities in support, I believe that the learned judge's findings of fact cannot be impugned. Having regard to the evidence before him and the benefit he had of observing the witnesses' demeanour, he was entitled in the circumstances to conclude that the appellant did cause injury to the respondent's repute.

Issue 2: Whether the award of $150,000.00 as general damages was reasonable

Appellant's submissions

[83] As to the quantum of damages, Mr Pagon submitted that within the proper context and its importation into the year 2023, if the award of $150,000.00 was made today, he would have been unable to say that it was excessive. However, within the context of the year of the award, 2005, the award was certainly a substantial amount of money. Counsel indicated that the award within today's context ought to be nominal since the defamatory words complained of concerned the respondent in his personal capacity and not his professional capacity. He contended that the evidence demonstrated that the respondent advanced in his career and remained in his post until the established body was closed down. Therefore, the respondent suffered no harm whatsoever. Accordingly, the award of damages within the context of 2005 was excessive, but would serve as nominal damages in 2023.

[84] Finally, Mr Pagon posited that in the absence of a ground of appeal challenging the learned judge's decision not to include an award of interest, this court ought not to entertain any such submission from the respondent. In this regard, reliance was placed on para. [121] of the authority of **Gladstone Wright**.

Respondent's submissions

[85] Mr Stewart addressed the issue of damages, citing the case of **Roy K Anderson v Dwight Clacken** [2023] JMSC Civ 42. In para. 34 of his written submissions, he stated that, at para. [84] of the judgment, "A. Nembhard J accepted the authority of ***Emmanuel v Lawrence*** [sic] Civil Suit No. 448 of 1995 as identifying six factors which are to be taken into account in awarding damage in defamation proceedings". He submitted that while the learned judge in the instant appeal identified and considered some of the recommended factors, he failed to consider or attach sufficient weight to other relevant factors, such as: -

> "1) The distribution list was large enough to cause the Respondent distress and injury to his feelings since it included nineteen (19) influential persons;
>
> 2) The fact that the defamatory letter was penned after the Appellant found out who the Respondent was;
>
> 3) The Appellant failed to issue an apology;
>
> 4) The Appellant maintained a plea of justification in relation to the charges of threatening language and taking precautions in the interest of his personal safety and yet led no evidence to support those charges; and
>
> 5) The learned trial judge failed to consider whether any award in previous cases would have appreciated due to the passage of time."

[86] Mr Stewart submitted that the case of **David Sykes v Guardian Insurance Brokers Limited and Brian M Self** (unreported), Supreme Court, Jamaica, Suit No CL S115, judgment delivered 3 December 1999 ('**David Sykes**') relied on by the learned judge as most comparable, was not. In that case, the publication was limited to only four

persons, and in this case, the publication was made to a wider audience of at least 19 persons. Additionally, the allegations in the case at bar were equally or more serious in comparison to those in **David Sykes**. Mr Stewart submitted that in the circumstances, the learned judge should have awarded $600,000.00, the same amount as awarded in the **David Sykes** case.

[87] Mr Stewart also advanced that in the respondent's writ of summons, he had claimed both damages and interest; however, the learned judge did not make an award for interest. On that basis, counsel asked for the judgment to be varied to include an award for interest as from the date of the cause of action to the date of the judgment. Incidentally, the relevant rate of interest at the time was 12% per annum on judgment debts.

Discussion and analysis

[88] The position in law, per the authority of **The Jamaica Observer Limited v Orville Mattis** [2011] JMCA Civ 13, is that the "award of damages may only be interfered with if its inordinately high or inordinately low". With that in mind, regard must be had to the severity of the defamatory statement on one's reputation. Harris JA, in the case of **The Jamaica Observer Limited v Orville Mattis** at para. [28], stated:

> "The severity of the libel is a highly significant criterion in the making of an appropriate award for injury to one's reputation. In ***John v MGN Ltd*** [1997] Q.B. 586 at page 607, Sir Thomas Bingham MR said:
>
> > 'In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be'."

[89] Additionally, at para. [30], the applicable test for assessing general damages in defamation claims was highlighted as follows:

> "…As I see it, where the allegations are grave, in assessing general damages in an action for libel, the applicable test ought to be that which was propounded by Forte P, in ***Gleaner Company Ltd and Anor v Abrahams***, which he put in this way: 'Could a reasonable jury have thought that this award was one which was reasonable to compensate the plaintiff and to re-establish his reputation?'"

[90] Following his finding of liability against the appellant, the learned judge correctly identified the relevant factors to consider when assessing the damages to be awarded to the respondent. Despite the respondent's testimony regarding his experiences, the judge was justified in concluding that the defamatory statement made by the appellant did not impact the respondent's ability to retain his position as president of the Cable Operators Association or secure alternative employment after SIHL's closure. There being no exceptional circumstances, the sum of $150,000.00 awarded by the learned judge to vindicate the injury to the respondent's reputation was more than reasonable in the circumstances. I, therefore, see no basis for disturbing the quantum of the award.

[91] The respondent has submitted that his "[w]rit of summons and endorsement" filed on 12 June 2000 "claimed damages and interest at such rate and for such period as this Honourable Court deems just". Despite the claim for interest, the learned judge did not include an award of interest in his final judgment. The respondent is now asking this court to vary the judgment to include an award of interest on the sum awarded "from the date on which the cause of action arose to the date of Judgment".

[92] The award of damages in the sum of $150,000.00 was made some 24 years ago, at which time it could have been considered a princely sum. The fact is that the effluxion of time and changes in the cost of living have rendered it a paltry sum in terms of its value today. Mr Stewart has entreated this court to increase the value of the award and also to award interest on said award of damages. An award of interest could result in a swelling of any sum awarded by an interest rate of 12% per annum for the relevant period. In contemplation as to whether the court has the jurisdiction to grant the order

sought, I am guided by the judgment of Morrison JA in **Gladstone Wright**. The learned judge of appeal, at para. [120], noted that:

> "[a]lthough the point does not appear to have been discussed in any of the decisions to which we were referred in this appeal, it may not be irrelevant to note that no order for interest was included in the final judgment entered by the trial judge sitting without a jury…"

[93] Morrison JA then highlighted three such decisions, namely, **The Gleaner Company Limited and Dudley Stokes v Eric Anthony Abrahams** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 70/1996, judgment delivered 31 July 2000, **CVM Television v Fabian Tewarie** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 46/2003, judgment delivered 8 November 2006 and **Edward Seaga v Leslie Harper** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 29/2004, judgment delivered 20 December 2005. At the said para. [120] he further enunciated:

> "…**It certainly seems to me that, in a libel case, there is some force in the consideration that, to the extent that the jury's (or judge's) award may be taken to reflect the court's view of what constitutes appropriate compensation to the claimant up to the time of the award, an order for the payment of interest in addition to damages may involve an element of double compensation.**" (Emphasis added)

[94] Further at para. [121] the learned judge of appeal restated from Chadwick LJ in **McPhilemy v Times Newspapers Ltd** (No 2) [2001] EWCA Civ 933, [2002] 1 WLR 934, as follows:

> "… '[t]he court must resist the temptation to substitute its own view for that of the judge unless satisfied that his discretion has been exercised on a basis which is wrong in law, or that the conclusion which he has reached is so plainly wrong that his exercise of the discretion entrusted to him must be regarded as flawed'. **In the absence of a ground of appeal challenging the judge's decision to include an order**

> **for payment of interest in his judgment in this case, therefore, I do not think it would be right for this court to second-guess the exercise of his discretion of its own motion.**" (Emphasis added)

[95] While being cognizant of this court's power pursuant to 2.14 (a) and (b) of the Court of Appeal Rules to "vary any judgment made or given by the court below… give any judgment or make any order which, in its opinion ought to have been made by the court below…" this discretion ought to be exercised judiciously. It was observed that no ground of appeal was filed by the respondent in his counter-notice of appeal, challenging the learned trial judge's decision to exclude the award of interest. Further, no authorities have been presented to convince me that, in the circumstances, such a recourse would be justified. It is, therefore, important to bear in mind that an award in defamation cases usually reflects the trial court's view of what measure of damage is appropriate compensation up to the time of the award. The measure of the award and the decision to award interest or not was entirely within the learned judge's discretion; I am not persuaded that a variation of the learned judge's award is justified. In light of this and all the circumstances of the case, I would recommend that that there be no order made to vary the learned trial judge's award to increase the quantum of damages or to include an award of interest. I would also recommend that the appeal be dismissed for the foregoing reasons.

[96] It is just that each party bear his own costs of the appeal to reflect that the appellant did not succeed on the appeal, nor did the respondent succeed on the counter-notice of appeal.

F WILLIAMS JA

ORDER

1. The appeal is dismissed.

2. The counter-notice of appeal is dismissed.

3. The orders made by L Pusey J (Ag) on 20 April 2005, are affirmed.

4. Each party shall bear his own costs of the appeal and counter-appeal.