

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVP2015/0007

BETWEEN:

**[1] JENNY LINDSAY
[2] JENNY LINDSAY & ASSOCIATES**

Appellants

and

**HARRIET CARTY
(Representative of the EPRESENTATIVE OF THE ESTATE OF
THOMAS EDWARD CARTY)**

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Paul Webster
The Hon. Mr. V. Dexter Theodore

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. Jenny Lindsay for the Appellants
Ms. Navine Fleming for the Respondent

2021: July 30;
December 7.

Civil Appeal-Slander - Defamation Actionable per se - Presumption of injury to reputation - Principles governing appellate court's interference with findings of fact by lower court - Whether master erred in finding that the slander complained of caused the appellant to suffer no or minimal actual damage - Whether master erred in the assessment and award of damages - Whether master failed to place sufficient weight on aggravating conduct of respondent - Whether judge erred in awarding prescribed costs vs assessed costs - Costs on discontinuance of claim

Thomas Carty - now deceased - instituted a claim against the appellants, Ms. Jenny Lindsay, an attorney-at-law and her business, Jenny Lindsay & Associates, alleging damages for

breach of contract. He claimed that Ms. Lindsay collected funds for legal services but failed to provide the same. Jenny Lindsay counterclaimed seeking damages for slander, on the grounds that in the days prior to the claim, Mr. Carty published the slanderous statements "Jenny Lindsay is a thief", "Jenny Lindsay has not done anything on my file" and "other lawyers are saying Jenny Lindsay is no good" to her clients and members of the public. Ms. Lindsay claimed that the slander resulted in serious damage to her personal and professional reputation and caused her great distress and embarrassment. The matter eventually went to mediation, and a mediation agreement was arrived at which included, inter alia, entry of judgment on Ms. Lindsay's counterclaim with damages to be assessed. At the assessment of damages hearing, Ms. Lindsay was awarded \$15,000.00 in damages for slander. Being dissatisfied with the judgment and regarding the amount awarded as manifestly low, Ms Lindsay appealed to this Court. In summary, Ms. Lindsay's proffered five grounds of appeal: (i) the learned master erred in fact when she determined that the slanderous words caused Ms. Lindsay no or minimal actual harm; (ii) the learned master erred in law and fact in assessing the award of damages; (iii) the learned master failed to give sufficient weight to certain elements of the respondent's conduct; (iv) the learned master erred in awarding prescribed costs on Ms. Lindsay's counterclaim rather than assessed costs on the whole proceedings; (v) no costs were made on the discontinuance filed by the respondent.

Held: dismissing the appeal and affirming the award of damages for slander in the sum of \$15,000.00; ordering the appellant to pay the respondent's costs of the appeal being two-thirds of the prescribed costs in the counterclaim and making an order as to costs on the assessment of damages hearing in the court below, that:

1. It is a well-established principle that findings of fact made by lower courts should not be disturbed by an appellate court except in very limited circumstances. To be overturned on appeal, a finding of fact must be one which no reasonable judge, based on the evidence before him, could have reached. This principle extends to instances where the findings of fact are made on written rather than oral evidence. Accordingly, where the findings of fact and the inferences drawn therefrom involve the trial judge's assessment of different factors, the correctness of the assessment is not merely undermined by the appellant challenging the weight given to any particular factor unless it is shown that the judge was clearly wrong. It is pellucid from a perusal of the judgment of the lower court that the master embarked on a thorough evaluative exercise of the evidence before her on paper and in so doing acknowledged that the defamatory statements did hurt Ms. Lindsay's feelings and caused her embarrassment and distress however there was no or minimal actual damage to her reputation and business. Additionally, the law is clear that while there is an irrebuttable presumption that reputational damage is presumed in cases of slander which are actionable per se, pecuniary loss caused by the publication of the slanderous words may be recovered in addition to general damages but must be proved. The master's observation that there was no proof of a 'drop off of work' was merely that, an observation in response to Ms. Lindsay's assertion that she suffered a 'drop off of work' which implies pecuniary loss. The master did not require Ms. Lindsay to prove a 'drop off of work' nor did the learned master consider it as a factor

in making the award of general damages. Consequently, there is nothing from the master's findings which warrants appellate interference.

Lachaux v Independent Print Ltd and Another [2019] UKSC 27 considered; **Fage UK Limited v Chobani Limited** [2014] EWCA Civ 5 applied; **Langsam v Beachcroft LLP** [2012] EWCA Civ 1230 considered; **Wheeldon Brothers Waste Limited v Millennium Insurance Company Limited** [2018] EWCA Civ 2403 applied; **Perry v Raleys Solicitors** [2019] UKSC 5 applied; **DB v Chief Constable of Police Service of Northern Island** [2017] UKSC 7 considered; **Dow Jones & Co Inc v Jameel** [2005] EWCA Civ 75.

2. Similarly, the appellate court is chary to interfere with the assessment of damages by a lower court unless it is satisfied that the trial judge erred in principle or, having regard to all the circumstances of the case, made an award so inordinately low or unwarrantably high that it cannot be permitted to stand. This court is not justified in substituting a figure of its own simply because it would have awarded a different figure if it had tried the case at first instance. There is no precise arithmetical formula which a court can employ when assessing damages in defamation however the guiding principle is that the award must be proportionate to the injury and no more than is necessary to compensate for damage to reputation; vindication of good name; and the distress, hurt and humiliation caused by the defamatory publication. The master considered all the circumstances including Ms. Lindsay's position and standing; the nature of the libel; the mode and extent of the publication; the impact on Ms. Lindsay's feelings, reputation and career and the respondent's motive of malice and weighed them against each other to arrive at a global figure inclusive of aggravated damages. The master engaged in a careful account of the evidence, applied correct legal principles and adopted a correct approach to the assessment of damages. Accordingly, there is no basis for this court to disturb the award.

Calix v Attorney General of Trinidad and Tobago [2013] UKPC 15 applied; **Cairns and Modi; and KC and MGN Limited** [2012] EWCA Civ 1382 considered; **Alphonso et al v Ramnath** British Virgin Islands Civil Appeal No. 1 of 1996 applied; **Lachaux v Independent Print Ltd and Another** [2019] UKSC 27 considered; **Bray v Ford** [1896] AC 44 at 53 considered; **John v MGN Limited** [1997] QB 586 considered; **Sir Kevin Barro MP et al v Jane Collins MEP** [2017] EWHC 162 (QB) applied; **Phonographic Performance Limited and Andrew Ellis Trading** [2018] EWCA Civ 2812 considered; **Bristol v St. Rose** [2005] ECSCJ No. 268 considered.

3. Ms. Lindsay contended that the learned master failed to give any or any sufficient weight to certain factors in assessing damages. As enunciated above, a challenge to the weight the master gave to certain elements is not enough to undermine the correctness of the master's evaluation. It must be shown that the master was plainly wrong or reached a conclusion not supported by the evidence. It was clear that the master made a thorough examination of all factors. Critically, Ms. Lindsay failed to present any evidence of the other factors such as Mr. Carty's threats to kill her, which she claims the master failed to consider. Therefore there was no basis on which this ground of appeal could succeed.

Manzi v King's College NHS Foundation Trust [2018] EWCA Civ 1882 considered; **Langsam v Beachcroft LLP** [2012] EWCA Civ 1230 considered.

4. The appellate court is constrained from interfering with the judge's exercise of the discretion in the lower court on costs matters unless it is satisfied that the conclusion on costs was not open to him to make. There was nothing to show that the master incorrectly exercised her discretion in awarding prescribed costs on Ms. Lindsay's counterclaim as opposed to assessed costs on the whole proceedings. In the same vein, the court has a discretion whether or not to order costs on the discontinuance of a claim and the absence of such an order, having regard to all the circumstances, is not an indication of an error on the part of the master. Notwithstanding, having regard to Rule 37.6 (1) of the Civil Procedure Rules 2000, the appropriate costs order on the discontinuance is prescribed costs and not assessed costs. Consequently, there is no merit in these grounds of appeal. However, in the exercise of this court's discretion, costs were awarded on the assessment of damages hearing which was not dealt with in the judgment of the court below.

R (Parveen) v Redbridge LB [2020] EWCA Civ 194 applied; Rule 64.4 of **the Civil Procedure Rules 2000** considered; Rule 37.6 (1) of **the Civil Procedure Rules 2000** applied.

JUDGMENT

Introduction

- [1] **BAPTISTE JA:** The appellant, Jenny Lindsay, an attorney at law, was awarded \$15,000.00 by the Master upon an assessment of damages for slander. The slanderous words in respect of which the award was made were: "Jenny Lindsay is a thief", "Jenny Lindsay has not done anything on my file" and "other lawyers are saying Jenny Lindsay is no good". Ms. Lindsay regards the amount awarded as manifestly low and has sought to persuade this court that the assessed damages should be increased. In that regard she cited alleged errors of fact and law and the insufficiency or lack of weight the master attached to various matters in the assessment. Also challenged, was the exercise of the master's costs discretion.
- [2] The respondent's counsel, Ms. Fleming, propounded in favour of the rectitude of the master's assessment and invited this Court to dismiss the appeal. Learned counsel contended that the master applied a fair and proper approach to the assessment of damages, took all the proper elements of damage into account and awarded fair

and reasonable compensation having regard to all the circumstances of the case. Further, the award was proportionate to the injury to Ms. Lindsay's reputation and the master did not take into account any irrelevant consideration. The findings of fact were based on the evidence and the appellate court should not interfere.

Background

- [3] By way of contextual background, Thomas Carty ('Carty') - now deceased - instituted a claim against Ms. Lindsay alleging damages for breach of contract, asserting that she collected funds for legal services but failed to provide the same. Ms. Lindsay counterclaimed seeking damages for slander, on the grounds that in the days prior to the claim, Carty published the slanderous statements to her clients and members of the public, resulting in serious damage to her personal and professional reputation, great distress and embarrassment. The matter was mediated, and a mediation agreement was arrived at upon terms that included an apology by Carty, the discontinuance of his claim and entry of judgment on Ms. Lindsay's counter-claim with damages to be assessed. The assessment of damages was conducted on witness statements, which stood as evidence in chief, without cross-examination, and on written submissions.

The Appeal

- [4] The appeal essentially represents an invitation to the Court to interfere with the master's exercise of discretion in awarding damages, and as such, engages the well-established principles governing appellate interference with such an exercise. For reasons articulated in cases of the highest authority, an appellate court is chary about interfering with the award of damages which commends itself to an assessment by a judge. Before an appellate court can interfere with such an award, it will be required "to be satisfied that the trial judge erred in principle or made an award so inordinately low or so unwarrantably high that it cannot be permitted to stand."¹

¹ Lord Kerr in *Calix v Attorney General of Trinidad and Tobago* [2013] UKPC 15 at paragraph 28.

- [5] Ms. Lindsay advanced three grounds of appeal against the master's damages award and two grounds in respect of costs. Before considering the grounds, it would be instructive to consider the applicable principles of law pertinent to damages in a defamation action and the purpose of general damages in respect thereof.
- [6] In **Lachaux v Independent Print Ltd and Another**,² Lord Sumption stated that the tort of defamation is an ancient construct of the common law. He explained that the law distinguishes between defamation actionable per se and defamation actionable only on proof of special damage. Libel is always actionable per se. Defamation actionable per se, comprised, in addition to all libels, four categories of slander which were assimilated to libel on account of their propensity to injure the reputation of the claimant. These categories included words imputing criminal offences and words tending to injure a person in his or her office, calling, trade or profession. In these cases, the law presumes injury to the claimant's reputation and awards general damages in respect of it. These are not merely compensatory but serve to vindicate the claimant's reputation. In an action for defamation actionable per se, damage to the claimant's reputation is presumed rather than proved. The presumption is one of law and is irrebuttable. Special damage, i.e. pecuniary loss caused by the publication, may be recovered in addition, but must be proved.
- [7] The law of defamation is there to protect a person's reputation. As stated by Cave J in **Scott v Sampson**³ "the law recognizes in every man the right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit." This vintage statement of Cave J has not diminished with the passage of time; it continues to resonate in our modernity. Thus, in **Lachaux**, Lord Sumption stated that the gist of the tort is injury to the claimant's reputation and the associated injury to his or her feeling.

² [2019] UKSC 27. Paragraphs 1, 4 and 5.

³ (1882) 8 QBD 491.

- [8] The general principles which the court applies when assessing damages in defamation actions were addressed in **John v MGN Ltd.**,⁴ where Sir Thomas Bingham MR stated at 607 - 608:

“The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is [a] 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. [b] The extent of the publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.[c] A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place. It is well established that [d] compensatory damages may and should compensate for additional injury caused to the plaintiff’s feelings by the defendant’s conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way.”

- [9] Sir Thomas Bingham MR also stated that there could never be any precise arithmetical formula to govern the assessment of general damages in defamation.

- [10] An award of damages in defamation is required to serve one or more, and usually all, of three interlocking purposes of compensation: damage to reputation; vindication of good name; and the taking account of the distress, hurt and humiliation caused by the defamatory publication:

“These distinct features apply to every defamation case, but the emphasis to be placed on each will vary from case to case. Sometimes, for example, there may be very little demonstrable damage to reputation, but serious emotional distress; on other occasions, the need for public vindication will

⁴ [1997] QB 586.

predominate; in yet other cases the financial consequences of damage to the reputation of the individual may represent the most serious feature.”⁵

[11] In **Sir Kevin Barron MP v Vines**,⁶ Warby J stated at paragraph 21, that:

- i. “The existence and scale of any harm to reputation may be established by evidence or inferred. Often the process is one of inference, but evidence that tends to show that as a matter of fact a person was shunned, avoided or taunted will be relevant. So may evidence that a person was treated as well as or better by others after the libel than before it.
- ii. The impact of [the defamation] on a person’s reputation can be affected by: (a) their role in society; (b) the extent to which the publisher(s) of the defamatory imputation is authoritative and credible. The person making the allegations maybe someone apparently well - placed to know the facts or, they may appear to be an unreliable source; (c) the identity of the publishees: publication of a libel to family, friends or work colleagues may be more harmful and hurtful than if it is circulated amongst strangers. On the other hand, those close to a claimant may have knowledge or viewpoints that make them less likely to believe what is alleged; and (d) the propensity of defamatory statements to percolate through underground channels and contaminate hidden springs, a problem made worse by the internet and social networking sites, particular for claimants in the public eye: *KC v MGN Ltd (reported with Cairns v Modi [2013] 1WLR 1051) [27]*.
- iii. It is often said that damages may be aggravated if the defendant acts maliciously. The harm for which compensation would be due in that event is injury to feelings.
- iv. Any award needs to be no more than is justified by the legitimate aim of protecting reputation, necessary in a democratic society in pursuit of that aim and proportionate to that need.”

[12] In **Cairns and Modi; and KC and MGN Limited**,⁷ Lord Neuberger at paragraphs 23 and 24 stated that:

“[23] In any case involving the assessment of compensation following a libel, the essential question is simply expressed: in the context of the principles identified in *John v MGN Limited*, how much loss and damage

⁵ See Lord Neuberger in *Cairns and Modi; KC v MGN Limited* [2012] EWCA Civ 1382, at paragraph 22.

⁶ [2016] EWHC 1226 (QB).

⁷ [2012] EWCA Civ 1382.

did the publication cause to its victim, and how is this to be reflected in monetary terms?...

[24] The process of assessing damages is not quasi - scientific, and there is rarely a single “right” answer...it is virtually self - evident that in most cases publication of a defamatory statement to one person will cause infinitely less damage than publication to the world at large, and that publication on a single occasion is likely to cause less damage than repeated publication and consequent publicity on social media. By the same token, rapid publication of the withdrawal of a defamatory statement, accompanied by an apology together with an admission of its falsity given as wide publicity as the original libel diminishes its impact more effectively than an apology extracted after endless vacillation while the libel remains in the public domain unregretted and insidiously achieving greater credibility.”

- [13] The Master’s judgment demonstrates cognizance of the principles governing the assessment of general damages and the function of general damages. In arriving at the quantum awarded, she made critical findings of fact, including that the defamatory statements were in a transient form with limited publication, having been published to two persons. The publication hurt Ms. Lindsay’s feelings and caused embarrassment and distress. There is no evidence that the limited publication of the defamatory statements affected or had any impact on Ms. Lindsay’s reputation, consequently, the need for an award of damages to repair or vindicate her reputation, including her business reputation, did not arise. This was one of the “rare cases where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage...”⁸

Ground 1- No or Minimal Actual Damage

- [14] This takes me to the first ground of appeal which asserts that the master erred in finding that the slander complained of had caused Ms. Lindsay to suffer no or minimal actual damage. Ground 1 represents a challenge to a finding of fact. An appellate court is constrained when considering findings of fact made by a trial judge, as the ambit of an appeal on facts is very narrow. An appeal court will not

⁸ See Phillips MR in *Dow Jones & Co Inc v Jameel* [2005] EWCA Civ 75 at paragraph 40.

interfere with such findings unless compelling grounds are shown for so doing. This position is obtained not only to findings of primary fact but also to evaluation of those facts and inferences to be drawn therefrom:⁹

- [15] Where conclusions of fact involve an assessment of a number of different factors which have to be weighed against each other and involve any evaluation of facts, an appeal court will also be reluctant to interfere. As Arden LJ stated in **Langsam v Beachcroft LLP**:¹⁰

“Where any finding involves an evaluation of facts, an appeal court must take into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach.”

- [16] Findings of fact by lower courts should not be disturbed except in very limited circumstances. To be overturned on appeal, a finding of fact must be one which no reasonable judge could have reached. In practice, that will usually occur only when there was no evidence at all to support the finding that was made, or the judge plainly misunderstood the evidence in order to arrive at the disputed finding.¹¹ In **Perry v Raleys Solicitors**¹² at paragraph 52, the Supreme Court summarized the constraints on interfering with findings of fact as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge’s finding was one that no reasonable judge could have reached.

- [17] What if factual findings and inferences drawn from them are made on the basis of affidavit evidence or witness statements or consideration of contemporaneous documents? An appeal court’s reluctance to interfere with a lower court’s findings of fact, extends to even where those findings are based on written rather than oral

⁹ Fage UK Limited v Chobani Limited [2014] EWCA Civ 5 at paragraph 114.

¹⁰ [2012] EWCA Civ 1230.

¹¹ Wheeldon Brothers Waste Limited v Millennium Insurance Company Limited [2018] EWCA Civ 2403 at paragraph 10.

¹² [2019] UKSC 5.

evidence. In **DB v Chief Constable of Police Service of Northern Island**,¹³ Lord Kerr stated that the vivid expression in **Anderson v City of Bessemer**¹⁴ that the first instance trial should be seen as the “main event” rather than a “try out on the road” has resonance even for a case which does not involve oral testimony. Lord Kerr explained that a first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration of the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of an appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent.

[18] Paying regard to the legal principles governing appellate interference with findings of fact, the questions are: was there an evidential basis underpinning the master’s finding that the slander complained of had caused Ms. Lindsay to suffer no or minimal actual damage? Was the finding one which no reasonable master could have reached? The learned master found at the time of the assessment, Ms. Lindsay was an attorney at law for 20 years and had worked in Anguilla for 12 years, and there was no evidence to refute her unblemished professional record, good character and standing. Further, there was no evidence of any conduct by the appellant to provoke the defamatory statements.

[19] In considering the important factors of the mode and extent of the publication, the master noted that the counterclaim averred that the defamatory statements were spoken to Ms. Lindsay’s clients and members of the public on diverse dates. The master stated Ms. Lindsay’s evidence was that the defendant “has spoken to other people such as Simeon Fleming, [Fleming] a JLA [Jenny Lindsay & Associates]

¹³ [2017] UKSC 7 at paragraph 80.

¹⁴ (1985) 470 US 564 at 574.

client. Others have spoken to me, though they are not currently willing to provide witness statements.” The master noted that there is no indication of exactly what words Carty spoke to other people such as Fleming and, specifically, whether the words spoken to others were a further publication of the defamatory statements complained of. The master found that Fleming’s evidence did not state that the defendant published any of the defamatory statements complained of to him. She accordingly concluded that the defendant did not publish the statements to Fleming. In my judgment, it was certainly open to the master to so find.

[20] The master quite correctly rejected Fleming’s evidence of his suspicion that Carty may have published the defamatory words to third parties. The basis for the rejection was that the evidence was tainted with hearsay, conjecture and speculation. The master found that Fleming had no personal knowledge of the publication of the defamatory statements to anyone.

[21] Another client of Ms. Lindsay, Mr. Lego Richardson (‘Richardson’) stated that Carty published all the defamatory statements complained of to him and that he knows that “Mr. Carty has spoken to other clients connected to Jenny Lindsay and Jenny Lindsay & Associates”. The master noted that Richardson did not exactly specify what words were spoken by Carty to other clients and more particularly whether these words included the defamatory statements complained of. Further, Richardson did not identify any of the other clients to whom he stated Carty spoke.

[22] The master considered the evidence of Randolph Babrow that Carty saw him on several occasions and told him that “the claimants whom he paid US\$21,000,00 to represent him did nothing. He said this was very bad and that he wanted his money.” The master found that based on the evidence of Mr. Babrow, Carty did not publish the statements, “Jenny Lindsay is a thief” or “other lawyers are saying Jenny Lindsay is no good” to him.

- [23] Based on the evidence before the court, the master rightly concluded that Carty published the defamatory statements to two persons – all to Richardson and some to Mr. Babrow. This finding on the limited nature of the publication was clearly open to the master on the evidence. Its evidential underpinning cannot be impugned. Further, the master's finding that this was a case of slander in a transient form with limited publication by Carty, is unassailable.
- [24] In finding that the defamatory statements had caused Ms. Lindsay no or minimal actual damage, the learned master considered her evidence of the impact of the defamatory statements on her feelings, reputation and career. The master found that the publication of the defamatory statements would have hurt her feelings and caused embarrassment and distress. The master however was not persuaded that the publication had the extent of the impact asserted by her. Ms. Lindsay's evidence was that her reputation as a provider of legal services was seriously damaged; she has suffered considerable distress and embarrassment; there was a drop off in work and no longer had as many people seeking legal advice from her as was previously had. She contemplated leaving Anguilla and the Eastern Caribbean entirely, because of what was done; she is devastated; and believed that she has to contemplate an alternative career.
- [25] The master's reasons for not accepting the extent of the impact of the defamatory statements as asserted by Ms. Lindsay were set out at paragraphs 35 (1) and (2) of her judgment to the effect that:
- (a) Ms. Lindsay has not provided evidence of the volume of work that she had prior to and post publication of the defamatory statements to corroborate her evidence of a 'drop off of work' and that this was attributed to the publication of the defamatory statements; and
 - (b) While Ms. Lindsay may have contemplated an alternative career, the defamatory statements were published more than four years prior and had not resulted in her leaving Anguilla or the Eastern Caribbean, as she is still practicing in the jurisdiction.

- [26] In her skeleton submissions, Ms. Lindsay advanced the issue of whether she was required and therefore failed to corroborate her unchallenged evidence of a drop off at work. She submitted that the master erred in law in requiring the corroboration of her unchallenged evidence of a “drop off of work”. Ms. Lindsay stated that damage is to be presumed and this presumption should not be rebutted in this case, and the Court could infer damage even where direct evidence is not available.
- [27] Ms. Fleming posited that nowhere did the master require Ms. Lindsay to prove any loss or damage and that at paragraphs 35 (1) and (2), the master only made observations which cannot be seen as factors which she took into consideration in making the award.
- [28] In my view, the master’s statement with respect to corroborating evidence of drop off of work, cannot be taken in isolation. It is important to look at the judgment as a whole. At paragraph 34 the master was dealing with Ms. Lindsay’s evidence of the impact of the defamatory words on her, and provided reasons at paragraph 35, as to why she was not persuaded that the publication had the extent of the impact asserted by her.
- [29] The master clearly stated at paragraph 50 of her judgment that the words used, clearly disparaged Ms. Lindsay in her profession and she is not therefore required to show proof of actual damage as damages are presumed to have flowed from the publication. In like vein, at paragraph 56, the master stated that based on the principles of law which still apply, there is a presumption of damages in cases of slander actionable per se without proof of actual damage. The master was clearly cognizant of the applicable legal principle that in a case of slander actionable per se, damage to reputation is presumed. However, one of the impacts asserted by Ms. Lindsay was a ‘drop off of work’. ‘Drop off of work’ speaks to pecuniary loss caused by the slander. While there is an irrebuttable presumption of law that reputational damage is presumed, the position is that pecuniary loss caused by the

publication may be recovered in addition but must be proved. It appears to me that that is the point the master was making. In the premises, Ms. Lindsay's complaint is not well founded.

[30] In considering the impact of the publication on Ms. Lindsay's reputation, the master also paid regard to the evidence of her witnesses. Richardson stated that Ms. Lindsay was his attorney and has had dealings with her for many years and was surprised by the defamatory statements. He further stated that he found her to be honest, sincere and hardworking. Because of her honesty, he has recommended her to many people even people in the Virgin Islands and that she is the only honest lawyer in Anguilla. The master also referred to the evidence of Fleming that Ms. Lindsay has given efficient service and his happiness with the work she has done. Ileen Richardson, another client, found Ms. Lindsay to be very honest and efficient. The master also considered the evidence of the former Chief Minister of Anguilla, Hubert Hughes, who had recommended Carty to Ms. Lindsay. The master stated that even proceeding on the basis that Mr. Hughes had become aware of the defamatory words, he did not say that his views of Ms. Lindsay had been affected or that he would no longer consider recommending anyone to her.

[31] The master found on the evidence, that the defamatory statements were published to two persons. None of the witnesses to whom the statements were published stated that Ms. Lindsay fell in their estimation following the publication or that they would cease to instruct her as a result of it. Further, their glowing reviews of Ms. Lindsay indicate that notwithstanding knowledge of the publication of the defamatory statement, they continued to have the highest regard for her character, competence, and professionalism. The master concluded that in the circumstances, there was no evidence that the limited publication of the defamatory statements affected or had any impact on Ms. Lindsay's reputation. This finding was clearly available to the master and supported by the evidence. The master carried out an evaluative exercise, assessed a number of factors and clearly

reasoned how she arrived at her conclusion. Appellate interference in these circumstances, is unwarranted. This ground of appeal accordingly fails.

- [32] Ms. Lindsay had also contended that although the master recognized the long-standing principle that there is an automatic presumption upon which damage will flow, she wrongly applied the case of **Dow Jones & Co Inc v Jameel**,¹⁵ and wholly misdirected herself when she said that the respondent can rebut the presumption of damages. Ms. Fleming submitted, and I agree, that the master alluding to **Dow Jones** was merely obiter. The reference to the **Dow Jones** was to make and amplify the point that in rare cases, the limited publication may result in the court assessing damages arriving at the conclusion that the injury to reputation was minimal. Further, the learned master did not say that the respondent can rebut the presumption of damages.

Ground 2- Assessment of Damages

- [33] Ground 2 asserts that the master erred in awarding the manifestly low sum of \$15,000.00. Formidable obstacles exist in the way of a successful prosecution of this ground of appeal. The first observation is that an appeal court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. As Singh JA opined in **Alphonso et al v Ramnath**¹⁶:

“The burden on an appellant who invites interference with an award that has commended itself to the trial judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, an appellate court should not disturb his award...

The mere fact that the judge’s award is for a smaller or larger sum than what the appeal court would have given is not of itself a sufficient reason for disturbing the award. The appellate court is empowered to interfere with the award, if of the opinion, having regard to all the circumstances of the case, there is no reasonable proportion between the amount awarded and

¹⁵ [2005] EWCA Civ 75.

¹⁶ British Virgin Islands Civil Appeal No. 1 of 1996.

the loss sustained, or if the damages are out of all proportion to the circumstances of the case.”

[34] I also keep in mind that the process of assessing damages is not quasi scientific and there is rarely a single right answer. There could never be any precise, arithmetical formula to govern the assessment of general damages in defamation. The court’s task is to assess the proper level of compensation, taking into account all the relevant factors, which includes any element of aggravation. The compensatory award granted can properly reflect any additional hurt and distress caused to the claimant by the conduct of the defendant and may reflect any proved elements of aggravation.

[35] The real question is whether the claimant can demonstrate, by admissible evidence which the court accepts, that the damage to her reputation and or her distress or upset has been increased by conduct of the defendant.¹⁷ In **Bray v Ford**,¹⁸ Lord Herchell stated that damages in defamation cases must be determined by “a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at 500 pounds or 1000 pounds.”

[36] Also, the appropriate amount of compensation depends on the nature and extent of the harm done to the claimant’s reputation, and feelings, and must take account of any award to vindicate reputation. The extent of injury to reputation will depend upon matters such as gravity, its prominence, circulation and any repetition. Matters tending to reduce harm to reputation include an apology. Injury to feelings may be aggravated by the conduct of the defendant after publication and should properly be reflected in the award. The total must be proportionate and no more than is necessary to serve these functions.

¹⁷ Lachaux v Independent Print Ltd and Another [2019] UKSC 27 at paragraphs 226, 227.

¹⁸ [1896] AC 44 at 53.

- [37] It is a general principle of the law of damages that the amount required to serve the three interlocking functions identified in **John v MGN Limited**,¹⁹ will be reduced by an apology, retraction, or correction. This is because such steps will prevent or reduce any continuing harm to reputation, should assuage hurt feelings, and ought to achieve something by way of vindication.²⁰
- [38] As already indicated, damage to reputation is the gist of the tort of defamation. In that regard, the master's findings of the transient nature of the publication; the absence of evidence of damage to Ms. Lindsay's reputation as a result of the limited publication of the defamatory statements; and consequently, the need for an award of damages to repair or vindicate Ms. Lindsay's reputation does not arise, are very important. The importance of the finding of limited publication lies in the fact that in most cases, publication to one person will cause infinitely less damage than publication to the world at large. These findings, well supported by the evidence, as they were, would necessarily have had a significant reducing effect on the quantum of damages. The master properly considered that even where a claimant had suffered no injury to reputation, she would be entitled to compensation for injury to feeling; noting that Ms. Lindsay must have suffered distress and hurt feelings as a result of the publication of the statements.
- [39] The master took into account that Carty published the defamatory statements between 2009 and 2010 and on 26th October 2010 commenced the claim for damages for breach of agreement to provide legal services. Ms. Lindsay filed a defence and counterclaim on 1st March 2012, claiming damages for slander. Following various contested interim applications, disclosure and filing of witness statements, the parties settled the claims at mediation on 26th June 2013. As part of the mediation agreement, Carty withdrew his claim and accepted that he published the defamatory words complained of and they were untrue. He also

¹⁹ *supra* n.4.

²⁰ Per Warby J in *Sir Kevin Barro MP et al v Jane Collins MEP* [2017] EWHC 162 (QB) at paragraph 29.

apologised to Ms. Lindsay at mediation and agreed to a further apology by way of a joint statement being read in court and a press release in terms satisfactory to Ms. Lindsay.

[40] Although noting that the claim did not go to trial, the master stated that it had progressed significantly before Carty accepted that he published the statements complained of and they were untrue, and he should not have brought the claim against Ms. Lindsay. Significantly, in the Mediation Agreement, Carty admitted that the statements he published were untrue and he was motivated by malice. The master found that his conduct aggravated the injury to Ms. Lindsay and in the circumstances, thought it was a good case for the award of aggravated damages.

[41] Aggravated damages are awarded for a tort as compensation for the complainant's mental distress, where the manner in which the defendant has committed the tort or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the claimant. Such conduct or motive aggravates the injury done to the claimant, and therefore warrants a greater or additional compensatory sum.²¹

[42] Serious allegations were undoubtedly made against Ms. Lindsay. In assessing damages for the slander, the master took into account factors such as Ms. Lindsay's conduct, position and standing; the nature of the libel; the mode and extent of the publication; and the impact on Ms. Lindsay's feelings, reputation and career. Against that, the extent of the publication was limited to two persons and was transient. No evidence of particular reputational harm was caused to her by the publication. The conduct of Carty aggravated the injury to her feelings and enhanced the need for vindication. On the other hand, pursuant to the Mediation Agreement, Carty published a fulsome and unreserved apology, encompassing a written apology in the newspaper and an apology in court.

²¹ Per Lewison LJ in *Phonographic Performance Limited and Andrew Ellis Trading* [2018] EWCA Civ 2812 at paragraph 11.

[43] In looking at comparative awards, Ms. Lindsay relied on the case of **Bristol v St. Rose** ²² as a comparator. **Bristol**, however, is easily distinguishable from the present case. Among other things, the publication in **Bristol** - by letter - was in a permanent form. It was published to the Medical Association and four other persons. It was very different from the present case, where only two persons could say anything about the defamatory words.

[44] In awarding damages of \$15, 000.00, inclusive of aggravated damages, the master considered all the circumstances and having taken all relevant factors into account and weighing them against each other, arrived at that global figure by way of an award. The master's award depended on an evaluative judgment where an appellate court is particularly reluctant to interfere. The master engaged in a careful account of the evidence, applied correct legal principles and adopted a correct approach to the assessment of damages. There is no basis for this court to interfere with the discretionary evaluation of the master. Ms. Lindsay has not discharged the high burden necessary for disturbing the award.

Ground 4- Weight of Certain Factors

[45] Ground 4 deals with the issue of weight. It alleges that the master erred in law by failing to give any or any sufficient weight to the following matters in assessing damages: The claim was entirely false, and the proceedings would have compounded the defamatory statements and harm to Ms. Lindsay's reputation in the eyes of the public and legal fraternity. Carty had made threats to kill Ms. Lindsay. He repeated the slander to other lawyers such as Valencia Hodge. Ms. Lindsay was mocked in the streets of Anguilla by a third party unrelated to the proceedings. Carty had interfered with Ms. Lindsay's witnesses so that they would retract their evidence in support of her counterclaim; and made a report about Ms. Lindsay to the Anguilla Police.

²² [2005] ECSCJ No. 268.

- [46] The law with respect to the attribution of weight is clear. Weight is a contextual evaluation for the judge who reads, hears and sees the evidence of the witnesses. It is inappropriate for an appellate court to interfere with that evaluation unless it is perverse.²³
- [47] In **Langsam**,²⁴ Arden LJ opined that “where any finding involves an evaluation of facts an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach.”
- [48] In her evaluative exercise, the master reached a multi-factorial judgment which took into account, among other things: the falsity of the claim; the hurt to Ms. Lindsay’s feelings; the issue of reputational damage; the fulsomeness of the apology; the limited extent of the publication; its transient nature; and made appropriate findings in respect thereof. There is no evidence relating to the other matters in respect of which Ms. Lindsay relied upon in support of this ground of appeal. With respect to threats to kill, they were never made by Carty and could not have been contemplated in any damages. In Richardson’s supplemental statement, he spoke to receiving calls from Carty and feeling that he was being harassed by him. He also spoke of his belief that Carty wanted him to retract his earlier statement and lie for him. It is unsurprising that the master attached little or no weight to this evidence. Finally, the master did not have the report to the police. For reasons earlier articulated, there is no basis to interfere with the master’s evaluation. Ground 4 accordingly fails.

²³ *Manzi V King’s College NHS Foundation Trust* [2018] EWCA Civ 1882; *Metropolitan Police Commissioner v Abdulle* [2015] EWCA Civ 1260 per Lewison LJ.

²⁴ *Supra* n. 9 at paragraph 72.

Grounds 3 and 5- Costs

- [49] Grounds 3 and 5 deal with the costs aspects of the appeal. Ground 3 asserts that the master erred in failing to award prescribed costs on Ms. Lindsay's slander claim rather than assessed costs. In **R (Parveen) v Redbridge LB**²⁵ it was stated that the appellate court should be chary in interfering with the exercise of discretion by first instance judges on costs matters and should only interfere if the conclusion of the costs judge was not open to him.
- [50] In the first paragraph of her judgment, the master set out what was before the court thus: "The application before the court is for damages to be assessed following the entry of a consent judgment against the claimant / ancillary defendant." On the issue of costs, the master stated that "while I note that in these types of cases the court may consider costs sanctions, in this case I will exercise my discretion in favour of awarding prescribed costs to the claimant". While the order may appear a bit ambiguous, it is fair to say that the master awarded prescribed costs on Ms. Lindsay's slander claim. I do not discern any error in so doing. In the premises, ground 3 is dismissed.
- [51] Ground 5 asserts that the master erred in law in failing to award assessed costs in respect of Carty's discontinued claim. The master did not address the issue of costs with respect to the discontinuance of the counterclaim. It is noted that as part of the Mediation Agreement, judgment was entered for Ms. Lindsay on her counterclaim with damages to be assessed.
- [52] The court has a discretion whether or not to order costs on the discontinuance of a claim.²⁶ Rule 64.4 of **the Civil Procedure Rules 2000** ('CPR 2000') provides that the Court hearing an appeal may make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal. CPR Rule 37.6 (1) states that a claimant who discontinues a claim is liable for the costs incurred by

²⁵ [2020] EWCA Civ 194.

²⁶ Rule 37.6 (1) (b) of the Civil Procedure Rules 2000.

the defendant against whom the claim is discontinued, on or before the date on which notice of discontinuance was served. Costs are to be quantified in accordance with the scale of prescribed costs in Part 65 of the CPR 2000, Appendices B and C. It appears to me that if the master was minded to award costs on the discontinuance, it would be on the basis of prescribed costs.

[53] Ms. Fleming submits, assuming that the master erred in not awarding costs on the discontinuance, the Court is entitled to find that no such costs ought to be awarded because, in exercising its discretion, the Court ought to pay regard to (a) the matter was not tried on its merits, (b) the parties had agreed to engage in mediation, (c) the discontinuance occurred out of conciliation between the parties and (d) the parties were each saved the costs associated with litigation of the claim to finality. There is much force in Ms. Fleming's submissions. For the reasons adumbrated by Ms. Fleming, which I accept, this is a suitable case for the Court to exercise its discretion and award no costs on the discontinuance of Carty's claim.

[54] Ms. Fleming conceded that the master erred in not making a separate order on costs occasioned on the assessment of damages. I agree. The assessment was conducted on paper and written submissions. It arose from the Mediation Agreement. I would make a summary assessment of costs at \$1,500.00; that would be reasonable in the circumstances.

[55] Mr. Carty was successful in resisting the appeal on all issues except the award of costs on the assessment. I would award him costs of the appeal at the rate of two-thirds of amount awarded for prescribed costs on the counterclaim.

Conclusion

[56] It is ordered that:

- (1) The appeal against the assessment of damages is dismissed.
- (2) The award of \$15,000.00 in damages for slander is affirmed;

- (3) Grounds 3 and 5 are dismissed and the decision of the learned master awarding prescribed costs to Ms. Lindsay on the counterclaim is affirmed.
- (4) Ms. Lindsay is awarded \$1,500.00 costs on the assessment of damages.
- (5) Mr. Carty is awarded costs of the appeal at the rate of two - thirds of amount awarded for prescribed costs on the counterclaim.

I concur
Paul Webster
Justice of Appeal [Ag.]

I concur
V. Dexter Theodore
Justice of Appeal [Ag.]

By The Court

Chief Registrar