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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1995/S292

| | | |
|---|---|---|
| BETWEEN | MOHAMMED SHAM | PLAINTIFF |
| A N D | THE JAMAICA OBSERVER LIMITED | IST DEFENDANT |
| A N D | PAGET DEFREITAS | 2ND DEFENDANT |
| A N D | DESMOND ALLEN | 3RD DEFENDANT |
| A N D | VIVIENE GREEN-EVANS | 4TH DEFENDANT |

Dr. B. Manderson Jones for Plaintiff

Mr. Hector Robinson instructed by Hector Robinson & Company for Defendants.

HEARD: February 10, 11, 12, 19 & November 30, 1999

REID, J.

The Plaintiff issued a writ of summons claiming damages for libel arising from a publication on the front page of the edition on 20th July 1995 of the First Defendant Newspaper "The Observer". The second and third Defendants are the Editor-in-chief and the editor respectively while the fourth named Defendant the author of the article is described as the "Education Observer Co-ordinator" of the newspaper. Under the Heading

UWI lecturers fired!

"Failure to publish despite million-dollar salaries"

the report reads:

> "The University of the West Indies (UWI) in a crack down on negligent lecturers has fired several of its academic staff for alleged breach of contract.
>
> The observer was unable to get the full list of lecturers dismissed and UWI spokesmen did not want to go on record, but sources at Mona said the list cuts across the six faculties of the University."

The report proceeded to name "two well known lecturers who got the boot" and continued:

> "The newspaper also confirmed that one of the most recent departures is Mohammed Sham of the faculty of Natural Science."
>
> In the majority of cases, the lecturers were axed after the University's assessment and promotions committee gave them low marks for a variety of reasons, mainly for not publishing research work in breach of the terms of their contract.

It described the dismissals as "the most dramatic indication yet that UWI Vice-Chancellor Allister McIntyre's co-called 'publish or perish' policy is beginning to bite - and from the Vice Chancellor's Report to Council in the month of April quoted the following:-

> "While extensions of contract and promotions are not judged exclusively on research performance, the expectations of the University are that every staff member, without exception, must have a creditable research record in order to receive advancement."

The report ascribed to "UWI sources"

> "the determination to deal with delinquent lecturers .... strengthened by the fact that university academic staff have now been getting million-dollar salaries, with allowances included for research work."

"The Source", said the report,

> "accused some lecturers of short-changing students by spending more time doing consultances for external entities than for the University."

Eptomised responses from each of the first two lecturers named, are contained in the article but none from the third-named who as the pleadings go and as events will show, was the Plaintiff.

At paragraph 5, the pleadings read:

> "The said words in their natural and ordinary meaning meant and were intended to mean that:
>
> 1) The Plaintiff was incompetent in his profession.
>
> 2) The Plaintiff was professionally negligent.
>
> 3) The Plaintiff was in breach of his contract of employment.
>
> 4) The Plaintiff was dishonest.
>
> 5) The Plaintiff was not fit to be a lecturer.
>
> 6) The Plaintiff was dismissed from his employment as a univeristy lecturer for failure to fulfil his obligations in that regard.

The amended defence at paragraph 4, while expressly admitting the publication of the article, made "... no admission that the words

contained (therein) referred to or were capable of referring to the Plaintiff."

In the alternative it was pleaded that if the words

> "were understood to refer to the plaintiff, the defendants deny that the words in their natural ordinary meaning bore or were understood to bear or were capable of bearing or being understood to bear any of the meanings set out in paragraph 5 of the statement of claim or any meaning defamatory of the Plaintiff. In particular the words in their natural and ordinary meaning do not bear and are incapable of bearing the meanings (set out in the statement of Claim)."

Paragraph 6 reads:-

> "Further, or in the further alternative, if, which is not admitted the said words were understood or were capable of being understood to refer to the Plaintiff, which is derived, and, if, which is denied, the words have or were capable of hearing any of the meanings set out in paragraph 5 of the statement of claim and in particular the meanings that the Plaintiff was dismissed from his employment as a university lecturer because he was in breach of contract or was not fit to be a lecturer or for failure to fulfil his obligations in that regard the words were in substance and in fact true."

The particulars to which the defence condescended are:-

a) At the time the article was publish the Plaintiff had recently resigned as a lecturer in the Faculty of Natural Sciences at the University of the West Indies.

b) The Plaintiff, at the time of his resignation was to the knowledge of the Plaintiff, due for assessment by the University Appointments Committee of the West Indies, in relation to an application by him for renewal of his contract.

c) The Plaintiff had not in fact published any research (sic) articles in refereed journals in a number of years and the University of the West Indies would have been justified in dismissing the Plaintiff on those grounds.

d) The Plaintiff's resignation in those circumstances amounted to constructive dismissal by the University of the West Indies.

7. The Defendants will say that the words were published on an occasion of qualified privilege.

The Particulars of the qualified privilege averred, read thus:

a) The First Defendant was at the time of publication a source on (sic) which the public relied for news concerning the public interest.

b) The standard of lecturers at the University of the West Indies is a matter of legitimate public interest.

c) The First Defendant had a social and/or a moral duty to bring to the attention of the public matters concerning the maintenance of standards at the University of the West Indies and the public had a corresponding duty and/or interest in receiving the publication.

d) The First Defendant published the words in pursuance of its duty aforesaid and acted without malice.

8. The defendants will also rely on Section 7 of the Defamation Act.

The Plaintiff's Case

The Plaintiff up to and until 30th September 1995 had been employed to the University of the West Indies (hereinafter referred to as 'the University' or UWI) as a lecturer in the department of physics in the faculty of Natural Sciences. Following the completion of an initial three-year contract of employment by which, in writing dated 28th July, 1978, he was engaged, there were four successive extentions of similar duration and on similar terms up to 30th September 1993 as also a two-year extension to 30th September, 1995.

In a letter to the Registrar dated 26th October 1994 (in evidence Exhibit 8) the Plaintiff wrote:-

"ATTENTION MRS. BARBARA CHRISTIE

"As I briefed you earlier, I do not wish to continue my present job later than September 30, 1995. Therefore I will not be submitting my updated C.V. (which contains substantial improvements and changes than the C.V. in your file) for the meeting to be held at the end of October 1994. It is no more necessary to forward my case to the above meetings.

If there will be any change in my decision stated above, I will brief you accordingly.

Sincerely,

M.Y. Shams
Lecturer in Electronics and Control
Physics Department, UWI Mona".

The Plaintiff holds a Master's degree in Applied Physics from the Punjab University of Pakistan and in addition to other qualifications is a member of the Jamaica Institute of Engineers.

Despite the mis-spelling of his name in the published article, he had understood it to be a reference to him and accordingly, by telephone spoke with the writer, the Fourth Defendant, who confirmed that the person named was the Plaintiff. The Fourth Defendant, said the Plaintiff, acknowledged that she had spoken to the other two lecturers named in the article. The Plaintiff inquired why had she not done likewise to him. Then it was he told her that he had not been 'fired'. She asked him to make a FAX transmission of his letter of resignation. He complied and sent a covering note. A few hours later, in the afternoon, he telephoned and was allowed to speak to the editor Desmond Allen (Third Defendant) who confirmed having seen the FAX and remarked on the absence of the University's letter-head. This, the Plaintiff explained, was an internal communication and did not require a letter-head, and adding that the Registrar could confirm same. No assurance was offered that a published correction would be forthcoming. The Plaintiff was requested to send on any correspondence pertinent between the University and himself. Among the documentary exhibits, in evidence by consent, was a newsletter called the "UWI Notebook" for July 24, 1995. It carried a repudiation of the Observer's report and confirmed as fact the Plaintiff's resignation.

The Plaintiff is unaware, he testifies, of any report of misconduct ascribed to him or submitted for consideration before any professional committee of the University for such purpose.

The Defendant's Case

Testimony for the defence came from the Fourth Defendant, currently the Research Editor of the 'Observer' and for four years as such. Having learnt, she testifies, of the Vice-Chancellor's 'publish or perish' policy, she sought more information from the several departments of the University. She received names of persons with whose work the University, in her words 'was not happy'. Having spoken with the lecturers named she successfully attempted to contact the Plaintiff by telephone. Again, for the sake of confirmation, she spoke to Mr. Falloon the Mona Campus Registrar who

> "did not want to go on record nor give me other persons' names."

"By that time", she testifies,

> "I had gotten quite enough information to write. So I wrote the story and then it was edited by my then editor Desmond Allen."

Her testimony is

> "I spoke to several persons including a Mr. Falloon Campus Registrar, I think; to representatives of public relations department and I tried to get Professor Lalor and there were few others to whom I spoke. I received some names of persons (with) whose work the University was not happy with (sic). I tried to contact these persons named in the article, Wenty Bowen, Robert Buddhan and Mohammed Sham."

She further added:-

> "I tried to get a further confirmation of the names I had, which I could include in the story, with Mr. Falloon's name. He did not want to go on record nor give me other persons' names."

Affirming to having seen the edited story before it went to the press, she had indicated to the editor that she had been unable to confirm one of the names mentioned.

She admitted that she had requested from the Plaintiff his letter of resignation; she could recall neither what the former had said pertaining to the letter, nor having herself seen same, although she had spoken twice with him following the publication. As to the reason for her believing the article to be true, she gave:

> "my sources - I had got the list; the list of three names - two were confirmed."

Cross-examined further, she admitted that at paragraph 3 of her affidavit of documents she had deposed to never having had in her possession any .... "letter memorandum (etc.) .... relating to the

> "issues raised in the statement of claim, defence and reply."

She did not know whether the employment of the lecturers, respectively, named, had ceased within, or, at the end of the same academic year. Although before the publication she had spoken, as she had averred, to representatives of the Public Relations Department, she remained unsure of her ever having gone back to (these 'sources') following the Plaintiff's repudiation of the report of his dismissal. What she had received, was names of persons with whose work the University was not happy, but the (paraphrase)

'dismissal' was her 'way of putting it.'

The reason for not mentioning her source at the time of submission to her editor was that that which had been supplied to her, had been done on condition of anonymity.

To the question why was there publication of the Plaintiff's name without her having first secured his confirmation, she replied.

> "The names on the list, two confirmed. I discussed it with Mr. Falloon, told him on the phone. I mentioned the names, I asked him for the others - in article more than three - He did not want to give me those other names but he did not deny the accuracy of the list."

More to the point, she answered:-

> "I am not saying that Mr. Falloon the Registrar had confirmed the list."

But to the question 'why mention Plaintiff's name?' she replied:-

> "Because Mr. Falloon had not denied and seeing (the Plaintiff's name among the others on the list, I inferred that the list was quite accurate."

To the question "So you relied on the information on the anonymous list?"

She replied

> "Yes, and his (Falloon's) refusal to deny:"

The following is instructive -

> Q. "For alleged breach of contract"?
>
> A. My original article may have indicated it. Yes.
>
> Q. What is the basis of so saying?
>
> A. From the anonymous source.
>
> Q. Was this on the list - was it in writing?
>
> A. No.

She proceeded to tell that this information was not on the list, which itself was not a written one. Both the 'list' and the accompanying information she had received by telephone.

Dr. Anthony Chen a senior lecturer in the department of Physics was called to support what, I may call, the pleadings of the dearth or insufficiency of publications standing to the Plaintiff's credit. On two occasions for a five-year duration during ' the eighties' and for two years (1991 - 93) respectively, this witness had acted as the head of the Department of Physics. The importance

of research and publication, he said, to renewals of a lecturer's contract, would vary according to whether consideration was being given to renewal merely, or on the question of 'tenure'. Heads of departments are required to submit reports (on lecturers) but do not sit as members of the Assessment and Promotions Committee. For the purpose of a first and second renewal of contract, research and publication are not as important as when assessment for advancement to a position of senior lecturer or for 'tenure' is to be considered.

The critical publications in this regard are refereed publications, that is to say, those submitted to journalists having first been subjected to peer review.

Defence submissions

Mr. Robinson alluding to what he termed "the use of several choice words", submitted that a careful examination of the article in its entirety together with its sub-title would reveal that the emphasis therein is on the reasons for the "dismissals and "departures" and not on the "departures" (themselves). The "sting of the libel", he urges, is not in the fact of the dismissal but with the alleged grounds for dismissal.

Relying on Section 7 of the Defamation Act,he would have the Court examine the facts presented in the newspaper article to determine whether its publication had in fact been justified and so conduce to absolving the Defendants under the provisions of the Section cited. Conceding that the Plaintiff's contract of employment had ended in September 1995 and at his behest not thereafter renewed, Mr. Robinson had recourse to the provisions of the UWI Calender (Ex.10) Charter and Statutes of the University (Ex.10) which, under the subtitle PART II REVIEW, regulate the composition of the Assessment and Promotions Committee. That document mandates the "reviews of appointment, of Academic and senior administrative staff", as well as requiring this Committee "to consider and make a recommendation to the Appointments Committee"in the case of each member of staff.

The provisions of the Charters and Statutes are by reference incorporated into the Plaintiff's contract of employment. The Assessment and Promotions Committee when considering whether to recommend renewal of an appointment is required to take into account the record of "research, publications ....", inter alia, of Academic

Staff in the field of Teaching and Research. Failure on the part of the Plaintiff, to conduct research and to publish, to a standard considered satisfactory, submits Mr. Robinson, would, and did constitute a breach of contract whether or not sanctions on such dereliction in fact ensued.

On the evidence before the Court, the inference should be drawn that the Plaintiff's record of publication had not attained the standard for the approval by the University.

Citing what Mr. Robinson termed "glowing commendations" from successive heads of department on other aspects of the Plaintiff's performance, he would urge the conclusion that the dearth of publications to the Plaintiff's credit, constituted the area with which the University was not satisfied. It was testimony from the Plaintiff himself that, following the presentation of an updated curriculum vitae (C.V.), there were only two additional papers presented by him which could possibly have been included in any subsequently updated C.V. The dates of presentation of each of these, when considered, could not make them qualify for any assessment in 1994 of the Plaintiff's performance. Parenthetically at this point however, it should be noted that the Plaintiff's letter as dated (Exhibit 8) (supra) , would render such further consideration by the Assessments and Promotions Committee of the C.V. a fait accompli.

On the issue of qualified privilege, Mr. Robinson submitted that the defence ought to succeed and enunciated the three-fold test namely:-

1. The legal moral or social duty on the part of the publisher to publish the material in question - (the duty test).
2. The interest of general public to receive the material (the interest test).
3. The protection, in the absence of malice, which the publication should enjoy having regard to the nature and source of the material as well as the circumstances of its publication (the circumstantial test).

Inasmuch as the substance of the article in fact addressed the standard of lectures being offered by the University, an institution funded, in part, by the public of Jamaica, reciprocity of the duty and interest tests was fulfilled by a newspaper with a circulation of 40,000 - a wide readership of the Jamaican community. The inaccuracy of the report that the Plaintiff was dismissed ought not to derogate from the circumstantial test which, as he submitted, had been satisfied.

Having obtained what the Fourth Defendant regarded as confirmation from the two lecturers named, it could not be said that she unreasonably concluded (in the circumstances of a less than positive response from the Registrar) that the unnamed source was one on which she could rely. Understandable, Mr. Robinson conceded, was the stance of the Campus Registrar reflecting as it would, the wish of the University not to be associated with the dissemination of information, which was less than factually accurate, relating as it would be, to the dismissal of a member of staff. In this context, the words of Lord Bingham C.J. in Reynolds v Times Newspaper [1998] 3 ALL E.R. 961 at 995, were a timely reminder:

> "So far as malice is concerned, it is important to bear in mind the heavy burden resting on the plaintiff, as authoritatively stated by Lord Diplock in Horrocks v Lowe 1974 1 ALL E.R. 662, [1975] AC 135.

In the event that the Defendants were found liable, the evidence adduced which would have proved insufficient to sustain the issue of justification might yet be prayed in aid to reduce the amount of damages awarded. Mr. Robinson was referring to what he submitted was the dearth of publication which, as he had earlier said, had entitled the University to treat the Plaintiff as one in breach of the terms and conditions of his contract. Reliance was placed on dicta by May L.J. in Atkinson v Fitzwalter [1987] 1 ALL E.R. 483 at 490 and 491.

Unwarranted, a fortiori, Mr. Robinson submitted, would be an award of aggravated damages for which Counsel for the Plaintiff in his opening address would press.

<u>Submissions on behalf of Plaintiff</u>

The words, Dr. Manderson-Jones submitted , did in fact, refer to the Plaintiff and were so understood. Although this is not admitted in the defence, the alternate pleadings therein, leave no doubt of this,as do the answers to the further and better particulars and to the interrogatories. The words, he submitted, bore the meanings and were understood to bear the meanings set out in paragraph 5 of the statement of claim. The gist and sting of the libel - "the single ordinary meaning" of the publication was that the Plaintiff was "fired", that is, dismissed from his employment as a lecturer at the University because he was negligent and in breach of his contract.

The question is not what the defendants intended; the imputation must be determined by the objective test. The so-called "Constructive dismissal" to be derived from the alleged circumstances of the Plaintiff's resignation is without merit. To maintain that the Gist of the libel is not in the averment of a dismissal but in the so-called "failure to publish" is likewise devoid of merit. The testimony of Dr. Chen is that a lecturer may have to his credit a substantial publication other than one published in a refereed journal. It followed that any failure imputed to the Plaintiff, to publish, since 1991, in a refereed journal,could not, per se, constitute a breach of his contract of employment. From the libellous imputations pleaded in the statement of claim, the Court will determine the single ordinary meaning to which the reasonable fair-minded reader would interpret the publication. It is that meaning which the Defendants are required justify. Impermissible is it for them to set up a meaning not pleaded and then seek to proceed to justify same. The Defendants are bound by the pleadings generally and in particular, their own.

To aver the dismissal as a fact and then proceed to attribute three possible grounds for same, is not to identify,as the defendants would, two or more distinct charges arising from the contents of the article. The single charge that Plaintiff had been dismissed would still materially injure his reputation even if the other allegations might possibly be regarded as "other charges".

Hence, the provisions of Section 7 of the Defamation Act cannot avail them. However, no evidence had been adduced to show that the Plaintiff had been deemed in breach of his contract.

On the issue of qualified privilege no evidence had been adduced in support of the particulars pleaded in paragraph 7 of the amended defence which, therefore, was bound to fail.

In the light of the admission that the allegations published were based on inference and conjecture derived from insufficient knowledge of the facts as well as from reliance on sources unnamed and unspecified, the publication was not made in the bona fide exercise of a duty which could qualify the occasion as privileged. Moreover, unverified information from unidentified sources would undermine the circumstantial test adumbrated above.

A publication made in reckless disregard of the truth of the contents must draw the inescapable inference that its purpose was primarily to enhance the sale of the newspaper. The lack of honest belief was to be inferred from the absence of confirmation of the disseminated information, which the answers to interrogatories reveal.

Learned Counsel submitted that the conduct of the Defendants called for an award of aggravated damages. There was a refusal to apologise. There was the persistence in the defence of justification even while asserting that the words do not in fact refer to the Plaintiff.

The admission in the amended defence of paragraph 3 of the statement of claim, it was submitted, must be construed as an admission that "the Defendants falsely and maliciously wrote ......" as the ipsissima verba of the statement of claim read.

Knowledge gained after the Plaintiff's communication with the author that the Plaintiff had resigned and had not been dismissed taken in conjunction with the so-called plea of "Constructive dismissal" constituted factors aggravating the untenable defence of justification. The dicta in Atkinson v Fitzwalter (above) would not avail the Defendants' prayer for a reduced award as there has not been any precise indication on what established facts is reliance made.

The failure to publish in a refereed journal since 1991, even if proved to be true, cannot constitute proven facts, which, by themselves insufficient to make good the defence as a whole, can sustain a proposition that the Plaintiff should receive a smaller sum by way of damages.

## Evidence of Plaintiff's performance as a Lecturer

The failure to publish ascribed to the Plaintiff constitute one factor prayed in aid of the alleged breach of contract. As counsel for the Plaintiff pointed out, the averment of a failure to publish cannot without more, constitute a libel, nor, a fortiori, be the gist and sting of the libel in the publication.

Excerpts from three confidential memoranda, in evidence by consent, addressed to the

"Senior Assistant Registrar, Appointment UWI"

are worth reproducing. The subject matter in each case relates to the Plaintiff's "renewal of contract on Indefinite tenure."

Exhibit 12 dated 10th October 1989 from Dr. M. N. McMorris head of the Department of Physics reads:

> "Mr. Shams' contract came up before for renewal on indefinite tenure. In my written report I did not support such a renewal then, but in any case, Mr. Shams asked that considered of his case by the Assessment and Promotions Committee be postponed.
>
> Now, emphasis will logically be placed on Mr. Shams' performance over the last three years but without ignoring any contributions that he has made to the department over the past eleven years.
>
> His teaching has continued to be useful in the Electronics Offerings of the Physics Department ....... The students would also have found him to be generally sympathetic to their personal and academic problems ..........
>
> However, in the determination of Mr. Shams deserts in the academic matter of tenure it seems that he has promised much but has not (yet), sic. delivered.
>
> I, therefore do not recommend the granting of tenure at this time."
>
> (Sgd.) M.N. McMorris

Exhibit 11 dated 30th July 1992 reads:

> "Mr. Shams 'C.V. has not changed substantially, and my assessment does not vary much from that of Dr. McMorris'.
>
> .... He has been active in promoting various interests in Electronics, both inside and outside the University.
>
> .... He has attended many courses, has presented several conference papers, and has several post-graduate students working for him. He has not yet however produced a substantial paper.
>
> "For his sabbatical leave in 1991/92 Mr. Sham spent "good amount of time with (post-graduate) students in Jamaica". I would have advised Mr. Shams to spend the time expanding his own research experience'.
>
> I do not recommend the granting of tenure at this time'.
>
> (Sgd.) A. Chen

In Exhibit 15 dated June 21, 1994 Dr. John Lodenquai confined his comments to the "intervening period covered in the C.V." He also wrote:

> "The only significant change since 1992 has been the successful completion of the supervision of a M. Phil. student although there are now several manuscripts that Mr. Shams is preparing to submit to refereed journals. Despite Mr. Shams' delay in submitting manuscripts for publication a distinct weakness on the part of an academic and I would strongly urge him to improve his performance on this point.
>
> However, there has been an urgent need for his teaching experience in the area of applied physics (electronics) ..... His significant interest in the welfare of our students and his strengths in the area of public relations are appreciated.
>
> In summary, I would recommend that Mr. Shams' contract be renewed but the offer of indefinite tenure be withheld at least until the outcome of the manuscripts now in preparation can be properly assessed."

The Plaintiff's submissions on this aspect and which the Court accepts are:

1. The failure to publish an article in a refereed journal (since 1991) is not a breach of the Plaintiff's contract. Dr. Chen in his evidence had admitted that a substantial publication can exist outside refereed journals.

2. Publishing only one article in a refereed journal between 1978 and 1995 is not a breach of the Plaintiff's contract.

3. There is no contractual requirement for publication in a refereed journal or at all, although publication will be one of the factors to be taken into account for renewal of a contract or for promotion.

There is nothing in the evidence to show that the University or the head of the Department had regarded the Plaintiff as being in breach of contract. On the contrary Dr. Lodenquai had recommended in June 1994 a renewal of the Plaintiff's contract. There is much force in the submission on the Plaintiff's behalf, that, counsel for the Defendants appear to have failed to appreciate the difference between a grant of 'tenure' and the renewal of the contract. Likewise sight must not be lost of the difference in the procedure for renewals of contract (University Charter Part II - Review) Ex.10 as opposed to that for dismissals. Ibid. (Part III Censure Suspension and Dismissal).

The Plaintiff's contract (including by reference the provisions of the Charter on Statutes of the University) does not make the "failure to publish or carry out research" a ground for dismissal.

Ex.10 under Part II Review provides as follows:

> "13. The assessment and Promotions Committee shall conduct reviews of appointments of academic and senior administrative staff and subject to the provisions of this ordinance make recommendations to the Appointments Committee.
>
> At 18.(iii) - that Committee
>
> "In considering whether to recommend renewals of an appointment under this clause shall in respect of the categories designated below also take into account the following criteria:-
>
> (a) Academic Staff (Teaching)
>
> research, publication, ability as a teacher, contrubution to university life, public service, scholarly and professional activity:-

The article, Exhibit 2, quotes from the report of the Vice- Chancellor the following statement:

> "While extensions of contract and promotion are not judged exclusively on research performance, the

> expectations of the University are that every staff member, without exception, must have a credible research record in order to secure advancement."

The fact that the Plaintiff had been a lecturer for a period of seventeen years during which he had enjoyed five renewals of his contract, could hardly have been achieved without publications and research. The contention that he has failed to publish or carry out research cannot in the face of the testimony be sustained; a fortiori, that a dearth of publication by him has resulted in the demise of his contract of employment.

Of the list of possible interpretations pleaded that the words in their natural and ordinary meaning were capable of, it appears that that which would have been conveyed to the reader is that:-

5(6) The Plaintiff was dismissed from his employment as a University lecturer for failure to fulfil his obligations in that regard.

Perhaps any or some of those meanings enunciated at 5(1) to 5(5) inclusive would be a corollary to the meaning at 5(6) -

The particulars pleaded in the issue justification raised have not been supported by evidence. If it is suggested that the Plaintiff at the time of resignation was due for assessment by the University Appointment Committee in relation to an application for him for renewal of his contract, the answer is that this is unsupported by evidence.

Even if the University would have been justified in dismissing him on the ground that he "had not in fact published any research article in refereed journals for a number of years, there is no evidence that such a move was imminent. Clearly then, the averment of constructive dismissal is a non-sequitur and undeserving of further consideration.

In order to rely on the provision of Section 7 of the Defamation Act the Defendant is obliged to identify two or more distinct charges. The single charge is the alleged dismissal of the Plaintiff. What makes it libellous is the unqualified context in which the reference to the Plaintiff is invoked namely:

1) a crack down on negligent lecturers fired for alleged breach of contract.

2) delinquent lecturers in an academic staff which had attained the status of million-dollar earners who had allowances included for research work etc.

Findings

It is clear, as the submissions for the Plaintiff show, that the words used in the publication must be construed as a reference to the Plaintiff. The imputation must be determined by the objective test and it cannot be a question of what the Defendant intended.

It is the natural and ordinary meanings which, the publication when read in its entirety, would convey to the mind of the oridinary reasonable and fair minded reader that the Court must ascertain.

Lord Morris makes this clear in the Privy Council decision in Jones v Skelton [1963] 3 ALL E.R. 952 at p. 958.

> "The ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of the words."

In each of the qualified responses from the two named lecturers (and in the article epitomised) no adverse imputation could remotely be inferred. Not so is the case of the Plaintiff, named as he is in a setting of unfavourable tidings, which must in substance have conveyed to the mind of the ordinary reasonable and fair-minded reader that he was one with whom the catalogue of derelictions and omissions was associated. Hence the gist and sting of the libel was that the Plaintiff had been dismissed from his employment as a University lecturer for failure to fulfil his obligations in that regard.

Inasmuch as the established position of the Plaintiff is that his contract of employment expired by the express terms fixing its duration from 1st October 1993 to 30th September, 1995,

the question of a "constructive dismissal" cannot arise. Moreover, nothing offered in support of the pleadings that his dismissal was imminent, could remotely pray in aid, a "constructive dismissal - a concept which, recognised in other areas of law, is totally inapplicable in this context.

The first interrogatory addressed to each Defendant and the similar response from each is significant.

Interrogatory: Did the University of the West Indies ever communicate to the Plaintiff that he was
(a) incompetent (b) professionally negligent
(c) in breach of his contract with the University (d) not fit to be a lecturer.

Answer: I do not know whether any such communication was made.

Section 7 of the Defamation Act reads:-

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

The gist and sting of the libel being as outlined above, the question remains, have the Defendants proved the pleaded imputations in support of the issue of justification, namely that the Plaintiff was (a) incompetent
(b) in breach of contract with the University
(c) not fit to be a lecturer?

Dr. Morris in a confidential report on the Plaintiff dated 10th October 1989 wrote (Ex.12):-

> "His teaching has continued to be useful in the Electronics Offerings of the Physics Department ... (and) ... the students have found him to be generally sympathetic to their personal and academic problems."

The report referred to the Plaintiff's endeavours in seeking contacts in the wider society and his advocacy of Electronics within and without the department.

Enumerating other efforts by the Plaintiff, the report expressed

> "disappointment that ... there has been no commensurate results so far."

It ended with the writer not recommending the granting of tenure at that time. In Dr. Chen's report dated 30th July 1992 in which he did not recommend the granting of tenure then, he expressed himself as not varying substantially from the assessment by Dr. McMorris. The report gives credit to the Plaintiff who had presented several conference papers despite not having yet produced a substantial one. The report which Dr. Lodenquai wrote on 23rd June 1994 Exhibit 15) speaks to the Plaintiff's delay in submitting manuscripts for publication but also records that the Plaintiff had been preparing several manuscripts to be submitted to refereed journals. It described his delay in submissions for publications as "a distinct weakness on the part of an academic."

Unnecessary is it to refer further to the contents of written exhibits. The evaluation of the Plaintiff's academic performance is the responsibility of the Assessment Committee of the University and not for this Court to perform. Suffice it to say, there has not been adduced before Court any or sufficient evidence to support a finding that the appropriate authority at the University had deemed the Plaintiff as either incompetent, unfit to be a lecturer, professionally negligent or in breach of his contract of employment.

The express plea of justification therefore, fails. Insofar as the allegation that the Plaintiff was dismissed from his employment attempts to suggest or provide several possible grounds for same, it cannot and should not be construed as constituting two or more distinct charges. The exonerating provisions of Section 7 of the Defamation Act cannot therefore arise for consideration.

The Court must now consider whether the occasion of the publication as one on which the Defendants may rely on a defence of qualified privilege.

Qualified Privilege

Where a publication is made by a person in the discharge of some public or private duty whether legal word, in matters in which his interest is concerned, in such cases the occasion prevents the inference of malice and affords a qualified defence depending on the absence of actual malice.

In the case of Stuart v Bell [1891] 2 Q.B. 341 at 436 Lindley L.J. explains the principle thus:-

> "The reason for holding any occasion privileged is common experience and welfare of society, and it is obvious that no definite line can be so drawn so as to mark off with precision those occasions which are privileged, and separate them from those which are not."

The statement of principle has been applied in numerous cases and at the highest levels of judicial pronouncement.

In the case of Reynolds v Times Newspapers Limited & Others reported at [1998] 3 ALL E.R. 961 Lord Bingham of Cornhill C.J. reviewed a number of authorities beginning with the oft-cited dictum of Baron Parke in Toogood v Spyring [1834] 1 Gr. M & R 183, and delivering the judgment of the Court of Appeal said at page 994:-

> "It seems to us on the strength of this very powerful and consistent line of authority, that the ultimate question in each case is whether the occasion of the particular publication in the light of the particular circumstances contains the necessary ingredients to give rise to the privilege."

The questions that required answering in relation to any particular occasion he reiterated as follows:

> "1. Was the publisher under a legal, moral or social duty to those to whom the material was published (which in the appropriate case ... may be the general public) to publish the material in question. (the duty test.)
>
> 2. Did those to whom the material was published ... have an interest to receive the material? (we call this the interest test).
>
> 3. Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice? (we call this the circumstantial test).

The term 'status' he further elucidated at page 995, ibid

> "We make reference to 'status' bearing in mind the use of that expression in some of the more recent authorities to denote the degree to which information on a matter of public concern may (because of its character and known provenance) command respect.
>
> The higher 'the status' of a report, the more likely it is to meet the circumstantial test. Conversely, unverified information from unidentified and unofficial source may have little or no status, and where defamatory statements of fact are to be published to the widest audience on the strength of such source, the publisher undertakes a heavy burden in showing that the publication is 'fairly warranted by any reasonable occasion or exigency.'"

In Horrocks v Lowe [1974] 1 ALL E.R. 662, in the House of Lords, Lord Diplock in his speech affirms at page 668 the equation of

> "... the public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny ."

with the accommodation of:

> "... the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognises that they have a duty to perform or an interest to protect in doing so."

At page 669 he points out that publication on a privileged occasion is not actionable even if it be defamatory and turns out to be untrue unless the occasion is used for some other reason and, is thereby deprived of the protection of privilege.

Underscoring the importance of motive and its translation into malice, he said at p.669.

> "So the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial ... he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved ... If it be proved that he did not believe that which is published this is generally conclusive evidence of express malice."

Of the proper perspective in the judicial process of evaluation of honest belief, he says:-

> "If he publishes untrue defamatory material recklessly without considering or caring whether it be true or not, he is in this, as in other branches of the law treated as if he knew

> it to be false. But indifferences to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true."

Of the consequences of the misuse of the occasion of privilege Lord Diplock also said:-

> "Even a positive belief in the truth of what is published on a privileged occasion - which is presumed unless the contrary is proved - may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law."

Of instances of improper motives, apart from personal spite, destroying the privilege, at page 670, he said:-

> "A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true."

Lord Diplock's caution appearing immediately following is worth bearing in mind:-

> "Judge or juries should however be very slow to draw the inference that a defendant was so far activated by improper motives so as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. .... It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that express malice can properly be formed."

Where, as in the present case, the only evidence of improper motive is, the steps taken by the defendants to verify the accuracy of the publication, there is only one exception to the rule that in order to succeed, the Plaintiff must show affirmatively that the Defendants did not believe it to be true or were indifferent to its truth or falsity.

That exception, says Lord Diplock, is where

> "what is published incorporates defamatory matter that is not really necessary to the

> fulfilment of the particular duty or the protection of the particular interest on which the privilege is founded."

To these considerations, Lord Diplock prefaced the sapient reminder that:-

> "Juries should be instructed and judges should remind themselves that this burden of affirmative proof is not one that is lightly satisfied."

The fourth defendant admitted that she had not been told that the names she had received were persons with whose work the University was not happy. She had chosen to interpret and in her article state that the persons named had been dismissed. The source, un-named, had not provided her with a written list. She was not successful in her effort to seek confirmation from the Registrar of the University, or from the several departments with which she had made contact. These factors bring into consideration Lord Diplock's caution as to honest belief as well as the exception when evidence of an improper motive is raised.

I adopt the submission of learn Counsel for the plaintiff, namely, that there was no urgency about the article which could not have waited further checks. Moreover there was no need to record the names of lecturers or having named two, to gloss the name of a third (the Plaintiff's) in order to emphasize the point that the Vice Chancelor's 'publish or perish' policy was being enforced. Without confirmation that the Plaintiff had in fact been dismissed, the publication carried a great risk that all critical points therein mentioned, were applicable to the Plaintiff.

Where the Court is left with "no other material on which to found an inference of malice except the contents of the speech itself, the circumstances in which it was made and, of course, the defendant's own evidence in the witness box." The test of malice, Lord Diplock reiterates, is very simple and is this: "has it been proved that the defendant did not honestly believe that what he said was true, that is, was he either aware that it was not true or indifferent to its truth or falsity?" See Clark v Molyneuz 3 Q.B.D. 237 , per Brett L.J.

As noted earlier, Mr. Robinson invited the Court to take into consideration evidence adduced which falling short of justification should conduce to a reduction of damages. The dictum in Atkinson v Fitzwalter - relied upon, reads:-

> "Although when a properly drafted plea of justification is included in the defence in a defamation action it is permissible to rely on any facts that are proved in order to support it, to reduce damages, even though those facts by themselves are insufficient to make good the defence as a whole".

The second part of the dictum provides the answer in the present action -

> "nevertheless it is not permissible to plead under the guise of particulars of justification, matters which do not go to a plaintiff's general reputation, with a view to leading evidence about them solely to support an argument that he should receive a smaller sum by way of damages."

The principle in my view has no application here.

The inclusion of the Plaintiff among delinquent lecturers who have short-changed students by "spending more time doing consultancies for external entities than for the University" constitutes a serious imputation.

Dr. Donald Milner manager of the University school of printing testified that he had read the article shortly after its publication and had spoken to the plaintiff on the matter. The report, the witness deposed, had become a topic of discussion generally and there were those persons who expressed the view that the Plaintiff would 'have to go' if the allegations were true.

Learned counsel sought an award which must include the injury to the Plaintiff's feelings exacerbated by the course of litigation as also the absence of an apology.

Citing the case of Cassells & Company Limited v Broome [1772] A.C. 1027 House of Lords, he invoked the reference of Lord Hailsham L.C. to the subjective element in the assessment of damages and the interpretation of the expression that damages in defamation are at large.

Two aspects, inter alia called for aggravated damages:

1) The persistence in the pursuit of a defence of judtification even while maintaining that

the words did not refer to the plaintiff.

2) The pleadings in paragraph 3 of the defence which read literally would acknowledge the falsity and malice averred in the statement of claim.

Such evidence as was led did not show that the attitude shown to the Plaintiff by persons with whom he came into social or professional contact was different as a result of the libel. Nevertheless, even in the absence of specific evidence, the gravity of the imputation must be presumed to be far - reaching and must constitute a serious injury to him. Nevertheless, the proper consideration of an award of damages must primarily be one of compensation and not punitive damages. If a retraction of the inclusion of the plaintiff in the report did not commend itself in the light of further information to hand, the defendants embarking on plea of justified privilege might not have appeared unreasonable. The persistence in the plea of justification with its attendant consequences as shown above, must perforce , exacerbate the award of damages to the plaintiff. Although not calling for as high an award in terms of aggravation as Dr. Manderson Jones would urge, the circumstances must merit an increase in what would ordinarily have been considered compensatory damages.

There will be judgment for the plaintiff against the defendant for damages in the sum of $600.000.00 with Costs to be taxed if not agreed upon.