*Privy Council Appeal No. 86 of 2001*

**(1) The Gleaner Company Limited and**
**(2) Dudley Stokes** *Appellants*

*v.*

**Eric Anthony Abrahams** *Respondent*

FROM

## THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 14th July 2003

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*Present at the hearing:-*

Lord Hoffmann
Lord Hope of Craighead
Lord Hobhouse of Woodborough
Lord Millett
The Rt. Hon. Justice Tipping

*[Delivered by **Lord Hoffmann**]*

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Libel damages: how much is too much?

1. There are two daily newspapers in Jamaica. One is the *Daily Gleaner* and the other the *Star*. The *Daily Gleaner* is a morning paper; a broadsheet newspaper of record, with a reputation for good journalism. The *Star* is an afternoon tabloid. Although there is said to be "friendly rivalry" between them, both belong to the first appellant, the Gleaner Company Ltd. It is a very well known company (established in 1848) with substantial interests in publishing and other activities. Between 1986 and 1992 the second appellant Dr Stokes was editor in chief of both papers.

2. In September 1987 both papers published libellous articles about the plaintiff, Mr Abrahams, who had been Minister of Tourism for Jamaica between 1980 and 1984. They quoted Mr Robin Moore, an American novelist with Jamaican connections, as saying that Mr Abrahams, when Minister of Tourism, had taken bribes from US public relations and advertising agencies in return for awarding them lucrative contracts for promoting tourism in Jamaica. Mr Abrahams immediately commenced proceedings

against the appellants for libel. They pleaded justification and qualified privilege.

3. For various reasons to which their Lordships will in due course return, the action took a very long time to come to trial. In an interlocutory judgment in 1994 the Court of Appeal struck out the defences on the ground that the defendants were unable to plead any facts to support them. In 1996 the action was heard by Smith J and a jury. The only remaining issue was the amount of damages. The jury heard many days of evidence and the judge gave them a careful and detailed summing up. After retiring for an hour and a half, the jury awarded J$80.7 million, which at that time was the equivalent of £1.2 million.

4. The defendants appealed. The Court of Appeal rejected all criticisms of the summing up but nevertheless decided that the damages were excessive. They set aside the award and substituted J$35 million, which was at that time the equivalent of £533,000. The defendants appeal to Her Majesty in Council on the ground that the damages are still excessive. In particular, they argue that the Court of Appeal did not have sufficient regard to the inhibiting effect which so large an award would have upon the exercise of the constitutional right to freedom of expression.

History

(a) The plaintiff

5. Mr Abrahams comes from a well known Jamaican family. He was a Rhodes Scholar and past President of the Oxford Union who, on returning to Jamaica, decided to make his career in tourism. At the age of 28 he was Chairman of the Jamaica Tourist Board, an independent statutory body charged with promoting tourism. He went into politics and, after election to Parliament for East Kingston in 1980, became Minister of Tourism. In 1984 he resigned as Minister and went into business as a tourism consultant, though remaining a Member of Parliament.

(b) The "kickback" scandal

6. The scandal in which Mr Abrahams found himself engulfed in 1987 arose out of an investigation by United States federal authorities in Connecticut. In 1981 the Jamaican Tourist Board appointed Young & Rubicam Inc, an American advertising agency, to mount an expensive advertising campaign in the United States. In 1983 the US Internal Revenue Service, which was investigating Mr Robin Moore on suspicion of tax evasion, seized some of his papers. They found documents which suggested he had been party

to arrangements by which Young & Rubicam paid a share of their commission ("kickbacks") to Jamaicans as a bribe for assistance in obtaining the contract. Young & Rubicam had been paying substantial sums to a Cayman Island company called Ad Ventures Ltd which they were purporting to employ as a consultant but which rendered no services. It was in fact a vehicle for the recipients of the bribes. Further information came to the authorities as a result of a mistake on the part of a Young & Rubicam employee who sent three cheques payable to Ad Ventures Ltd to Mr Arnold Foote, a prominent Jamaican advertising man, at the address of the Jamaica Tourist Board in New York. There they came to the attention of the Board's regional manager and aroused his suspicion.

7. These sources pointed to the involvement of Foote and Moore. But they did not as yet implicate anyone else. In April 1986 Moore pleaded guilty to tax avoidance and, as part of the plea bargain, agreed to assist the federal authorities with their investigation into the payments by Young & Rubicam. The United States Attorney in Connecticut empanelled a grand jury to consider indicting Young & Rubicam and the other conspirators. Moore spoke freely about his evidence to the grand jury to Ms Lisa Marie Petersen, a staff writer on the *Advocate* of Stamford, Connecticut. She drafted an article based on what Moore had told her. This contained allegations by Moore that he had suspected that Mr Abrahams was receiving bribes.

(c) The publications

8. There followed an unfortunate chapter of accidents. For reasons unexplained, Ms Petersen's draft was released to Associated Press (AP) before it had been published in the *Advocate* and, indeed, before she had completed her inquiries. On Wednesday 16 September 1987 she telephoned Mr Abrahams in Jamaica and read him her draft. He reacted strongly; told her that Moore's story was a libel and that he, as Minister, had no power to award advertising contracts. That was a matter for the Jamaica Tourist Board, an independent body. Ms Petersen took note of his comments and when her article eventually appeared in the *Advocate* on Saturday 19 September 1987, it included a balanced account of Moore's allegation and Mr Abrahams's denial, including his statement:

> "I was minister of tourism. I was not on any tourist board and I had nothing to do with spending money. I didn't award contracts and any suggestion that I have anything to do with any kickbacks is highly preposterous."

9. Meanwhile, however, the original draft had been released by AP on its wire service on 16 September. It was received by the *Star*, where Ms Cherice Brown, an experienced sub-editor, decided that it would be an interesting item to fill a space on her international page. She did not think it necessary to consult anyone or check the story with Mr Abrahams or anyone else. Within half an hour, someone (presumably at the *Advocate)* told AP that a mistake had been made and AP sent out a message "killing" the story. But apparently the correction was not sent to Jamaica.

10. On Thursday 17 September 1987 the *Star* published the first article of which complaint is made:

> "Stamford, Connecticut
>
> Author Robin Moore says his personal diary and files contributed to Federal authorities suspicions that New York business executives paid kickbacks to Jamaican officials for lucrative tourism promotion contracts.
>
> 'All I can say is that I suspected the Minister of Tourism was exacting a toll', the writer, Robin Moore of Westport told the *Advocate* of Stamford in a copyright story published Tuesday.
>
> 'Call it a bribe, call it anything you want' said Moore, the author of '*The French Connection*', a novel on drug smuggling.
>
> The *Advocate* reported Sunday that Federal authorities in Connecticut are investigating public relations and advertising executives suspected of paying Jamaican officials one million dollars for contracts worth $40 million from 1981-1985.
>
> The *Advocate*, quoting anonymous sources close to the probe has said five or six executives of the public relations firm Ruder Finn and Rotman and the advertising firm Young and Rubicam are the focus of the investigation.
>
> Officials of both firms have denied any wrongdoing and said they are co-operating with the investigators.
>
> KEY FIGURE

Moore said on Monday that his files helped lead Federal agents to suspect that Anthony Abrahams, Jamaica's former Tourism Minister was being paid by American businessmen for the multi-million-dollar tourism contracts.

Sources close to a federal grand jury have said Abrahams is a key figure in the investigation, the newspaper said. Abrahams, however, has not testified before the grand jury empanelled in New Haven, the *Advocate* reported.

The newspaper said efforts to reach Abrahams and his successor, Hugh Hart, during the past two weeks were unsuccessful, and Hart didn't return telephone calls to his office on Monday.

Moore, 61, said the notes in his diary are impressions of what was going on between Abrahams and the United States companies. The subjects also appeared in letters between him and friends in Jamaica.

'I have no definitive proof that this ever happened - it was just a suspicion of mine', Moore said. 'People were talking. There were certain things everybody knew. There was no secret about the situation with the (former) Minister of Tourism'.

Moore said IRS agents seized his diary and other documents in June 1983, when he was being investigated for his part in phony literary tax shelters. Moore is now awaiting sentence on his 1986 conviction of evading taxes.

Moore, who has lived in Jamaica periodically for the past 27 years, said that in 1981 he volunteered his services to the Jamaican government to find advertising and public relations companies that would help the country's tourist trade.
'I was a sort of self-appointed liaison, although I asked to help. I said, "Let's try to do something about the image here, which is very bad at the moment". I did indeed help introduce the advertising agency of Young & Rubicam to Jamaica but I certainly had nothing to do with any kickbacks, if indeed they did happen'.

US Attorney Stanley Twardy Jr. has refused to confirm or deny the existence of the kickback investigation."

-AP

11. Abrahams saw the article and went to see Dr Stokes. He told him that he had spoken to Ms Petersen and that she had said that she would be amending the draft which she had read on the telephone and which had now been published unamended in the *Star*. Dr Stokes said that if he would write a rebuttal, it would be published in the *Star* of the following day.

12. Abrahams delivered his rebuttal to the offices of the newspapers. But the *Star* did not publish it. Instead, on the following day, Friday 18 September, under the headline "Robin Moore: I suspected Jamaica Tourism Minister", the original story was reprinted in the *Daily Gleaner*. The only difference was that the words "People were talking. There were certain things everybody knew. There was no secret about the situation with the (former) Minister of Tourism" were omitted on the advice of Ms Donna Smith, a recent law graduate employed by The Gleaner Company Ltd, who said that they might be libellous. This is the second publication of which complaint is made.

13. On Saturday 19 September Mr Abrahams's statement still did not appear but the *Daily Gleaner* carried an item headed "Clarification":

> "Absolutely no reference was made, or intended to be made, to the current Minister of Tourism in the headline: 'Robin Moore: I suspected Jamaica Tourism Minister', in the second paragraph of the Associated Press (AP) story 'All I can say is I suspected the Minister of Tourism was exacting a toll, the writer Robin Moore, of Westport, told *The Advocate* of Stamford ...' which was published on page 2 of yesterday's Gleaner Sept. 18, 1987."

This article, pointing the finger unequivocally at Mr Abrahams, is the third publication for which he sues.

14. Finally Mr Abrahams's statement was printed on page 2a of the *Sunday Gleaner*, another sister newspaper, on 20 September 1987.

Effect of the publications

15. The effect of the publications on 18 and 19 September was sensational. Dr Donald Keith Duncan, a political opponent but also, as happens in the small political world of Jamaica, an old school friend, gave evidence at the trial of the scenes at his party conference, which was taking place that week-end. Everyone was reading the *Star* and the *Daily Gleaner* and discussing the astonishing news that Mr Abrahams, previously thought to be a

man of integrity, had been revealed to be dishonest. Although the articles reported only Moore's suspicions, Dr Duncan was sure that a newspaper with the *Daily Gleaner's* reputation for responsible journalism would not have published such allegations unless it was sure that they were true. Despite his previous friendship with Mr Abrahams, he therefore believed the story and, when he eventually read the rebuttal on the Sunday, dismissed it as self-serving.

16. Mr Abrahams 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.

(e) Claim and defence

17. Mr Abrahams issued a writ and statement of claim on 23 September 1987. On 2 October the defendants entered an appearance. But they did not file a defence within the time allowed by the rules and on 23 October 1987 Mr Abrahams entered judgment in default of defence. The defendants then applied to set aside the judgment and for leave to file a defence relying upon justification and qualified privilege.

(f) Mr Gentles

18. By the time the defendants applied for leave to plead justification, they knew that AP had withdrawn the story. But they also claimed to rely upon another source. Between December 1980 and February 1983 Mr John Gentles, a man with previous experience of the catering trade, had been Director of Tourism and afterwards Chairman of the Jamaica Tourist Board. He was therefore both Chairman and Chief Executive Officer of the Board at the time that the Young & Rubicam contract was awarded. He left under a cloud: after an investigation, Mr Abrahams, as Minister, had dismissed him. A company selling goods to the Board had been found to be controlled by his wife. After his dismissal, he had been employed by Mr Oliver Clarke, the chairman of The Gleaner Company Ltd. But in 1987 he was running a hotel in Chicago and was willing to assist the investigation in Connecticut.

19. Mr Gentles told a representative of the *Daily Gleaner* that he could testify that Mr Abrahams had signed contracts and cheques in the course of corrupt dealings and that he was giving evidence to this effect to the grand jury. The defendants asked him to put these

allegations on affidavit. It is unclear how willing Mr Gentles was to commit himself on oath in public: in October 1993 counsel for the defendants told the Court of Appeal that it had been difficult to obtain an affidavit from him (Record Vol I p 32) but in evidence at the trial in 1996 Dr Stokes denied this **(**Record Vol I p 247). At any rate, on 18 January 1988 Mr Gentles swore an affidavit which may be reproduced in full:

> "1. My true place of abode and postal address are at 400 East Randolph, Chicago, Illinois, USA and I am a Hotelier.
>
> 2. I served as Director of Tourism in Jamaica from about December 1980 until February 1983. In about the month of April 1981 I was also appointed Chairman of the Jamaica Tourist Board.
>
> 3. I have read the words set out in paragraphs 3, 4 and 5 of the Statement of Claim filed herein.
>
> 4. The words set out in each of those paragraphs are true in substance and in fact. New York business executives in fact paid kickbacks to Jamaican officials for lucrative tourism promotion contracts. Included among these payments were cheques either made payable to the Plaintiff or negotiated to the Plaintiff and received by the Plaintiff and further negotiated by him.
>
> 5. It is true that the United States of America federal authorities in Connecticut are investigating public relations and advertising executives suspected of making payments to Jamaican government officials for the award of contracts by Jamaican agencies to the firms of those executives.
> 6. The matters involved are currently being investigated by a Federal Grand Jury in Connecticut aforesaid and I have given evidence before the said Grand Jury. I was asked to identify a number of documents and the signatures therein and these included public relations and advertising contracts and cheques either drawn by or made payable to the Plaintiff or negotiated to the Plaintiff and on which the Plaintiff's signature appeared. I identified the Plaintiff's signature on those cheques.
>
> 7. I am aware that the Plaintiff is a key figure in the Federal Grand Jury investigation."

20. It is hardly necessary to point out that, as material for a defence, this affidavit raises far more questions than it answers. What were the public relations and advertising contracts with "Jamaican agencies" and what was the Minister of Tourism doing signing them? If Mr Abrahams was receiving bribes, why was he drawing cheques; in whose favour and on which account? Whose cheques had been payable to him and why should he as payee have signed them? How did Mr Gentles come to see them? The lack of particularity is striking.

21. This was the only material with which the defendants went before Edwards J to have the default judgment set aside. The application was heard on 16 December 1988, more than a year after the issue of the writ. The judge dismissed it. He said that the facts proposed to be pleaded could not sustain defences of either justification or qualified privilege.

(g) The grand jury indictment

22. The defendants appealed and the appeal was not heard until nearly three years later. Meanwhile, a good deal had happened. On 6 October 1989 the grand jury in Connecticut, after years of deliberation, delivered itself of an indictment alleging corruption in various forms against Young & Rubicam and certain of its executives, as well as two Jamaicans: Mr Arnold Foote and Mr Abrahams. These developments were of course widely reported in Jamaica.

23. Up to that stage, neither the grand jury nor any of the US investigators had spoken to Mr Abrahams or given him any opportunity to explain or deny the allegations against him. The hearings were in secret and the evidence sealed. But almost immediately after the indictment had been published, an American lawyer engaged by Mr Abrahams approached the prosecutors and suggested that they interview him. He made full disclosure of his bank accounts. He met the prosecutors and answered their questions (in Canada, because following the indictment a warrant had been issued for his arrest in the USA). The prosecutors did not appear to have any contracts or cheques purporting to bear his signature because none were produced to him for explanation. The federal prosecutors visited Jamaica, obtained documents and interviewed other people there. Contracts with the Tourist Board were public documents open to inspection. The Cayman Island authorities, pursuant to a co-operation treaty with the USA, allowed disclosure of the principals behind Ad Ventures Ltd. No connection with Mr Abrahams was found.

(h) Disposal of the indictment.

24. As a result of these investigations, the prosecutors agreed to have the indictment against him dismissed. On 9 February 1990 Young & Rubicam pleaded guilty. They are an extremely well known company and the conduct of their executives who had paid money to Ad Ventures Ltd and others naturally precipitated an internal inquiry. They made a statement with their guilty plea saying that their investigations had revealed no evidence of any payments to Mr Abrahams. Mr Moore and Mr Foote may have pretended that he needed to be bribed but they appeared to have kept the money for themselves.

(i) Persistence in plea of justification

25. The result was that when the appeal against the decision of Edwards J came before the Court of Appeal in December 1991, the United States proceedings against Mr Abrahams had been dropped. The defendants nevertheless persisted in their plea of justification. And the appeal was successful. The Court of Appeal held (1991) 28 JLR 657 that the defendants were entitled to a trial on both qualified privilege and justification. On 24 December 1991 the *Daily Gleaner* published the judgment. Under the strapline "True" it repeated its defence of justification. Mr Abrahams had an unhappy Christmas. Despite the withdrawal of the American proceedings, the *Daily Gleaner* was publicly stating its intention to prove that he was dishonest. Very few people did not accept this at face value. Dr Duncan still thought that the newspaper must have convincing evidence. This is not surprising. It is a rule of professional conduct that counsel should not make allegations of fraud or dishonesty unless he has before him "material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it": *Medcalf v Mardell* [2003] 1 AC 120, 134, per Lord Bingham of Cornhill. Miss Martinez, another witness called at the trial who was herself a successful tourism consultant, said that she had been brought up "in absolute respect" for the authority of the *Daily Gleaner*.

26. After the publications in 1987, Mr Abrahams's tourism consultancy business collapsed. No one was willing to do business with him. Apart from his salary as a Member of Parliament, he "did not earn a shilling" (Record Vol I p 103) until 1992. His goodwill as a consultant had depended entirely upon the contacts which he had made over the years; at school, at the University of the West Indies, at Oxford, in business and politics. As he said afterwards in evidence, his contacts were the only capital assets he

had. When he was proclaimed to be dishonest, they all melted away.

(j) The offer of employment

27. In 1992 Mr Abrahams secured a position as a radio talk show host; an occupation for which commercial integrity is not an essential qualification. The show was a success. In 1993, Mr Abrahams was approached by the manager of a new radio station called Power 106 in which The Gleaner Company Limited had a controlling interest and offered a contract. Mr Abrahams said that he was unhappy about being employed by a company which was publicly alleging that he was dishonest. He met Mr Oliver Clarke, the chairman of The Gleaner Company Limited. According to the evidence of Mr Abrahams at the trial, Mr Clarke said that his best bet was to take the contract with Power 106. If he did, the *Daily Gleaner* would apologise. But he should not expect any damages and he should realise that if he did not accept the terms, it would be five years before he would see the end of the matter. Mr Clarke, who gave no evidence at the trial, was not exaggerating. It took much longer. But Mr Abrahams refused the offer.

(k) The defence struck out

28. The only particulars of justification offered by the defendants were the terms of the affidavit of Mr Gentles. It did not appear that the intervening three years had induced him to be any more forthcoming about his allegations. Mr Abrahams asked for further and better particulars; Bingham J refused them. Mr Abrahams appealed. On 24 January 1994 the Court of Appeal was told by counsel for the defendants that they were in no position to give any particulars. They were trying to obtain the evidence which had been given to the grand jury but that was difficult and might take at least a year. The Court of Appeal reminded the defendants that Mr Abrahams had a constitutional right, under section 20(2) of the Constitution, to a fair trial within a reasonable time. A trial without particulars of dishonesty would not be fair and to wait another year would not be reasonable. So they struck out the defence. The defendants did not appeal against that decision.

(l) A further diversion

29. That left only the assessment of damages. But the defendants made a further application before the case could come to trial. They issued a third party notice to join AP as a defendant. AP objected, pointing out that the terms of their contract with the Gleaner Company Limited provided that no one was obliged to print their material and that they gave no warranty as to whether it would be

considered libellous. Mr Abrahams also objected, saying that to join AP, who seemed to have a good defence, would only delay his action against the defendants, whom the Court of Appeal had held to have no defence. Counsel for the defendants told the judge that Mr Abrahams was opposing the joinder of AP because he was afraid that the evidence given to the grand jury would be disclosed. Mr Abrahams not unreasonably regarded this as a repetition of the libel. He said that he had no objection to the disclosure of the grand jury evidence. On 25 November 1994 Ellis J set aside the third party notice and early in 1995 an order was made for the assessment of damages.

(m) The apology

30. On 9 July 1995, when there appeared to be no way of avoiding the assessment, the *Star* and the *Daily Gleaner* published articles headed "Apology". No attempt had been made to negotiate the wording with Mr Abrahams in advance:

> "In September 1987 the story of which complaint is made concerning Mr Anthony Abrahams, former Minister of Tourism of Jamaica, came from The Associated Press of the United States, in the ordinary and regular course of business. At that time we honestly believed the information to be true and accurate considering the usually reliable source from which it came. This agency has supplied us with material suitable for publication over a number of years and is responsible and reputable.
>
> Accordingly, we published the information in the issue of the newspaper of the 18th September 1987. We were sued by Mr Abrahams in libel and in our defence we pleaded justification and qualified privilege, sincerely and innocently believing that we could obtain the evidence to support these defences. As it turned out the Court of Appeal dismissed these defences since the evidence was not forthcoming. We now realise that we cannot sustain these allegations. Accordingly we hereby withdraw the allegations.
>
> In the circumstances we tender our sincere apologies to Mr Abrahams and are very sorry for any embarrassment or discomfort arising from the article."

(n) The trial

31. The trial took place a year later, in May, June and July 1996. The defendants gave notice of the matters upon which they intended to rely upon in mitigation of damages. The first was that

they had published a "full and ample apology". A second was that AP was a "responsible and reputable news agency". The third was that the grand jury in Connecticut had presented an indictment. And the fourth was that the defendants had made Mr Abrahams "reasonable offers of employment" in an associated company. That was presumably the offer of a contract with Power 106.

32. Mr Abrahams pleaded no special damage, such as loss of particular earnings, but gave evidence in support of an award of general damages which took loss of earnings into account. He said that in 1987 his business as a tourism consultant was prospering and seemed about to take off. He hoped to make real money. Instead, for five years he earned nothing and then had to take up a different occupation.

33. In addition, Mr Abrahams called medical evidence about the effect on him of the ostracism and humiliation he had suffered. He had, for example, been thrown out of the offices of a potential client and searched by his security officers. At one stage he felt unwilling to go out of doors. An eminent psychiatrist deposed that he had suffered both physiological and mental damage; the aggravation of asthma and diabetes, development of obesity through inertia; damage to his self-esteem. Dr Duncan said that when he met him after a long interval he was shocked at what he looked like.

34. The evidence given by Dr Stokes at the trial made it clear that the "full and ample apology" was by no means an admission that he had been in error. Not at all. Cross-examined as to how anyone could have accepted the affidavit of Mr Gentles as sufficient material upon which to destroy a man's reputation, he said:

> "The first reason is that Mr Gentles made it abundantly clear that he identified plaintiff's signature on these cheques (and if my memory serves me right the indictment was still in place).
>
> The reason why is because I would personally want to see the cheques. In other words, unless I personally saw the cheques I think it was reasonable to maintain that Abrahams was guilty."

35. The judge gave the jury a standard direction, in accordance with English law as laid down in *Rookes v Barnard* [1964] AC 1129 and *Broome v Cassel & Co Ltd* [1972] AC 1027 on the circumstances in which they could award exemplary damages. The

jury stated in their verdict that they did not award exemplary damages. On general compensatory damages, the judge directed the jury (Record Vol I p 486) that the award should be reasonable and proportionate:

> "You should ensure that any award you make is proportionate to the damage which the plaintiff has suffered as a result of the libel, and is a sum which is necessary to award him so as to provide adequate compensation and to re-establish his reputation."

36. He told the jury that they were entitled to have regard to the evidence of loss of earnings and the evidence of actual physiological and psychiatric damage which Mr Abrahams had suffered. In aggravation of the compensatory damages, they were also entitled to have regard to the persistence in the plea of justification until it was struck out; indeed, to the evidence of Dr Stokes which made it clear that notwithstanding the absence of any particulars, he would still have wished to maintain that plea at the trial. In the circumstances, they were entitled to regard the "apology" as insincere. Likewise, they were entitled to regard the terms upon which Mr Oliver Clarke offered Mr Abrahams employment with Power 106 as contemptuous. The jury awarded J$80.7 million.

(o) The Court of Appeal

37. The defendants appealed. During 1997 they issued six summonses for extensions of the time within which to file the record and another four during 1998. In October 1999 they filed supplementary grounds of appeal. The appeal was eventually heard between October 1999 and February 2000. Judgment was given on 31 July 2000.

38. The defendants made several criticisms of the summing up, particularly about the directions as to the regard which the jury could have to loss of earnings and injury to health as elements in general damages. They were all rejected by the Court of Appeal and have not been pursued before their Lordships' Board. The judges of the Court of Appeal all agreed that there was ample evidence on which the jury could award aggravated damages. Forte P said that there was "abundant evidence of malice in the appellants' qualified apology offered so long after the publication and the persistence in the plea of justification". Harrison JA said that there was evidence of "clear instances of humiliation which must have caused [the plaintiff] immeasurable stress". Langrin JA

said that the case had "outrageous features" which put it in a class by itself. Nevertheless, they decided that J$80.7 million was simply too much. Forte P said that, given the provisions relating to freedom of speech in section 22 of the Constitution, the award was in excess of the amount reasonably required to protect the plaintiff's reputation. The Jamaican Court of Appeal does not have the power conferred upon the English Court of Appeal by section 8(2) of the Courts and Legal Services Act 1990 and the Civil Procedure Rules to substitute an award of damages for a sum awarded by the jury which it considers to be excessive. Except by consent, it can only order a new trial. In the present case, however, the parties had agreed that the Court of Appeal should be at liberty to substitute what they considered to be an appropriate sum. So the Court substituted an award of J$35 million.

Submissions before the Board

39. The chief submission of Lord Lester of Herne Hill QC, who appeared for the appellants before their Lordships' Board, was that the Court of Appeal had insufficient regard to the constitutional provisions to which Forte P referred. But before coming to the constitutional aspect of the matter, their Lordships address some more general questions about libel damages.

(a) Exemplary and compensatory damages

40. The plaintiff had cross-appealed against the refusal of exemplary damages; the cross-appeal was unanimously dismissed and has not been pursued before their Lordships' Board. In dismissing the cross-appeal, Forte P said:

> "Nevertheless I should add that the sum of $35 million which I would substitute for the jury's award is in my view sufficient to achieve the purpose of punishing the appellants and deterring others from behaving in the manner in which the appellants acted in this case."

41. Lord Lester complains that this passage indicates that Forte P did not understand the distinction between punitive and compensatory damages and wrongly introduced a punitive element into his substituted award of J$35 million. Their Lordships reject this submission. In their opinion Forte P's observation reflects an entirely orthodox view of the dual function of compensatory damages. Ever since the distinction between compensatory and exemplary damages was formulated by Lord Devlin in *Rookes v Barnard* [1964] AC 1129 it has been recognised that compensatory damages may also have a punitive, deterrent or exemplary function.

What distinguishes exemplary damages for the purpose of the *Rookes v Barnard* dichotomy is that they do not have a compensatory function. Lord Devlin made this clear when he said (at p 1228):

> "In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum."

42. This passage has formed the basis of numerous similar statements in later cases (see, for example, Sir Thomas Bingham MR in *John v MGN Ltd* [1997] QB 586, 619). In the case of any tort, liability to pay damages as compensation for loss or harm is capable of having some deterrent or exemplary effect and this is particularly true of defamation; first, because it is an intentional tort and secondly because the conduct of the defendant is capable of aggravating the damages. It is true that in *Broome v Cassel & Co Ltd* [1972] AC 1027, 1077 Lord Hailsham of St Marylebone LC said that compensatory and exemplary damages were "as incompatible as oil and vinegar" but most judges have accepted that in many cases the two purposes are inextricably mixed. The monetary value which a society places upon reputation and freedom from unjustified shame and humiliation is bound to be a conventional figure. The higher it is set, the greater the deterrence.

(b) <u>The quest for uniformity and moderation</u>

43. In England, until quite recently, it was not considered appropriate to tell the jury more about the amount of damages which it would be appropriate to award than could be conveyed by general words like "fair compensation" or "moderate". No figures were mentioned. But judicial concern about very large and sometimes capricious awards led to, first, a change in the law (section 8 of the Courts and Legal Services Act 1990) which gave the Court of Appeal power to substitute its own figure for an award which it considered excessive and, secondly, a change in practice by which judges gave juries more precise guidance about the appropriate level of damages.

44. Three ways of giving the jury guidance on the amount of the award have been canvassed in the recent authorities. First, to give them a reminder about the purchasing power of money: how much

income a given capital sum could produce if invested, the cost of a motor car, a holiday and so forth. Secondly, to suggest a comparison with awards in other libel cases. Thirdly, to make a comparison with awards of general damages in personal injury cases.

(i) The purchasing power of money.

45. Reminders of the purchasing power of money were recommended by the Court of Appeal in *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153 and have been the practice in England ever since: see *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, 696; *John v MGN Ltd* [1997] QB 586, 608. In the present case, Smith J told the jury that they should consider the purchasing power of the award which they made.

(ii) Awards in other libel cases

46. Comparisons with other libel awards were rejected in *Sutcliffe's* case as more likely to cause confusion and waste of time than to assist. For similar reasons, the Court of Appeal in *Ward v James* [1966] 1 QB 273, 301-302 emphatically rejected the suggestion that greater uniformity in awards of general damages in personal injury actions could be achieved by telling juries of awards in other cases. (Instead, the Court of Appeal abolished juries in such cases.) But the question was reconsidered by the Court of Appeal in *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, after the 1990 Act allowed the Court of Appeal to make its own awards in cases in which that of the jury had been held to be excessive. The Court of Appeal said that article 10(2) of the European Convention on Human Rights, which required that any restrictions on freedom of speech should be "prescribed by law" and "necessary in a democratic society", required that awards of damages for libel should be more controlled and predictable than they were. Leaving the award to a unguided jury and refusing to interfere unless the damages were such that "no twelve men could reasonably have given them" might not comply either with the principle of legal certainty or the requirement of proportionality. Their view was later confirmed by the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 in which an award of £1.5 million by a jury under the pre-*Rantzen* regime was held to be excessive having regard to the absence of any judicial guidance.

47. *Rantzen's* case therefore made two changes in the law. First, juries should still not be told of awards made by other juries but could be referred to awards made by the Court of Appeal in the

exercise of its new powers. Neill LJ said [1994] QB 670, 694 that over time the decisions of the Court of Appeal would provide a corpus to which reference could be made and which could provide a norm. By the time of *Kiam v MGN Ltd* [2002] 3 WLR 1036, nine years later, the corpus amounted to six cases. Secondly, the Court of Appeal decided that in future the awards of juries would be subjected to "a more searching scrutiny" than in the past. The question, in relation to compensatory damages, would be:

> "Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation? ([1994] QB 670, 692)."

48. Since then, English juries have been referred to Court of Appeal awards in other cases, although, as Neill LJ himself foresaw in *Rantzen's* case, the practice is not without some danger of time-consuming and inconclusive arguments before the jury about the facts of other cases and the extent to which other awards are truly comparable. In *Kiam's* case ([2002] 3 WLR 1036, 1054) Simon Brown LJ made some eminently practical suggestions about how to deal with this problem and ensure that generally speaking counsel avoided reference to comparables and left the detailed guidance on figures to the judge.

(iii) General damages in personal injury cases

49. Reference to awards in personal injuries cases is far more controversial. It was advocated as a legitimate comparison by Diplock LJ in *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, 109-110 but rejected by Lord Hailsham of St Marylebone LC in *Broome v Cassel & Co Ltd* [1972] AC 1027, 1070-1071 and by the Court of Appeal in *Rantzen's* case [1994] QB 670, 695. In *John v MGN Ltd* [1997] QB 586 the Court of Appeal reversed itself and since then juries have regularly been told to have regard to awards of general damages (for pain, suffering and loss of amenity) in personal injury actions. These are themselves conventional figures: the current scale was fixed by the Court of Appeal in *Heil v Rankin* [2001] QB 272 and runs to a maximum of £200,000 for the most catastrophic injuries. As a result, Eady J said in *Reed & Lillie v Newcastle Borough Council* [2002] EW HC 1600 (QB) at paras 1547-1551 that there is now a ceiling of £200,000 for compensatory damages in libel cases.

50. Their Lordships express no view on the current practice in England. But the matter is clearly one on which different opinions may be held. The arguments in favour of comparison tend to stress the moral unacceptability of treating damage to reputation as

having a higher "value" than catastrophic damage to the person. It is however arguable that the assessment of general damages in both personal injury and libel cases is far more complicated than trying to "value" the damage; an exercise which everyone agrees to be impossible on account of the incommensurability of the subject-matter. Other factors enter into the calculation. Personal injury awards are almost always made in actions based on negligence or breach of statutory duty rather than intentional wrongdoing. Furthermore, the damages are almost always paid out of public funds or by insurers under policies which are not very sensitive to the claims records of individual defendants. The cost is therefore borne by the public at large or large sections of the public such as motorists or consumers. The exemplary and deterrent elements in personal injury awards are minimal or non-existent. On the other hand, the total sums of compensation paid for personal injury are very large. They have an effect on the economy which libel damages do not. The amounts of the awards in personal injury actions therefore depend to some extent upon what society can afford to pay victims of accidents over and above compensation for the actual financial loss they have suffered. As Lord Woolf MR said of general damages in personal injury cases in *Heil v Rankin* [2001] QB 272, 297:

> "Awards must be proportionate and take into account the consequences of increases in the awards of damages on defendants as a group and society as a whole."

51. Once it is appreciated that the awards are not paid by individual defendants but by society as a whole or large sections of society, there are also considerations of equity between victims of personal injury which influence the level of general damages. Compensation, both for financial loss and general damages, goes only to those who can prove negligence and causation. Those unable to do so are left to social security: no general damages and meagre compensation for loss of earnings. The unfairness might be more readily understandable if the successful tort plaintiffs recovered their damages from the defendants themselves but makes less sense when both social security and negligence damages come out of public funds. So any increase in general damages for personal injury awarded by the courts only widens the gap between those victims who can sue and those who cannot.

52. In addition, as Sedley LJ pointed out in *Kiam v MGN Ltd* [2002] 3 WLR 1036, 1057, once one treats awards of general damages as simply an unsophisticated attempt to place a value upon misfortune, all kinds of anomalies appear. He drew attention

to the maximum of £7,500 for a claim for bereavement set by section 1A(3) of the English Fatal Accidents Act 1976, which not infrequently constitutes the sole claim for the death of a child and provokes outraged headlines deploring a law which places so low a "value" upon a child's life.

53. Few of these considerations of equity and policy apply to awards in defamation cases. On the other hand, defamation cases have important features not shared by personal injury claims. The damages often serve not only as compensation but also as an effective and necessary deterrent. The deterrent is effective because the damages are paid either by the defendant himself or under a policy of insurance which is likely to be sensitive to the incidence of such claims. Indeed, the effectiveness of the deterrent is the whole basis of Lord Lester's argument that high awards will have a "chilling effect" on future publications. Awards in an adequate amount may also be necessary to deter the media from riding roughshod over the rights of other citizens. In *Kiam's* case Sedley LJ said at p 1058:

> "[I]n a great many cases proof of a cold-blooded cost benefit calculation that it was worth publishing a known libel is not there, and the ineffectiveness of a moderate award in deterring future libels is painfully apparent … Judges, juries and the public face the conundrum that compensation proportioned to personal injury damages is insufficient to deter, and that deterrent awards make a mockery of the principle of compensation."

54. The remedy suggested by Sedley LJ to preserve the purity of the distinction between compensation and punishment was a revival of the prosecution for criminal libel. But some might feel that so drastic an intervention by the state in regulating the conduct of the media had other disadvantages. They might prefer instead to compromise the purity of the distinction and see practical wisdom in what Lord Wilberforce said in *Broome v Cassel & Co Ltd* [1972] AC 1027, 1114:

> "It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for

> redressing a wrong in the social fabric, or that damages in any case can be broken down into two separate elements. As a matter of practice, English law has not committed itself to any of these theories; it may have been wiser than it knew."

Oil and vinegar may not mix in solution but they combine to make an acceptable salad dressing.

55. In addition, as this case amply illustrates, there are other differences between general damages in personal injury cases and general damages in defamation actions. One is that the damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated. Particularly if the defendant has not apologised and withdrawn the defamatory allegations, the award must show that they have been publicly proclaimed to have inflicted a serious injury. As Lord Hailsham of St Marylebone LC said in *Broome v Cassel & Co Ltd* [1972] AC 1027, 1071, the plaintiff "must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge".

56. A second difference is that in an action for personal injury it is usually not difficult for the plaintiff to prove that his injury caused inability to work and consequent financial loss. Loss of earnings is therefore recoverable as special damage and ordinarily, in cases of grievous injury, constitutes by far the greater part of the award. Likewise, the expenses of care, nursing and so forth are recoverable as special damage. They do not constitute a factor in the assessment of general damages. In defamation cases, on the other hand, it is usually difficult to prove a direct causal link between the libel and loss of any particular earnings or any particular expenses. Nevertheless it is clear law that the jury are entitled to take these matters into account in the award of general damages. The strict requirements of proving causation are relaxed in return for moderation in the overall figure awarded. In the present case, in which Mr Abrahams was unable to find any remunerative employment for five years, loss of earnings must have played a significant part in the jury's award.

Criticisms of the Court of Appeal

57. The directions given by the judge to the jury and the award of the jury are not strictly in issue in this appeal because the Court of Appeal set the award aside. The criticisms are of the substituted award by the Court of Appeal. But the judges did express views on how the jury should be directed and the test for deciding whether

an award was excessive, on both of which it is appropriate for their Lordships to comment.

(a) Other libel awards

58. Forte P was unwilling in general to allow the jury to be addressed by counsel about first instance awards in other defamation cases. He said that the variables were too many to be "conducive to making worthwhile comparisons". In holding this opinion he followed the consistent views of the English Court of Appeal in *Rantzen's* case ([1994] QB 670, 694) and *John's* case ([1997] QB 586, 611-612) and their Lordships do not think that his ruling is open to criticism. As for the English practice of allowing reference to awards made by the Court of Appeal itself, Forte P pointed out that the power to make a substituted award, which had allowed the development in England of such corpus of authority as there was, did not exist in Jamaica. Only because the parties had consented to a substituted award was this "the first opportunity for a long time" for the Court of Appeal to make one. Both Forte P and Harrison JA were willing in principle to accept the possibility of reference to Court of Appeal awards but, for the moment, the material did not exist.

59. In fact the judge had allowed counsel for the defendants to refer to two other awards in Jamaica, but commented to the jury:

> "Comparison with other awards is very difficult, because the circumstances of each libel case are almost bound to be different. You are not going to find two cases with the factors the same, and indeed this fact was borne out in Mr George's [for the defendants] and Mr Spaulding's [for the plaintiff] addresses to you."

60. In explaining his decision to set aside the jury's award, Forte P did say that it was "phenomenal" and "multiple times any award ever granted in Jamaica in these type of cases". This extremely limited use of previous awards (which have in Jamaica been of relatively modest amounts) is understandable. The appellants complain that he did not make further reference to earlier awards in arriving at the substituted figure of $35 million, which was also many times larger. But their Lordships see no merit in this criticism. It is inherent in the fixing of damages of this kind that it will be impossible to produce a formula which explains why so many times earlier awards is sufficient but double that amount is too much.

(b) Personal injury awards

61. The judge made no reference to personal injury awards. Forte P thought that they might be a "general guide" but that the present case was too far removed from any personal injury case cited for a comparison to be of any value. But Harrison and Langrin JJA did not think that any rational assistance could be obtained from them. Similar views were expressed by McKay J in *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24, 47 and the Irish Supreme Court in *Proinsias de Rossa v Independent Newspapers plc* [1999] 4 IR 432.

62. The appellants submit that the rejection of guidance from personal injury awards was an error of law. As will be apparent from the earlier discussion, their Lordships consider that this is a matter open to legitimate differences of opinion. They do not think that any question of legal principle is involved. Whether a link should be established between defamation awards and personal injury awards is a question of policy. General damages in personal injury cases are, as their Lordships have pointed out, conventional figures influenced by the overall amount which a society considers it reasonable to pay in compensation to accident victims and fairness between successful tort plaintiffs and other accident victims on state benefits. Defamation awards, on the other hand, are also conventional figures, but influenced (among many other things) by society's views on the need to use private litigation as a means of controlling irresponsible behaviour by the media. It is not the practice of the Board to take a view on these matters. In *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590, 644 Lord Morris of Borth-y-Gest explained why the Board declined to interfere with the decision of the High Court of Australia not to review its jurisprudence on exemplary damages in the light of *Rookes v Barnard* [1964] AC 1129:

> "[I]n a sphere of law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v Barnard* compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable."

63. In the present case likewise, the law in Jamaica before *John's* case was as settled as it had been in England. No references were made to awards in personal injury cases. Their Lordships are not willing to say that the Court of Appeal was wrong in considering

that in Jamaica no change was desirable. They were entitled to hold the opinion that a conventional figure established for an award performing one social function was no guide to what should be the conventional figure for an award performing a different social function.

(c) The test for deciding whether an award is excessive.

64. The test for excess propounded by Neill LJ in *Rantzen's* case ("Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and re-establish his reputation") was founded upon article 10(2) of the European Convention on Human Rights and particularly the requirement that the award should be "necessary in a democratic society". The language of section 22 of the Jamaican Constitution, which requires that the provisions of any law restricting freedom of speech should be "reasonably required for the purpose of protecting the reputations ... of other persons" is somewhat different. But "necessary" has much the same value as "required" and their Lordships can see no difference in the overall meaning. ("A matter of word games", as Lord Cooke of Thorndon said in *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24, 37.) Forte P commented upon the linguistic differences but said in the end that he was an agreement with the *Rantzen* test and would "bring a similar approach to the interpretation of section 22 of the Constitution". This meant, he said, that an award which exceeded the amount "reasonably required for the protection of the plaintiff's reputation" would be subject to interference by the court. He then rephrased the question as:

> "Could a reasonable jury have thought that this award was one which was reasonable to compensate the plaintiff and to re-establish his reputation?"

65. Lord Lester made much of the substitution of "reasonable" for "necessary" in this formulation and said that it watered down the test. But a fair reading of this part of the judgment shows that Forte P did not think that he was saying anything different from what Neill LJ had said. His final conclusion was that J$80.7 million was "in excess of an amount which is reasonably required by law to protect the position of the respondent, given the provisions of section 22 of the Constitution". Langrin JA expressed the test in similar terms, using the words "reasonably necessary". Again, their Lordships see no difference in meaning. But they recommend that in order to avoid these delicate linguistic arguments in the future, it would be better to adhere to Neill LJ's formulation.

(d) The substituted amount

66. Lord Lester submitted that although Neill LJ's test in *Rantzen's* case [1994] QB 670, 692 was satisfactory for the purpose of deciding whether the jury's award should be set aside, it was an inadequate guide to deciding what amount should be substituted. Their Lordships do not understand this criticism. The test sets out the criterion which the jury should apply and says that an award in excess of what a reasonable jury could have thought satisfied this criterion will be liable to be set aside. It seems to their Lordships entirely right for the Court of Appeal, having set aside the award, to apply the criterion which the jury should have done. And in so doing, they had to be loyal to the findings of fact which the magnitude of the jury's award shows that they must have made.

67. This is what the Court of Appeal said they were doing and their Lordships see no grounds for saying that they acted upon any other principle. Lord Lester complained that despite the fact that the parties had agreed that the Court of Appeal's power to substitute its own award was without prejudice to the right of either party to appeal to the Privy Council, the Court of Appeal did not explain how it arrived at the figure of the figure of J$35 million. But what would have counted as an explanation? This is how Neill LJ, whose experience of libel cases and knowledge of the law is second to none, dealt with the matter in *Rantzen's* case at p 696:

> "A very substantial award was clearly justified ... The jury were entitled to conclude that the publication of the article and its aftermath were a terrible ordeal for Miss Rantzen. But, as has been pointed out, Miss Rantzen still has an extremely successful career as a television presenter. She is a distinguished and highly respected figure in the world of broadcasting. Her work in combating child abuse has achieved wide acclaim. We have therefore been driven to the conclusion that the court has power to, and should, intervene. Judged by any objective standards of reasonable compensation or necessity or proportionality the award of £250,000 was excessive. We therefore propose to exercise our powers under section 8(2) of the Act of 1990 and Ord. 59, r. 11(4) and substitute the sum of £110,000."

68. Why £110,000? Why not £100,000 or £120,000? The matter is not capable of further analysis. Similarly in *John's* case Sir Thomas Bingham MR had little more to say on the matter [1997] QB 586, 621:

> "We turn therefore to consider the size of the compensatory award, which was £75,000. We take account of the prominence given to this article in the 'Sunday Mirror' and of the distress and hurt which the plaintiff described in his evidence. It is also relevant to note that though an apology was offered it was never published. This was not a trivial libel. The plaintiff had striven hard to overcome his previous disabilities and, because he was a man with an international reputation, probably every reader of the newspaper knew to whom the article referred. Nevertheless we have no doubt that the award of £75,000 was excessive. Though the article was false, offensive and distressing it did not attack his personal integrity or damage his reputation as an artist. We would substitute the figure of £25,000."

69. Their Lordships therefore think that the Court of Appeal were perfectly justified in simply saying that they thought that $35 million was the amount necessary to compensate Mr Abrahams. Whether this was the right figure they were in the best position to say. As the highest court sitting in Jamaica, they would have had a knowledge which their Lordships do not share of, among many relevant matters, the standing in Jamaican society of the *Daily Gleaner* and the *Star*, the sensitivity of the local community to corruption and the links between the political, social and business life of the community which amplified the effect of the libel on the plaintiff. In *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 the European Court of Human Rights said (at p 472):

> "… perceptions as to what would be an appropriate response by society to speech which does not or is not claimed to enjoy the protection of Article 10 of the Convention may differ greatly from one Contracting State to another. The competent national authorities are better placed than the European Court to assess the matter and should therefore enjoy a wide margin of appreciation in this respect."

70. Their Lordships think that the same is true of the courts of Jamaica. In any case, even if the attitude to damages of the courts in Jamaica were the same as that in England, this case differs widely from the standard English "comparables" such as *Rantzen* and *John*. In neither of those cases was there any evidence that the libel had caused serious financial loss or actual damage to health. Lord Lester repeatedly asked in what respect the circumstances of this case were, as the Court of Appeal described them, extraordinary or highly unusual. Their Lordships have set out the history at some length. For nearly sixteen years the defendants,

with all the prestige and resources at their command, have doggedly resisted the attempts of Mr Abrahams to clear his name. They have maintain their allegations far beyond the point in 1988 at which it became obvious that they had no evidence to support them; at the trial in 1996 and even before their Lordships' Board. Paragraph 6.15 of their printed case reads:

> "Because of the way in which the Court of Appeal struck out the defences, the Appellants were deprived of the opportunity to prove the relevant facts, for example, by calling Mr Gentles as a witness, cross-examining the Respondent, seeking discovery of the Respondent's bank statements and cheque books and copies of public relations and advertising contracts which he had signed, administering interrogatories, seeking to subpoena copies of the relevant contractual documents from the Ministry of Tourism and giving notice to the Respondent to admit relevant facts."

71. Their Lordships regard this passage as nothing more than a repetition of the libel under cover of absolute privilege and cannot understand how it could have been thought likely to induce their Lordships to reduce the damages. On the contrary, it underlines the importance of Lord Hailsham of St Marylebone's observation in *Broome v Cassel & Co Ltd* [1972] AC 1027, 1071, that in case the allegations should re-emerge, the damages must be large enough to proclaim the baselessness of the libel.

Conclusion

72. That leaves the constitutional argument upon which Lord Lester relied. He said that so large an award was a threat to a free press and contrary to the requirement of section 22 of the Constitution which limits restrictions on free expression to what is reasonably required for the purpose of protecting the reputation of other persons. But the judges of the Court of Appeal, like the trial judge, had well in mind the provisions of section 22. That was why they set aside the jury's award. This is not a case in which freedom to publish is in issue. It is accepted by the defendants, even though with bad grace, that publication was wrongful and fell outside the permissible limits of section 22(1). So the only question is whether the damages were no more than was necessary adequately to compensate the plaintiff. For the reasons already stated at length, their Lordships would not interfere with the Court of Appeal's assessment of the necessary amount. They were entitled to take the view that if it had a chilling effect upon this kind of conduct, that would be no bad thing. Their Lordships see no reason to think that the award of so large an amount in the special circumstances of this

case will inhibit responsible journalism. They will humbly advise Her Majesty that the appeal should be dismissed with costs.