[2014] JMSC Civ 127

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009 HCV 00070

BETWEEN	**JOSEPH M MATALON**	**FIRST CLAIMANT**
AND	**HONOURABLE MAYER MATALON OJ**	**SECOND CLAIMANT**
AND	**JAMAICA OBSERVER LIMITED**	**DEFENDANT**

Gordon Robinson instructed by Winsome Marsh for the first claimant

Winston Spaulding QC and Vincent Chen instructed by Chen Green & Company for the defendant

February 6, 7, 8, 11, 2013 and August 15, 2014

DEFAMATION – LIBEL – FAIR COMMENT – QUALIFIED PRIVILEDGE – REYNOLDS PRIVILEGE – RESPONSIBLE JOURNALISM

SYKES J

[1] Mr Joseph M Matalon is revolted at Mr Al Edwards' piece in the Caribbean Business Report, a pull-out business magazine, published by the Jamaica Observer Limited (JOL) on Friday, October 3, 2008. He believes that the article defames him by (a) omitting critical facts; (b) misrepresenting some facts by not placing them in their proper chronological order; and (c) portraying him as the chief architect of an elaborate plot to fleece investors by setting out on a path to 'hook' them on the 'toxic' bonds offered by Mechala. Toxic bonds, it is said, has a pejorative meaning, namely, that they are based worthless underlying assets and this fact was concealed from the bondholders. The purveyors of such bonds, it said, knew that the bonds were 'dodgy' but nonetheless, by concealment of vital information which amounted to misinformation, unsuspecting persons were induced to purchase them and only realised that they really hollow. The risks were not disclosed.

[2] Mr Matalon was distinctly unimpressed by his picture being given front page prominence in the newspaper under the title 'The Matalons: A story of family bonds.' If this, seemingly innocuous title was bad enough then Mr Matalon's view of Mr Edward's work went into sharp decline when he saw the title of the body of the piece on page 3 which was, 'The trouble with toxic bonds: How Mechala bond holders lost out.'

[3] According to Mr Matalon, the words of the article and, in particular, those highlighted in his particulars of claim, when examined in the full context, their ordinary and natural meaning is that Mr Matalon was part and parcel of a plot to (a) take money from investors under false pretences; (b) lie to investors by misstating the true financial position of the company raising the money; (c) use that money to capitalise the family companies; (d) use the money for the personal benefit of the family.

[4] Mr Al Edwards, the author the offending piece, was ebullient and confident. Mr Edwards stated that the article would safely be ensconced in the pantheon of his

best works. He describes himself as a very experienced writer on financial affairs having worked in that capacity for in excess of fifteen years.

[5] JOL, the defendant and employer of Mr Edwards, has a number of publications including the Caribbean Business Report (CBR). The CBR, as the name suggests, reports on business matters occurring within Jamaica, the Caribbean and the wider world.

[6] JOL, in response to this claim, pleads that the 'article was objectively written in good faith expressing fair comment on a matter of significant public importance and on a matter involving the public interest on an occasion of qualified privilege' (para 12 of defence). It particularises the grounds on which this plea rests.

[7] In paragraph 16, JOL states that 'the article constitutes fair comment on matters of public interest on an occasion of qualified privilege' and that 'the words were expressions of [honest, sincere] opinions' which were 'reasonable beliefs in the circumstances.' In paragraph 17, JOL pleads that the 'defendant had a duty to publish and the public a right to read the article which was a matter of public interest.'

The offending article

[8] The relevant parts of the article will now be set out. The paragraphs will be numbered for ease of reference even though they are not numbered in the original publication:

THE TROUBLE WITH TOXIC BONDS

How Mechala bond holders lost out

> ***[1]*** *The crisis of the United States financial system meltdown has drawn comparisons with the Jamaican landscape of the '90s and more particularly the failings of*

some of its leading indigenous financial institutions. A look back at the Mechala bond offering by the Matalons in both apt and instructive.

Fictitious capital

[2] *The reason may of Wall Street's leading institutions are experiencing difficulties is because of a liquidity problem transmuting into an insolvency problem. Why? Because many of them are going broke, thus leading to a banking crisis.*

[3] *There are those who surmise the crisis is not a result of insufficient money flows making their way throughout the financial system. Many of the citadels of Wall Street – Bear Stearns, Lehman Brothers, Wachovia – held billions in depreciated mortgage-backed securities that nobody wanted to buy whether they were called Collateralised Debt Obligations (CDOs) or Asset Backed Commercial Paper. What is happening is that these instruments are now worth far less than their original price and as a result, these toxic instruments are written down; those who invested in them have to settle for far less and as a consequence end up having to bite the bullet. The premise of these so-called assets is that you are buying not into actual wealth but future wealth that is not yet generated.*

[4] *By the mid-nineties the Matalon family had a huge debt obligation which threatened the viability of the family-run business empire which at one time had 32 subsidiaries which stretched from banking, construction, dairy operations, pharmaceuticals, sales and a host of other businesses. In 1995, the Mechala Group was incorporated as the operating holding company for all the Matalon subsidiaries.*

[5] *The Matalon family took the decision to rationalise its operations and change its management structure with Joseph A Matalon (Big Joe) making way for Joseph M Matalon (Little Joe) as president and CEO of the family empire.*

[6] *The new vehicle for the Matalon family business interests would be called Industrial Commercial Developments (ICD) with the Matalons offloading many of its interests and focusing on core activities. "We will now focus primarily on seeking investment opportunities for further growth and development of the ICD group while still providing broad-based policy direction and legal services for the subsidiaries" said Joseph M Matalon back in 2000.*

[7] *What is clear is that the Matalon group of companies which was established way back in 1962 had by the mid-nineties become desperately short of capital and had to reconfigure its balance sheet. It would have to acknowledge that it was no longer the corporate force it once was, and find a way of increasing its equity stake in companies that once were synonymous with corporate Jamaica run by the first family of Jamaica.*

Turning to the international capital market

[8] *With a debt of almost US$70 million in a high interest rate regime, the Matalons turned to the international capital market in an effort to rescue a business dynasty. The bonds were predicated on the reputation of the Matalon family, and its position in corporate Jamaica. As the US firm Donaldson, Lufkin & Jenrette Securities who later served as the Matalons' financial advisor put it: "Mechala is one of the*

largest companies in Jamaica. It is a diversified business enterprise engaged in three principal lines of business development and construction manufacturing and trading and financial service.

[9] *"Mechala and its subsidiaries are together Jamaica's largest developer of housing and related social and commercial infrastructure; a major distributor of foods, hardware, pharmaceutical, personal care and other consumer products; and a major provider of insurance investment management and other financial products and services."*

[10] *This is how would investors would be hooked, and it would be a sovereign bond that would put Jamaica on the map with other companies expected to follow in the footsteps of the Matalons.*

[11] *The Matalons raised US$100 million which allowed them to address their debt and clean up the balance sheet, but the bond offering was an abject failure. The Matalon companies failed to perform and the trading of the bonds became illiquid. It sullied the reputation of Jamaica on the international capital market and other leading Jamaican players could no longer go this route. The Matalons saw their credit rating downgraded and the value of the bonds depreciated fast. Those who bought into the bonds were badly burnt, with the Matalons unable to pay out what they should have.*

[12] *Bear in mind that a bond is a debt security in which the authorised issuer owes the holders a debt and is obliged to repay the principal and interest (the coupon) at a later date, termed maturity. The Matalons in effect used other people's money to capitalise their businesses, eradicated debt and*

because of the poor performances of their companies were unable to make good. It was an embarrassment of humungous proportions.

Matalon bondholders got burnt

[13] *A bondholder who was traumatised by the experience said: "Looking back there a number of us that felt disgruntled and unhappy with the bond issue. One of the problems with that bond offering was that the Matalon group of companies are private, not listed, so no one really knew what was going on. We had to take their word for it and the picture they painted was rosier than really was the case."*

[14] *Merrrill Lynch was the lead institution of the Matalon bonds, which was subscribed by mainly overseas investors. It touted US$75 million in senior notes, which were set to mature at the end of 1999 and another US$25 million in senior notes due to mature in December 2002.*

[15] *Many Jamaicans were not inordinately impressed with the Matalon bonds and so the family went on a road show to sell them in the Eastern Caribbean.*

[16] *With the bonds proving to be a damp squib and investors losing out big time, the Matalons with US$100 million in their pockets, paid bondholders a paltry 47 cents on the dollar to buy back the bonds.*

[17] *…*

[18] *…*

[19] *The Mechala Tender Offer was to purchase all of Mechala's US$75-million 12 ¾% senior notes due 1999 at US$351.57 per US$1000 principal amount (including all accrued and unpaid interest through the expiration date) and*

all of its outstanding US$25-million 12% Senior Notes due 2002 at US$345.28 per US$1,000 principal amount, subject to the terms and conditions set forth in the Offer to Purchase dated June 24, 1999.

[20] *By this time Donaldson, Lufkin & Jenrette were brought on to act as financial adviser to Mechala in connection with the Offer and Solicitation and related matters.*

[21] *In short, Matalon bondholders were paid a reduced sum in lieu of their investment in bonds valued at US$100 million. Feeling aggrieved and hard done by the Matalons, three US mutual funds, Federated Strategic Income Fund, Federated International High Income Fund and Strategic Income Fund who had invested US$5 million in the Matalon bonds sued to recover more money and sought to obtain 70 cents on the dollar from the subsidiaries of the Mechala group.*

[22] *…*

Matalons restructure again

[23] *Come 2005, the Matalons underwent yet another restructuring exercise. Now called Industrial Commercial Developments Limited, and after selling its merchant bank Manufacturers Sigma to Pan Caribbean Financial Service, the once mighty business empire that comprised 32 subsidiaries was reduced to its construction arm WIHCON, WIHCON Properties; its general insurance firm BCIC, and its insurance brokerage IIB/CGM.*

[24] *…*

[25] *..*

[26] *Back in July 1999, the late eminent columnist Morris Cargill, commenting on the changing fortunes of the once*

> *Mighty Matalon family, wrote:" "On the subject of misfortunes I see that Mechala is teetering on the edge of collapse. This really worries me even than the usual spate of business failures. I have always regarded the Matalons as exceptionally able and rich. If they are now in trouble then all of us are. However, I am intrigued by the latest proposal of Mechala.*
>
> ***[27]*** *It sold bonds in its businesses to various people. As the profitability of Mechala declined the value of those bonds also declined, and it seems they are worth on the market about one-third of what they were worth before. In consequence, Mechala is proposing to buy back these bonds at about one-third of the price at which they were originally sold.*
>
> ***[28]*** *This will neatly cancel two-thirds of their original debt. This is a smart piece of financing, entirely legal and entirely within the rules of the games which people like that play.*
>
> ***[29]*** *I have never played according to those rules. The consequences have been, not unexpectedly, that I am relatively poor; nevertheless I thank the Lord Buddha that I have been spared these activities. I sleep well at nights and do not have to indulge in situations which made me want to go outside and throw up."*

[9] It is now appropriate to give some additional flavour to this claim by giving a brief history of Mr Matalon and the group of family owned businesses so that the contours of the trial can be negotiated properly.

The context

[10] Mr Joseph M Matalon is a member of what has been referred to as the third generation of Matalons. The Matalons are respected business and civic leaders in

Jamaica. Mr Joseph M Matalon from this point onward will be referred to as Joseph M in order to distinguish him from Mr Joseph A Matalon who will be called Joseph A. Also, it should be noted that the second named claimant, Mr Mayer M Matalon died before this trial commenced. The claim has gone forward with Joseph M as the sole claimant. Mr Mayer M Matalon will be referred as MM. No disrespect is intended. This is merely to assist in the retelling of the narrative.

[11] It is well known that Jamaica underwent a period of exceptionally high interest rates (at times over 50%). Many businesses were struggling to survive. The businesses owned and operated by the Matalon family were no exception. In 1995, Mechala, a holding company, was formed to hold the various companies owned and operated by the family.

[12] Mechala sought to reduce its debt burden and to this end was seeking ways to either pay off existing debt or substitute cheaper debt for the expensive debt it was carrying. After discussion with legal and financial advisers, Mechala took the decision to raise money by issuing bonds to qualified institutional investors in the United States of America. In order to do this, Mechala had to meet all the requisite regulatory requirements of the Securities Exchange Commission (SEC), the United States of America's equivalent of Jamaica's Financial Services Commission.

[13] The documentation stated explicitly that there was a risk involved with purchasing the bonds that were to be issued by Mechala. The SEC took the decision that the bond should be issued only to qualified institutional investors. It is common ground in this case that all the relevant prospectus document was available on the SEC's website. Mr Edwards admitted that he saw the prospectus on the website.

[14] The SEC required all the risks to be specifically identified. This was done. In order to give a flavor of the risk identified, a few will be stated. In the Offering memorandum in respect of the US$75,000,000.00 12 ¾% Senior Notes due 1999, under the heading 'Risk Factors' it was stated that Mechala had limited assets of its own and that the ability of Mechala to pay interest on notes or repay the notes on

maturity or otherwise would be dependent on cash of the subsidiaries and payment of funds by those subsidiaries to Mechala. It was also stated that Mechala was highly indebted. It was noted that Mechala collected substantially all of its revenue in Jamaican dollars in a context where the company was raising money in United States currency and the Jamaican dollar has experienced significant depreciation against the United States dollar.

[15] The document indicated that there was no market for the bonds; that there was no assurance that any secondary market would develop and even if such a market developed the prices at which the notes would be traded could not be stated with any degree of certainty.

[16] Investors were specifically told that Mechala would not be required to file reports with the SEC but that the company would, so long as the bonds remain outstanding, provide information to the holders and to securities analysts and prospective investors on request.

[17] Under the heading country risks, it was stated that virtually all the group's operations are located in Jamaica where the dollar depreciated significantly against the United States currency. It was noted that there were high levels of inflation.

[18] Under the heading risks related to the company. The offering memorandum noted that there were net losses of US$5.3m (1994), US$0.3m (1995) and US$5.2m (first half of 1996).

[19] In the section headed 'Notice to Investors' it was specifically stated that the notes were not registered under the Securities Act and are not to be sold in the United States of America. Later on in that section, it was stated that each purchaser will be deemed to be purchasing the note for his own account or on account of his or her sole investment discretion.

[20] The documentation put it beyond doubt that any issuing or selling or dealing with the bonds in breach of the SEC's requirements would be visited with serious consequences, including but not limited to criminal sanctions.

[21] Between 1996 and 1997, Mechala raised US$100m. The bonds were issued in two tranches. However, things did not go according to plan. As the end of 1998 approached, it became apparent that Mechala would not generate enough revenue to pay off the bond holders by the maturity date in 1999. A plan was needed to deal with the impending problem.

[22] After agonising over the matter, Mechala decided that it would enter into a scheme of arrangement under the Companies Act of Jamaica which would see that the bond holders receive US$0.47 of the face value of their original investment. The scheme was approved by the Supreme Court and upheld by the Court of Appeal of Jamaica notwithstanding the efforts of two institutional investors who were opposed to the plan.

[23] This plan saw Joseph M, on behalf of the owners of the company, putting up some JA$20m of their private money. It took the form of additional equity into the company and giving up their bonds without compensation, that is to say, those members of the family who held bonds put them into the pool without getting the US$0.47 per dollar to which they would be lawfully entitled. This contribution by the Matalons enabled the investors (other than the Matalons) to get an increased payout from US$0.35 per dollar to US$0.47 per dollar. In short, they too suffered like the other bond holders. There is no evidence to suggest that the Matalon family bond holders came out better off than the other investors. They were in fact worse off because they put up additional money and lost the value of their bonds. This process was completed by 2000/2001. The article appeared in November 2008.

Joseph M's case

[24] The court now turns to the cases of the parties beginning with Joseph M's. Joseph M put his case in this way. The full photograph of Joseph M on the front page of the publication under the front-page caption, **THE MATALONS: A story of family bonds**, indicated that he was to be the main focus of the article. This was reinforced by a smaller photograph of Joseph M placed in the body of the article. The title of the article itself, '***The Trouble with toxic bonds***' and the sub-title, '*How Mechala bond holders lost out'* indicated that Mechala bonds were to be viewed as toxic bonds. Toxic bonds, according to Joseph M, in evidence, meant those bonds which the issuers knew from the outset were no good but were sold as if they were good. Not only that, the issuers withheld vital information or at least did not provide full and accurate information so that that purchasers would have been able to make fully informed decision about the quality of the bonds on offer and consequently, an informed decision on whether they wished to purchase these bonds. By contrast, the Mechala bonds were fully described and all the risks associated with them were spelt out in clear and unmistakable language. The court observes, having read the prospectus, that this was an understatement. Even the most obtuse could not fail to appreciate the risks involved. The prospectus used largely accessible English and such jargon as there was did not detract from a clear identification the risks involved.

[25] This is how the court understood Joseph M saw the various paragraphs of the article. Paragraphs 1 – 3 referred to bonds packaged as mortgage-backed securities and sold to the public. It is now common knowledge that some of these bonds in some instances, included loans called ninja loans (no income, no jobs and no assets) and lodoc loans (low documentation). These were loans extended to persons who had no income, no jobs and no assets or at least, no satisfactory documentation to support the assertions made by the borrowers. In other instances, the borrowers verified their own incomes. These types of loans were placed together with other loans and sold to the public as if they were sound investments. The loans were described as triple A by leading investment analysts in the United States of America. Mechala bonds were not so packaged and were never sold as triple A bonds as

some of these mortgage-backed securities were sold. The risks in respect of the Mechala bonds were clearly articulated in plain enough English.

[26] The lead-in with the first three paragraphs set the stage for the introduction of the Matalon family in paragraph 4. The vice here, as Joseph M explained, was that in light of the title and sub-title of the article the innuendo was that the Matalons generally and him in particular (two pictures) were associated with toxic bonds, that is toxic as explained by Joseph M.

[27] Joseph M complained that paragraphs 4 - 6 omitted the correct time sequence. While he accepts that paragraph 4 is correct, the next two paragraphs and indeed the whole article, failed to make the point that (a) Joseph A did not step down until 2000, well after the bonds were issued and the pay-back to the bondholder made. The paragraphs created the impression that Joseph A was pushed aside and Joseph M took over, in a sort of putsch. The article created the impression that this coup d'état was necessary in order to launch the rescue of the Matalon - owned companies. Having deposed Joseph A, Joseph M then set about resolving the debt-crisis for the group of companies. Paragraph 6 was said to be chronologically inaccurate because ICD was not formed until after the bond pay-back.

[28] These paragraphs omitted to say that Joseph M left the Mechala Group in 1997 and only returned in 1999 when it became apparent that difficulties had arisen with the repayment of the bonds. The article, it is said, failed to mention that Joseph A remained as president and chief executive officer of the Mechala Group until 2000/2001. The complaint here is that these paragraphs created the false impression that Joseph M engineered the putsch before the bond issue and was therefore an integral part of what turned out to be a massive confidence trick perpetrated on the ignorant investing public.

[29] Paragraphs 8 – 10, combined, were said to be grossly offensive in a number of ways. First, paragraphs 8 - 9 have a quotation attributed to Donaldson, Lufkin and

Jenrette (DLJ) and when placed alongside paragraph 10 suggest that Joseph M used the quotation to mislead investors by luring them into a state of affairs Joseph M knew to be untrue, that is, caused the bond purchasers to think that the company was better than it really was. The offence is that DLJ was not involved in the issue and so factually could not have proffered this kind of endorsement to potential bond purchasers. Second, the very quotation itself was not made by DLJ. Third, the use of the word 'hooked' in paragraph 10 suggests that the quoted words were part of scheme to induce, dishonestly, persons to invest in the bonds. Fourth, the quotation was attributed to the wrong source so that is an error of fact which was deliberately done to mislead the reader into thinking that Joseph M was part and parcel of this scheme to trick investors into parting with valuable capital in exchange for toxic bonds as that term was understood by Joseph M.

[30] Paragraph 11 has a factual inaccuracy in that the bond offering was not a failure because they were in fact all taken up and the issue was in fact over-subscribed. It was therefore not true to say that the bond 'was an abject failure.'

[31] Paragraph 12 stated, inaccurately, that the Matalons 'in effect used other people's money to capitalise their business.' It was said that no part of the bond issue was used to capitalise the business. The implication here is that rather than use the money to pay down or eliminate the high-cost debt as the bond purchasers were led to believe, instead they used some of the money to add to the capital base of the company. This was said to be a gross falsehood. This statement, it was said, smacks of criminality and when placed, as it was, before paragraph 13, the smear was complete.

[32] Paragraph 13, cites a 'traumatised' bond holder who alleges that he did not know what was really going on with the bonds and the Matalons, Joseph M included, made it appear that the bonds were better than they were.

[33] Paragraph 13 suggests that the bond holders had no access to information. This was said to be factually inaccurate because Mechala had provided extensive

information to the SEC. The article did not state that all the details of the bond issue and financial status of companies as well as express warnings about the risks were publicly available on the SEC's website. Some of these risks have been stated above.

[34] Therefore when paragraphs 12 and 13 are taken in their immediate context and the context of what went before, the implication is that Joseph M, chased out Joseph A, saw to it that the toxic bonds were issued, used part of the money to capitalise the business and they were able to do this because the companies were 'private, not listed, so one really knew what was going on.' It was said that would be how the ordinary reader of the publication would have understood the article up to this point.

[35] The omission to state that the Mechala group had complied with every single regulatory requirement of the SEC was said to be unpardonable.

[36] Joseph M was particularly incensed by the fact that the article did not mention that the bonds were offered in the United States to Qualified Institutional Buyers (QIBs) who were persons able to assess the risk associated with the bonds. Further, the article omitted to state that Mechala provided full disclosure of the risk factors and this was publicly available.

[37] Paragraphs 15 and 16 were said to be factually inaccurate. First, the bonds were never offered to Jamaicans as implied by the paragraph because that would have been a clear breach of the terms of the bond issue. The term was that the bond issuer could not offer the bond in Jamaica since the offer was being taken up by institutional investors who would or might wish to see if they could create a secondary market in Jamaica. Second, no member of the Matalon family went to the Eastern Caribbean to offer the bond for sale.

[38] Paragraph 16 was said to be inaccurate because the bond issue was totally subscribed and therefore could not be described as a 'damp squib.' The words 'the

Matalons with US$100 million in their pockets' were said to mean, in the mind of the ordinary reader, that Joseph M was the mastermind, having displaced Joseph A, of this scheme to hood-wink investors by pumping and dumping. That is they bonds were 'pumped' in the manner suggested by the quotation attributed to DLJ, the money was secured and misused by the businesses, and this was done by putting the money in their pockets and them 'dumped' by paying back 'a paltry 47 cents on the dollar.' Add to this the lack of public information, it was the perfect scheme to lure investor to give the Mechala group US$100m, knowing full well that the bonds were toxic from the start, and having received the benefit of this sum, defaulted with the result that the investor lost 53 cents on the dollar. The implication being that the Matalons, led by Joseph M, got the full benefit of sum raised but only gave back 47 cents.

[39] Summarising all that has been said, Joseph M's case was that the article, by omission of critical facts and juxtapositioning of inaccurate timelines, the natural and ordinary meaning which would be arrived at by the ordinary reader of the Caribbean Business Report who was not naïve and able to read between the lines would be that Joseph M was at the centre of a power play which him deposing Joseph A, then set about issuing no-good bonds to public. He was able to secure US$100m to, capitalise his business, engaged in personal consumption of some of the money raised, (all in breach of honest business practice) and having so benefited, turned around and only handed back a paltry 47cents in the dollar having consumed 53 cents out of the dollar.

The defence

[40] JOL has raised two defences to this claim. It relies on fair comment (which should now be called honest comment because that is the core of the defence) and qualified privilege. It has not relied on justification which in its essence is saying that what was said is true.

[41] As Mr Robinson stated, once the publication is defamatory thereafter the defendant is to prove, prove, prove. He submitted that the stance of the defendant

has in fact conceded the defamatory nature of the publication and so the only question is whether the defendant has been able to escape by the doors of honest comment or qualified privilege. Mr Robinson submitted that once the defendant failed to rely on justification then it necessarily follows that the defendant is accepting that the publication is defamatory and is now seeking to deflect liability by saying that it was making an honest comment about an issue of public importance or that it was privileged.

[42] The court observes that it is not easy to see how qualified privilege would arise as a defence in the context of newspaper publishing the kind of article that it did when Reynolds privilege was available.

Honest comment

[43] JOL, in this case, is relying on the defence of fair comment. Recent cases suggest that it would be more appropriate to call it honest comment because the core of the defence is that the writer honestly believed what he stated in his commentary. Admittedly fair comment is the expression used in section 8 of the Defamation Act. The defence protects honest comment.

[44] In addition to the requirement of honest comment, the defendant must state the facts on which his comment is based. He need not give every chapter, verse, jot or tittle but must nonetheless give, generally, the facts on which the comment is based. What is necessary is that the facts are substantially true. The law tolerates a few minor errors of unimportant minutiae. The comment must be comment and not imputation of fact. The defence does not apply to defamatory statements of fact.

[45] It is here that the undercurrent of truth makes its effect felt despite the absence of a plea of justification. If the facts on which the comment is based are untrue then the defence fails even if the view is honestly held by the commentator. Therefore, it is vital for the defendant, if challenged by a defamation claim, to show that the facts on which the comment is based are true if the defence is to succeed. In other words, there is no such defence as honest comment based on an untrue set of facts. An

honest belief that the facts were true is of no avail. This is how the law of defamation resolves the tension between freedom of speech, an important value in a constitutional democracy, and the right not to have lies told about you. As Lord Nicholls observed in **Reynolds v Times Newspaper Ltd** [2001] 2 AC 127, 201:

> *Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed, choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.*

[46] Lord Hope also put the matter in perspective in **Reynolds** at pp 237 – 238:

> *The citizen is at liberty to comment and take part in free discussion. It is of fundamental importance to a free society*

> *that this liberty be recognised and protected by the law. The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed.*

[47] Not only must the facts be true but they must be truly stated. What this means is that a defendant cannot state facts which are true and omit other true facts if those omitted facts would have given a different impression had they been stated. As stated by Eady J, when giving an example of omitting important facts from an otherwise accurate statement of fact, in **Branson v Bower** [2002] QB 737 at [37], it is not honest comment if the defendant speaks about a person charged with a sexual offence and suggests he is unfit to hold his job without also pointing out, if that is the case at the time of the comment, that the person was either acquitted or proceedings against him dropped because the case against him was shown to be unreliable or worse, totally false. In such a case the basis for thinking that the person may be guilty of serious impropriety would have been eroded.

[48] The test, regarding whether the facts are true or the whole relevant facts were presented is an objective test. The honest belief of the defendant that the facts are true is wholly irrelevant to this aspect of the case. Thus the starting point for an assessment of the defence of honest comment is whether facts stated are true,

whether the facts are truly stated and where the circumstances of the case raises the issue of omitted facts, then the assessment is whether the omitted facts would have altered the complexion of the true facts already stated. If this test is not passed then the defence must necessarily fail. If the defendant has cleared this then the next stage is whether any fair-minded person could have honestly held the opinion in expressed. If the answer to that is yes, then the next stage is whether the defendant in fact held that view honestly. This last stage is linked with the malice in that even if the first two criteria are met but there is evidence of malice then the comment would not be one honestly held. Malice here means spiteful or vengeful. The defence is not a medium for spewing invective over the reputation of the claimant.

[49] In addition to what has been said already, there is still the important question of distinguishing fact from opinion or comment. Sometimes the nature of the article is such that it is difficult to separate one from the other but it is a task that must be performed where necessary.

[50] The criteria set out for the defendant to establish the defence of honest comment is subject to two qualifications. The first is qualified privilege. If the facts were published on a privileged occasion and there was a commentary on those facts published on the privileged occasion, no liability arises if it turns out that the facts were not true.

[51] Second is section 8 of the Defamation Act. That section prevents the defence of honest comment from failing if the only reason the defence would fail is if defendant fails to prove the truth of ‘every single allegation of fact.’ However, this section only applies if the publication consists ‘partly of allegations of fact and partly of expression of opinion.’

Qualified privilege

[52] The law appreciates that there are times when frank communication is necessary. Where this is the case, then defamatory communication is permissible. However, while creating this exception the law has set boundaries. In establishing the boundaries the law has developed two traditional categories of privilege. These are qualified privilege and absolute privilege. Absolute privilege is not in view here and need not be addressed further.

[53] What can perhaps be said is that as far as qualified privilege is concerned there are now two strands. The first directed at occasions of a more private and restricted nature such as a report to a superior or to a committee where the circulation of the defamatory information is limited and restricted but is excused on the basis that the occasion of the communication provides a defence. This first strand is not immediately relevant to the context before the court but needs to be identified and distinguished so that the second strand can be properly identified – it is the same genus but different species.

[54] As Lord Nicholls explained in **Reynolds**, 194:

> *There are occasions when the person to whom a statement is made has a special interest in learning the honestly held views of another person, even if those views are defamatory of someone else and cannot be proved to be true. When the interest is of sufficient importance to outweigh the need to protect reputation, the occasion is regarded as privileged.*
> *Sometimes the need for uninhibited expression is of such a high order that the occasion attracts absolute privilege, as with statements made by judges or advocates or witnesses in the course of judicial proceedings. More usually, the privilege is qualified in that it can be defeated if the plaintiff proves the defendant was actuated by malice.*

[55] From this exposition and focusing on qualified privilege, this defence (excluding for the moment, the Reynolds extension and its progeny, reportage) requires the defendant to prove that despite the defamatory nature of the statement, the occasion was marked by qualified privilege, that is to say, (a) there must be come relationship between the maker and recipient that gives rise to a duty to make the statement; (b) the recipient was entitled to receive it and (c) it was made in furtherance of some private or shared interest between the maker and the recipient. This type of privilege is now called 'classical privilege' or 'traditional privilege.' The formulation in this paragraph relates to private communication and as long as the maker did not go further than was required and he was not motivated by malice then no liability can arise. Malice has this metamorphic effect of changing what was prima facie privileged communication into defamation because malice shows that the communication was for a purpose other than a bona fide effort at communication for a proper purpose.

[56] The second type of privilege under qualified privilege is that directed to matters more in the public domain. This strand of qualified privilege can be called Reynolds privilege. The law appreciates that sometimes wider publication than to a small group or very limited class of persons is necessary. The occasion may be such that publication to the world at large may be considered sufficiently important to override the protection of the reputation of the defamed person. If the matter was one of legitimate public interest then the defendant is protected from liability once (a) he was not malicious; (b) the report was fair and accurate; (c) the subject of the report was a matter of public interest. In this latter type of privilege the basis of the publication is not that the recipient and publisher had an antecedent relationship which created an obligation to report or to receive the defamatory information but rather that the information was of sufficient value that the public ought to know about it. In making this kind of assessment, all the circumstances must be examined (**Reynolds,** Lord Nicholls at page 195). Value to the public involves consideration of the quality and subject matter of the publication (**Reynolds**, Lord Nicholls at page

202). If malice is proved then, as under classical privilege, the defence is lost because the privilege would have been abused.

[57] The purpose of Reynolds privilege was stated by Lord Nicholls in **Bonnick v Morris** [2003] 1 AC 300 at **[23]**.

> *Stated shortly, the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care.*

[58] In this age of social media such as Twitter, Facebook and Skype, the publication of information which it is in the interest of the public to know cannot and should not be restricted to newspapers and news producing media. It is not a right restricted to newspapers but a right enjoyed by all persons. Indeed the Charter of Fundamental Rights and Freedoms speak only to freedom of expression. No person has any greater right to freedom of expression than any other. There is no rational basis for singling out newspapers and other news media for special dispensation. This is the approach suggested by the logic implicit in **Seaga v Harper** (2008) 72 WIR 323. This court considers it important to make this point because the defendant appeared to suggest that newspapers are special and unique when it comes to freedom of expression. Newspaper publishers are not entitled to greater protection under the Constitution than any other person.

[59] As has now been recognised by the House of Lords, not only in **Reynolds**, it is now unwise to speak of the any common law principle without reference to the Human Rights Act. If that is so in relation to the Human Rights Act, then that precept is of even greater importance when one is dealing with the common law in a constitutional democracy such as Jamaica. Under the Constitution, there is freedom of expression and freedom to receive and disseminate ideas, make comment and express opinions. Panton P in **CVM Television v Fabian Tewarie** SCCA No 46/2003 (unreported) (delivered November 8, 2006) reminded at paragraph 7:

> *… there is no duty to publish inaccuracies. There is certainly no duty to publish a story that gave false details … A [newspaper] takes unto itself the duty of reporting facts and events. It may also provide commentaries but such commentaries must be on facts. It has no duty to report falsehoods and inaccuracies. Where there are such mistaken reports, immediate sincere apologies are required accompanied by publication of appropriate corrections. The constitutional right of freedom of expression that a person has in Jamaica is not a licence for the taking away of another person's constitutional right to the protection of the law. Hence, freedom of expression does not allow one to injure another's reputation.*

[60] In **Reynolds**, the House of Lords held that a newspaper can escape liability if the publication is defamatory once it can show that the article was the product of responsible journalism. This approach to defamation law is now part of the law of Jamaica by virtue of decisions of the Judicial Committee of the Privy Council in **Seaga** and **Bonnick v Morris** [2003] 1 AC 300.

[61] Since freedom of speech is a fundamental human right breach of which is actionable under the Constitution, it is fair to say that in moving forward, bearing in

mind the liberalising intent of **Reynolds**, **Seaga** and **Bonnick**, a correct conceptual approach should be that (a) border line cases should be resolved in favour of the defendant, unless there is compelling reason not to do so; (b) courts should be slow to find defamation in matters of public interest. In so doing, the concept of the public interest should not be given an unduly narrow definition. **Bonnick** was a case described as 'near the borderline' (Lord Nicholls **[28]**) and resolved in favour of the defendant by the Court of Appeal and the Privy Council despite the fact that the words were in fact capable of defamatory meaning.

[62] This approach is consistent with that articulated by Lord Carswell in advising Her Majesty in Council in **Seaga** at paragraph **[12]**:

> *The third matter debated since Reynolds's case, and now specifically dealt with by the House of Lords in Jameel's case, is how the factors set out by Lord Nicholls in describing responsible journalism in Reynolds's case are to be handled. They are not like a statute, nor are they a series of conditions each of which has to be satisfied or tests which the publication has to pass. As Lord Hoffmann said in Jameel's case (at [56]), in the hands of a judge hostile to the spirit of Reynolds's case, they can become ten hurdles at any of which the defence may fail. That is not the proper approach. The standard of conduct required of the publisher of the material must be applied in a practical manner and have regard to practical realities (see [56]). The material should, as Lord Hope of Craighead said (at [107]-[108]), be looked at as a whole, not dissected or assessed piece by piece, without regard to the whole context.*

[63] What this passage suggests is that having regard to the constitutional importance attached to freedom of expression, the court should not approach the defamatory words in question (using Lord Nicholls's guidelines) in an unduly restrictive way. The judge is not to regard the guidelines as an obstacle course which the defendant is to negotiate at his peril, or like a minefield where each foot step is likely to be the last. They are intended to guide the thought process in order to get a rounded view of the matter in a practical and sensible way. No single piece must be seized upon and parsed without regard to the immediate context in which the words appear and the article as a whole. It must also be remembered that Lord Nicholls did say in **Reynolds** that his list was not exhaustive.

[64] In assessing the meaning of the libelous material, the court should approach in this manner stated by Lord Nicholls (**Bonnick [9]**):

> *In short, the court should give the article the natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the "Sunday Gleaner", reading the article once. The ordinary, reasonable reader is not naive; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis and, also, too literal an approach. The intention of the publisher is not relevant.*

[65] The reasonable, ordinary reader must be one in Jamaica who is familiar with social context of the publication and how words and phrases are understood in the particular social milieu. So too, the judge, in order to carry out his role as stated by Lord Nicholls must be aware of his society and how the reasonable, ordinary reader would understand the words in the context in which they are used. It is not the judge's subjective opinion that matters.

[66] The judge then, should try to look at the matter in the round, without being unduly technical, without being hostile to the press while being informed by the ordinary, reasonable reader in the context of the constitutional right to free speech and having due regard to the right of the individual not to have untruths told about him.

Analysis of the evidence

[67] The cross examination of Joseph M is crucial and some time will be spent on it because it was through this effort that the defendants were seeking to establish that significant parts of the disputed article did nothing more than restate what was already in the public domain. Mr Chen sought to juxtapose previously published articles with paragraphs in the offending article to make his point that no new information was stated by the article and in particular that it did not defame Joseph M.

[68] The article relied on by Mr Chen are tersely summarised in the table below. It should be noted that the exhibit number is not in strict chronological order. For the purpose of this analysis the court will use the chronological order and not the exhibit order.

Exhibit number and publication	Content of exhibit
Exhibit 12 - Financial Gleaner dated November 15, 1996	Mechala Group formed by 3rd generation Matalons to acquire some entities controlled by some 2nd generation Matalons.
Exhibit 9 – The	Spoke to Joseph M being

Weekend Observer dated March 13, 1998	director and chairman of finance committee. Joseph M's job was taken over by Colin Steele. Restructuring done by Joseph M and Joseph A.
Exhibit 11 – The Gleaner – Wednesday Business – October 20, 1999	Mechala said that most of bond holders decided to take 25 cents on the dollar and that ICD was to take control of Mechala's remaining assets.
Exhibit 10 – The Financial Gleaner, Friday, December 31, 1999	Mechala offering to buy back bonds at 34 and 36 cents on the dollar. Bond was trading at 25 to 29 per cent of face value. Poor performance of construction division led to 1999's poor results.
Exhibit 10 – The Gleaner – published on June 25, 1999	Mechala Group to set up new holding company called Mediterranean St Lucia Limited to hold assets of Mechala. Bondholders cannot sue new company because they had

	transaction with Mechala. Mechala unable to make interest payments or repay or refinance senior notes due 1999.
Exhibit 8 - The Gleaner – Tuesday, December 12, 2000	ICD officially replaces Mechala Group. Joseph A giving up CEO post and to be replaced by Joseph M as of January 2, 2001. The restructuring followed scheme of arrangement for 47 cents in the dollar for bondholders.
Exhibit 6 – The Gleaner – Wednesday Business – Wednesday, May 11, 2005.	ICD Group continuing restructuring. The group was once a 32 subsidiary group but now down to 4.
Exhibit 7 – The Financial Gleaner, Friday, May 26, 2000.	The business was hours away from liquidation but was saved. Quotes from various persons about the stressful nature of the difficulties.

[69] In all the articles except two, Joseph M's photograph appears. The trend of the articles shows that Joseph M took a leading role in the management of Mechala and ICD.

[70] Under cross examination, Joseph M indicated that the offending article gave the incorrect chronological sequence. Joseph M said the article gave the impression that the decision to rationalise and restructure occurred in 1995 but that was not actually done until 2000. The paragraph referred to is paragraph 5 using the court's numbered paragraphs. Joseph M said that the same paragraph incorrectly described him as president and CEO when he was the chairman and CEO. This is a minor factual error which the court not attach much significance.

[71] It was also said that time sequence was incorrect when the article referred to statements attributable to the financial adviser DLJ. This firm was not involved in the bond issue in the early stages but the article gave the impression that they were. However a comparison between what was attributed to that firm and the prospectus reveals that both were saying substantially the same thing, namely that the Mechala Group is involved in construction, manufacturing, trading and financial services. Despite the inaccurate time reference, the statement attributed to the financial adviser is not defamatory. In the court's view, these inaccuracies are quite minor and in the context of the article, unimportant minutiae.

[72] One part of the article which may be described as defamatory is paragraph 10 using the court's numbering where the expression '[t]his is how investors would be hooked' is found. Upto that point in the article nothing libelous was said and so it might be said to be imply journalistic hyperbole. However, a different picture begins to emerge when the rest of the article is read beginning with paragraph 12 – 16.

[73] Counsel for Joseph M referred to what is paragraph 12 of the court's numbering of the paragraphs where the article said that:

> *The Matalons in effect used other people's money to capitalise their businesses, eradicate debt and because of poor performances of their companies were unable to make good.*

[74] This was after the writer defined what he regarded as a bond. It is really loose language which one would not expect from such an experienced journalist writing a reflective piece. One would expect a journalist such as Mr Edwards who prides himself on being a consummate journalist on financial matters to be a bit more precise. The debt was not eradicated. The strategy was to substitute lower cost debt for the higher cost debt. It was more in the nature of refinancing. Also it is not true to say that the bond issue capitalised the company. These statements by Mr Edwards are unfortunate because the prospectus for the US$75m bond issue explicitly states that 'the Company will use such net proceeds to (i) refinance approximately J$2.0b (US$56.5 million) of existing indebtedness incurred by the Company's subsidiaries in the ordinary course of business, and (ii) exercise its option to acquire BNSJ 50% interest in IFH …' The court notes that the sentence was careful to observe that it was the poor performance of the companies which led to the problem.

[75] When the part of paragraph 12 just referred to is read with paragraphs 13 – 16, a different picture emerges. Where the writer has gotten into problems is at paragraphs 13 - 16. At paragraph 13 a statement is attributed to a bondholder which suggested that information about the bond was not available. The bondholder attributes this lack of information to 'fact' that (a) the company was not publicly listed and (b) investors had to take the company's word. It was not pointed out that Mechala had in fact complied with the regulatory requirements of the SEC and that the prospectus had spelt out in clear and unmistakable terms the risks of the issue and that any purchase of the bond was at the investor's risk and it would be deemed that he exercised his own discretion. The problem here for the defendant is that statement attributed to the traumatised bondholder is being asserted as a factual statement and not the bondholder's opinion.

[76] At paragraph 15, the reference to many Jamaicans not being impressed with the bonds and so the family took the issue on the road to the Eastern Caribbean was not true. None of the bonds was offered in Jamaica by Joseph M or any Matalon family member and none was offered in the Eastern Caribbean by Joseph M or the Matalons or anyone at their behest. No evidence was called by the defendant to prove this allegation. Not only was it not a fact it would have been contrary to terms of the prospectus which expressly stated that '[t]he notes will not be offered or sold in Jamaica' meaning that Mechala itself would not offer any of these bonds for sale or be part of offering them for sale in Jamaica. The article gave the distinct impression that the Matalons including Joseph M did offer them and when that did not work out then went to the Eastern Caribbean. Interestingly, Mr Edwards asserted in his examination in chief that it 'is a fact that the bonds were pitched in the Eastern Caribbean to prospective investors.' This assertion was not proved by reliable and admissible evidence. Mr Edwards never claimed to be an eyewitness to this salemanship and neither did the defendant offer any evidence other than the naked, unsupported and unsubstantiated statement that the bonds were so offered. This type of evidence amounts to what some call proof by assertion. It is one thing to make an assertion and hope it is not challenged but when challenged then the person making the assertion ought to be able to back it up by some kind of admissible evidence. Mr Edwards was unable to do this.

[77] Paragraph 15 was followed by paragraph 16 which had the unfortunate phraseology, '[w]ith the bonds proving to be a damp squib and investors losing out big time, the Matalons, with US$100 million in their pockets, paid bondholders a paltry 47 cents on the dollar to buy back the bond.' Mr Chen sought to say that the expression 'in their pockets' was innocuous. As a prepositional phrase it is surely harmless but language takes meaning from context and context include the social milieu in which the language operates. This overlooks the fact that language has both a logical and a psychological dimension. It is the psychological dimension that leads to the development of idiomatic expressions which have an emotional impact. Idiomatic expressions are particularly culturally based so that a person outside of the

culture may understand the meaning of the individual words which make up the idiom but does not fully grasp the psychological and emotional impact of the expression. In this court's view, the expression 'in their pockets' often times has a negative connotation in Jamaica. As explained below when this expression, used as it was, in that part of the article, which spoke the lack of information about the bonds clearly suggests or implies that some form of sleight of hand was afoot.

[78] When paragraphs 13 to 16 are read together and in the context of the whole article, including paragraphs 10 and 12, they are capable of meaning that the lack of information led persons to purchase the bonds thinking that they were better than they really were and this withholding of information contributed to their initial success reflected in the bond issue being oversubscribed. The implication being that had the truth been told and that truth was available to any potential investor, the 'traumatised' bondholder would or may not have purchased the bonds. In the Jamaican culture, the juxtapositioning of lack of information about the an investment coupled with the expression 'US$100m in their pockets' along with the picture of Joseph M in the article and Joseph M taking over the 'family empire' is capable of being defamatory. The reference to the unnamed bondholder seemed to have been a ploy by Mr Edwards to convey the idea that there was in fact a lack of information about the bond issue and the risks associated with this issue. That section of the article is capable of suggesting that Joseph M engaged in sharp if not dishonest practice. This court agrees with Mr Robinson that the omission to mention that there was in fact full disclosure in the relevant documents which were available to investors was a significant omission. Had that fact been mentioned at the same point where the bondholder was claiming ignorance the context would have been that it was the bondholder who did not avail himself of information rather than suggesting that it was Joseph M either personally or persons on his behalf who withheld critical information.

[79] When that part of the article is read along with paragraphs 4 – 6 which omitted to say that Joseph M took over from Joseph A in 2001, after the bond issue, the connection is that the reasonable reader would conclude that Joseph M took over at

or around the time of the bond issue, did not provide adequate information to the investing public which led to the bond being more successful than it should have been.

[80] The court also agrees with Mr Robinson that the title of the article on page 3 of the publication along with what has just been stated was part and parcel of the defamation. While it is true that the expression toxic bonds, at the time it was used, was not defined by scholars, the phrase is associated with bonds which the issuers knew from the outset were totally worthless as distinct from a bond issued in good faith that runs into difficulty because of poor performance by the bond issuer. The title and subtitle on page 3 when taken together with the omissions pointed out are indeed capable of suggesting that Joseph M, took a lead role in the Matalon family and issued or caused to be issued or was very instrumental is having sold bonds which were 'toxic' and therefore inherently worthless.

[81] Mr Chen made reference to that section of the Constitution of Jamaica which deals with free speech in order to suggest that in some way a finding adverse to the defendant undermines freedom of speech. However, reference to the passage from Panton P in **Tewarie** is sufficient to neutralise that submission.

[82] The omission of material facts concerning information about the bonds would have changed the tenor of the article had those facts been referred to. As the court has stated, the writer need not reproduce the entire prospectus. One sentence to say that the risk of dishonouring the bonds was fully disclosed and highlighted over nine pages would not have lengthened the article unreasonably. The court appreciates that a newspaper is not the Encyclopedia Britannica but surely a complete picture ought to have been given. The highlighting of Joseph M by using his picture twice and writing an incorrect chronology regarding the departure of Joseph A did convey the impression that Joseph M was implicated in withholding the crucial information that misled investors. The defence of fair comment therefore fails. While the law tolerates minor inaccuracies, omissions and juxtapositioning which have the effect of conveying misleading facts is not acceptable.

[83] The court will analyse the privilege claimed as Reynolds privilege. The preconditions for traditional privilege are not present. There was no occasion between the newspaper and any narrow class of persons that warranted publication. There was no duty existing between the newspaper and anyone which demanded frank discussion.

[84] To get directly to the heart of the matter, the question is, was this responsible journalism? This court does not form the view that it was responsible to publish an quotation from an alleged bondholder who was complaining about lack of information and it was difficult to get accurate information about the bond thereby creating the impression that somehow important information was kept away from the bondholders when that was not the case. Mr Edwards admitted that he saw the prospectus on the SEC's website. There was no time pressure since this was a reflective piece being written about an event that took place a decade before.

[85] One of the critical factors pointed out in cross examination to Mr Edwards was that the prospectus specifically dealt with the Mechala's ability to repay the debt. Indeed, on reading the prospectus the court observed that it said: '[t]here can be no assurance, however, that the Company's business will generate cash flow at the necessary levels that, together with available capital expenditures, interest payments and scheduled principal payment.'

[86] The court is not saying that Mr Edwards should have quoted chapter and verse from the prospectus but rather that it is misleading to print the assertion from the traumatised bondholder that there was a lack of information regarding the bonds when that was not true. It was also inaccurate to create the impression that investors were not aware of the risks when the true position was that the prospectus went into exceptional detail regarding the risks. The prospectus pointed that in certain circumstances the Mechala may be forced to operate in circumstances where 'the holders of the Notes could experience increased credit risk and could experience a decrease in the market value of their investment.'

[87] To continue with the incorrect factual suggestion that information was withheld and having failed to sell the bond in Jamaica, the bond was taken by the Matalons to the Eastern Caribbean was plainly wrong. There is no evidence that Joseph M or any Matalon was part of this activity. Not only that, one of the conditions of sale was that Mechala would not offer the bonds in Jamaica. In effect, the article suggested that Joseph M by taking such prominent role having taken over from Joseph A was part and parcel of conduct that was contrary to the promises they made in their prospectus. In effect, he was promising not to sell the bonds in Jamaica in the document was actually doing the very thing he was saying the company would not do. In business as in other spheres in life reputations are important.

[88] Had Joseph M been engaged in or supporting any sale of bonds in Jamaica or the Eastern Caribbean it would be a fundamental breach of their word as given in the prospectus. In effect, they would be engaged in stifling the possibility of the institutional investors developing a secondary market. In the world of finance this would be a very significant ethical breach with also the possibility of real sanctions from the SEC. In other words, having promised the QIBs that the Matalons and Joseph M would not engage in secondary sales and thus leaving the way clear for the QIBs to develop a secondary market, the Matalons and Joseph M were actively engaged in stymieing those efforts.

[89] Matters were not helped by the reference to toxic bonds which has come to mean, according to the evidence, bonds which the issuers knew from the outset were deeply flawed, based on unsound lending practices and that information was concealed. It must be said that having regard to the disclosures in the Mechala prospectus it was indeed unfortunate to link the Mechala bonds to the expression toxic in light of the meaning which it acquired over time. In other words there is a world of difference between a toxic bond and a bond issued in good faith with full, complete and honest disclosure. The former is a crooked scheme from the beginning; the latter is an honest scheme that has failed to perform.

[90] Mr Edwards in his examination in chief stated that in 'paragraph 1 of the article [he] intend[ed] to set the tone and make a comparison between the financial crisis in the United States and the financial crisis in Jamaica in the 1990s.' Mr Edwards continues by saying that the article 'expresses [his] conclusions drawn from material available to me in the public domain in newspaper articles and my own investigations that bonds or investment instruments that are created to raise capital that then dramatically lose their value largely due to inadequate performances, an overestimation of potential earnings or indeed a failure to fully discern the company or institution's true worth leaving a trail of disenchantment and unhappy investors with a lack of confidence reposed in financial institutions and their leaders. The Mechala bonds were a case in point and draws interesting parallels between the US financial crisis in 2008 which I considered to be worthy of consideration and I considered this to be a matter of public interest.'

[91] Having read Mr Edwards' article and the exhibits in the case it is difficult to appreciate the point Mr Edwards was making. Mechala was not a financial institution. It did not collaterise any debt obligations and sold them as bonds. In light of its detailed prospectus outlining losses and its heavy indebtedness and the risk factors highlighted it really is difficult to see how anyone could conclude that there was an overestimation of potential earnings by Mechala or fail to get a sense of the true worth of the company's value. The risk of inadequate performance was there for all to see. It was in the prospectus which Mr Edwards testified under oath the saw on the SEC's website. While the court accepts that there is intellectual freedom and freedom of expression, based on what is known about the dodgy underlying assets that formed the base of the bonds (toxic) sold without full information to the investing public, the court is hard pressed to see how that approach could be remotely applied to Mechala, which, at the risk of repetition, stated major risk factors. Indeed so great was the risk that Mechala's bonds were not issued to the general public but QIBs. To put it another way, it was because of the full and complete disclosure of the risk that the general public was barred from purchasing initially. The bond issue was really for skilled and mature investors who would be willing to take the risk. It was not an

investment for the ordinary man in the street hence the restriction to qualified institutional investors. If Mr Edwards was acting responsibly then it seems to this court that responsible journalism demanded that he point out that Mechala, unlike what some did in the United States, did not withhold any information and thus investors were able to make an informed decision. An examination of the prospectus showed sixteen risk factors were identified. There was the general heading of 'Risks related to the offering.' The document highlighted risks relating to country, Jamaica; risks related to the company itself. In other words, the macro economic risk factors were identified as well as the micro economic risk factors specific to the company. The Reynolds defence of responsible journalism therefore fails.

[92] It is fair to say that an honest, unduly suspicious reader, with a sufficient understanding of financial matters, seeing Joseph M's picture on the front page and in the body of the article and reading the reference to him taking over without clear reference to time sequence coupled with non-disclosure of critical information would conclude that Joseph M was part of a scheme to sell bonds without giving full and accurate information. They would conclude that Joseph M was not only associated with selling bonds known to Joseph M to be dodgy but also that he sold them nonetheless with full knowledge of their unsoundness and concealed the necessary information. Judgment is entered against JOL in favour of Joseph M alone.

[93] The court therefore expressly finds that the omissions and misplacement of chronological history along with picture of Joseph M were not only only capable of being defamatory but were in fact defamatory

Quantum

[94] In this claim, Joseph M asserted in the pleaded case that the article has defamed him to such an extent that he 'has been severely injured in [his] credit, character and reputation and [has] been brought into public scandal, odium and contempt.'

[95] The evidence of Joseph M suggests that no loss of reputation seemed to have ensued. There is none of the expected fall out that one would expect to see in this type of case. Mr Chen was able to establish, through cross examination, that in 2000, Joseph M was appointed Chairman of the family company ICD was still the Chairman at the time of trial. It was also established that in 2010, two years after the article, Joseph M was conferred with an Order of Distinction, Commander Class for contribution to the private sector and public sector. With six months of the article, Joseph M was elevated to the presidency of the Private Sector Organisation of Jamaica, an extremely powerful lobby group in Jamaica. In the year before the article was published, that is 2007, Joseph M was appointed to the board of the Development Bank of Jamaica and was still a member of that board.

[96] Joseph M founded St Patrick's Foundation and is now its Honorary Chairman. He is a director of Multicare Foundation which assists the less fortunate. He is also chairman of the Board of Governors of Hillel Academy, a distinguished private school in Jamaica. Two years after the article, 2010, he was appointed to the Board of the International Youth Foundation based in Baltimore in the United States of America.

[97] There was no specific evidence coming Joseph M indicating how he has shunned or suffered as a result of the article. Nothing has been produced to say that in business circles Joseph M has suffered loss of prestige. This case is unlike that of **Gleaner Company Ltd v Abrahams** (2003) 63 WIR 197 the jury award of JA$80,700,000.00 was reduced to JA$35,000,000.00. Even this reduced figure was very high by Jamaican standards. It was high then and still high now. Mr Abrahams in that case 'was universally treated with hostility and contempt. Everyone knew him, so there was nowhere he could go. He was openly called a thief by a shopper in the supermarket and taunted in public. Social invitations ceased. No-one would do business with him. He became depressed, withdrawn and prone to weep. Only a handful of people believed that he was innocent' (**[16]**). There is no such equivalent circumstance in the present case. The witnesses who testified on behalf of Joseph M did not say that they lost any respect for him. Mr Bornstein stated that he regarded Joseph M then and now as honest man.

[98] Indeed the objective evidence is that Joseph M as not lost any board membership since the article. Indeed he has received a national honour and secured the presidency of an important private sector organisation. There is nothing to say that even within his family business there has been any loss of face. There is no evidence of loss of stature.

[99] Mr Robinson has suggested that this case should attract on award of JA$50m. This case is at the low end of defamation awards. The allegations were serious but from all indications Joseph M is none the worse. The court will use the case of **Seaga v Harper** (2008) 72 WIR 323 because the circumstances there are closer to the present case than those cited by counsel. In that case the award was JA$3,500,000.00 at trial which was reduced on appeal to JA$1,500,000.00. The Consumer Price Index (CPI) at date of Supreme Court award was 73.95. The latest CPI available is June 2014 which is 215.9. Updating that award to today's value gives JA$4,379,310.34. This is the sum that is awarded. Costs to Joseph M to be agreed or taxed. The second claimant died before the case began. His claim is no longer before the court.

[100] The delay in producing this judgment is regretted but was largely occasioned by the delay in getting a full transcript. Although most of it was available in 2013, the outstanding portion became available in June 2014. The judgment was delivered at the earliest time possible having regard to other cases the court was involved in.

Disposition

[101] Judgment for Joseph M. The sum awarded is JA$4,379,310.34. Costs to Joseph M to be agreed or taxed.