COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 64 of 2022

BETWEEN

JENNIFER BAIN

Appellant

AND

FAMILY GUARDIAN INSURANCE COMPANY LIMITED

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Jones, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Ms. Camille Cleare, Counsel for the Appellant**
Mr. Leif Farquharson, KC, with Mr. John Minns, Counsel for the Respondent

DATES: **20 October 2022, 19 January 2023**

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Civil Appeal - Insurance Act, section 137 - Conspiracy to Injure by Unlawful Means - Compensatory Damages - Principles for Awarding Exemplary Damages - Rules of the Supreme Court, Order 59 - Costs - Costs in the Discretion of the Court - Civil Procedure (Award of Interest) Act, section 3 - Prejudgment Interest

The Appellant (an insurance agent) contracted with the Respondent (an insurance company) to secure insurance business for the Respondent. Subsequently, the Appellant informed the Respondent that the Appellant would be pursuing tertiary education in the United States. The Respondent terminated the Appellant's contract on the basis that the Appellant's absence outside of the jurisdiction constituted a breach of contract.

The Appellant began working with another insurance company and some of the Respondent's former clients took their business to the other insurance company. The Respondent wrote a letter accusing the Appellant of improperly using client information and copied the letter to the supervisor for insurance companies.

The Appellant subsequently sued the Respondent for, inter alia, breach of contract, conspiracy to injure and defamation. She also claimed exemplary damages and interest on the monies found due.

The trial of the action was heard by the judge who found that the Respondent was liable for breach

of contract, conspiracy to injure the Appellant by *lawful* means, and defamation. The judge held that the Appellant's allegation of conspiracy to injure by *unlawful* means was not made out on the facts. The judge awarded the Appellant damages for breach of contract equivalent to 12 months' notice, $20,000 for conspiracy, and $25,000 for defamation. No award was made for exemplary damages or interest on the monies found due. Finally, the judge awarded costs of $60,000 for professional charges and $10,675.25 for disbursements.
The Appellant was dissatisfied with the judgment and has now appealed to this Court.

Held: A conspiracy requires an agreement among two or more different persons. An employer and its employee are not two distinct parties. An employer is not normally in conspiracy with its employees and no charge of conspiracy should be brought when the employee is merely acting in the ordinary course of the business. As the Respondent's employee was merely going about her business as an employee of the Respondent, no charge of conspiracy can properly be brought. Even if an employer and an employee could engage in a conspiracy, the Appellant has not adduced evidence sufficient to establish a conspiracy to injure by unlawful means.
The elements of the tort of conspiracy to injure by unlawful means are a. an arrangement between two or more people, b. concerted action between the two people, c. an intention (although not necessarily the only intention) to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention, and d. loss is caused to the target of the conspiracy. It is a defence to an action for conspiracy to injure by unlawful means if the defendant acted to protect his own interests and believed that he had a lawful right to act as he did.
Regarding the appeal for compensatory damages, because damages are generally more a matter of speculation and estimate, an appellate court is reluctant to interfere with evaluative judgments of this kind in the absence of an error of principle. This Court will only interfere with an award of damages if it is satisfied that the judge acted on a wrong principle of law, misapprehended the facts, or made a wholly erroneous estimate of the damage suffered. The Appellant did not proffer any sum to the judge for damages and has not satisfied this Court that there is any reason to interfere with the judge's award for compensatory damages.
Regarding the appeal for exemplary damages, such damages may be awarded where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. However, awarding exemplary damages remains anomalous and the exception to the general rule. A court may make an award for exemplary damages if the conduct of the defendant is malicious, oppressive, or wanton. Courts are reminded that damages must be reasonable and ought not to be a windfall. The facts of this case are not such that an award of exemplary damages would be warranted.
The Civil Procedure (Award of Interest) Act gives courts the discretion to order prejudgment interest on debt or damages between the date when the cause of action arose and the date of judgment. The judge did not address her mind to the claim for prejudgment interest. This Court will exercise its discretion and award prejudgment interest on the damages to the Appellant at a rate of 2.4% from the date the writ of summons was issued on 17 February 2016, to the date of judgment on 8 March 2022.

Costs orders in the Supreme Court are provided for by order 59 of the Rules of the Supreme Court (RSC). O. 59, r. 2 of the RSC sets out that costs are at the discretion of the court. O. 59, r. 9. of the RSC empowers the court to order a gross sum for costs, rather than ordering that costs be taxed. Once costs are ordered to be taxed, O. 59, r. 12 of the RSC empowers the Registrar of the Supreme Court ("the Registrar") to tax the costs. The judge erred by suggesting to the Appellant that accepting a gross sum of $60,000 in costs was advisable because the judge would otherwise tax the costs herself and likely award a lower figure than $60,000 during the taxation. The judge had no jurisdiction to tax the costs so representing to the Appellant that she would tax the Bill of Costs may have induced the Appellant to accept the $60,000 under duress. Accordingly, the judge's award of $60,000 with respect to costs is set aside and this matter is remitted back to the Supreme Court for the Bill of Costs to be duly taxed before the Registrar.

AXA Insurance UK plc v Financial Claims Solutions Ltd and others [2018] EWCA Civ 1330; considered
Balmoral Development v. Cottis Law [2017] 1 BHSJ. No. 73; considered
Brandly Mortimer Roberts v Perfect Luck SCCivApp. 106 of 2020; mentioned
Crofter Hand Woven Harris Tweed Co. V Veitch 1942 SC (HL) 1; Considered
FM Capital Partners Ltd v Marino [2018] EWHC 1768 (Comm); considered
Meretz Investments NV v ACP Ltd [2007] EWCA Civ 1303; applied
Wellesley Partners LLP v. Withers LLP [2016] Ch. 529; applied

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JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. The Appellant, Jennifer Bain, is a licensed insurance agent under the Insurance Commission of the Bahamas ("ICB"). The Respondent, Family Guardian Insurance Company Limited, is an insurance company duly registered by ICB.

2. On 1 October 2011, the Appellant entered into an agreement with the Respondent as an independent contractor to secure insurance business for the Respondent. Sometime in June 2015, the Appellant advised the Respondent that she intended to pursue tertiary education in the United States for approximately 16 months, commencing in September 2015. The Appellant and the Respondent had negotiations regarding whether the Appellant would be able to perform as an insurance agent, while being out of the jurisdiction.

3. Subsequently, by letter dated 29 September 2015, the Respondent terminated the Appellant's services stating that her absences from the office had created a breach of contract. Thereafter, some of the Appellant's clients with the Respondent requested that their agent/broker be changed to Hope Insurance Agents and Brokers Limited ("Hope

Insurance"). Hope Insurance was an independent contractor engaged by the Respondent to act as agent/broker. However, a Mrs. Major (the Respondent's Senior Manager for Group Sales) advised some of the Appellant's former clients that if they purchased insurance directly from the Respondent, that they would be offered a more favorable insurance rate.

4. Further, in a letter dated 9 October 2015, Mrs. Major wrote to the Appellant and complained that the Appellant had improperly provided clients' information to Hope Insurance. The letter was copied to Michele Fields and Patrice Rolle, the Superintendent and the Manager of the Intermediary & Market Conduct Unit of ICB, respectively. The letter alleged that the recent appointment of Hope Insurance as broker of record for several policies arose as a result of the Appellant disclosing client information. Mrs. Major demanded that the Appellant 'cease and desist'. She referenced the Data Protection (Privacy of Personal Information) Act ("Data Protection Act"), which prohibits persons from using information obtained without authority.

5. The Appellant subsequently sued the Respondent for, inter alia, breach of contract, conspiracy to injure and defamation. She also claimed exemplary damages and interest on the monies found due. The trial of the action was heard by Justice Indra Charles ("the judge") who, on 8 March 2022, gave judgment in the matter. She found that the Respondent was liable for breach of contract and conspired with Mrs. Major to injure the Plaintiff by *lawful* means and defamed her by writing the letter which was copied to the ICB. However, the judge found that the Appellant's allegation of conspiracy to injure by *unlawful* means was not made out on the facts.

6. The judge awarded the Appellant damages for breach of contract equivalent to 12 months' notice, $20,000 in damages for conspiracy, and $25,000 in damages for defamation. She declined to make an award for exemplary damages. The judge also did not award any interest on the monies found due. Finally, the judge awarded costs of $60,000 for professional charges and $10,675.25 for disbursements.

7. The Appellant was dissatisfied with the judgment and has now appealed to this Court. The grounds of appeal are:

> **"<u>Conspiracy to Injure by Unlawful Means</u>**
>
> **1. The Judge erred in law and incorrectly applied the test in Revenue and Customs Comrs v Total Network SL [20081 2 All ER 413 by holding at paragraph [146] of the Ruling that even if the Respondent breached the Agency Agreement with Hope Insurance Ltd. (Hope), it was actionable only by Hope and therefore did not satisfy the element of unlawfulness required to constitute a cause of action of conspiracy to injure by unlawful means against the Appellant. The Judge ought to have properly found that such breach necessarily formed the cause of action of conspiracy to injure, whether or not it was only actionable by Hope.**

2. The Judge having found on the facts that Mrs. Major and the Respondent acted in combination to induce John Bull Ltd. and Bahamas Bus & Truck Ltd. not to deal with Hope by offering a lower premium if they dealt directly with the Respondent, on a proper construction of Section 137 of the Insurance Act, the Judge ought to have gone on to hold that the Respondent had thereby contravened the Act by making an offer of a discount which was intended to be in the nature of a rebate of premium, and to find that such unlawfulness of means was the foundation of the tort of conspiracy to injure, whether actionable or not by the Insurance Commission of The Bahamas or anyone else. The conclusion that the Judge came to on the facts was wrong in principle and could not properly have been reached on the basis of the primary facts as found.

3. The Judge failed to consider the indisputable factual circumstances that the Respondent assigned new executive agents to the Appellant's former clients, after those clients had submitted a Change of Broker of Record letter appointing Hope as their new agent, and to find that in so doing, the Respondent and Mrs. Major disclosed those clients' private billing information to the new intended agents in contravention of the Data Protection Act; such unlawfulness of means was a further foundation of the cause of action of conspiracy to injure, whether actionable or not by those clients.

4. The Judge having found on the facts that Mrs. Major and the Respondent "inexplicably denied the Appellant the opportunity to communicate on behalf of certain accounts at Hope even after Mr. McCardy confirmed that she was sponsored and thereby authorized" ought to have held that this act was in breach of section 1.2 of the Agency Agreement between Hope and the Respondent and that such unlawfulness of means satisfied the cause of action of conspiracy to injure, whether actionable or not by Hope.

<u>Damages</u>

5. The Judge unreasonably and wrongly exercised her discretion in awarding compensatory damages of only $20,00.00 [sic] for lawful means conspiracy. The Judge failed to consider that such an amount was manifestly inadequate and exceeded the generous ambit within which a reasonable disagreement is possible given that:

> **a. damages are at large for an intentional economic tort; and**
> **b. the Judge found the Respondent to have acted with serial malice in the scheme to financially ruin the Appellant.**

In reasonably and properly exercising her discretion the Judge ought to have considered the counter factual question of what on the balance of probabilities would have happened had there been no conspiracy, both lawful and unlawful, in order to establish the proper measure of loss to be compensated for each cause of action.

6. The learned Judge erred in law and contradicted herself in the unreasonable exercise of her discretion in declining to award exemplary damages when she found that this was not a case where the conduct of the Respondent could be categorized as "malicious" and/or that to make an award of exemplary damages would be a windfall to the Appellant. The learned Judge misdirected

herself as to the significance of her earlier finding of malice in both the publishing of the defamatory letter and in prohibiting the Appellant from dealing with her group clients while sponsored by Hope. The Court also failed to consider the means of the Respondent and that the Respondent was aware that the expected benefits of its wrongdoing (attempting to stop the Appellant from taking business away) might outweigh the possible detriments, including being caught, and it ought to have weighed everything which aggravates or mitigates the Respondent's conduct and, having done so, it ought to have properly found that this was an exceptional case where exemplary damages would be appropriate in the circumstances.

Interest

7. The learned Judge erred in law in failing to exercise her discretion to award pre-Judgment interest on the damages from the date of termination on 29th September 2015 to the date of Judgment on 8th March, 2022.

Costs

8. The Judge misdirected herself and erred in law by exercising her discretion to reduce the Appellant's itemized bill of professional fees from $230,000.00 to $60,000.00 (inclusive of V.A.T.) without making any commensurate findings of misconduct to warrant such an extreme discount; the reduction being unusual and manifestly inadequate to meet the justice of the case.

9. The learned Judge misdirected herself in law by taking into consideration the amount of damages that she had generously awarded to determine what amount of costs would be reasonable in balance thereto.

10. Moreover, the Judge was unreasonable and irrational in giving the Appellant an option to have the bill taxed by a Registrar, which was accepted, then arbitrarily taking the option back, foreshadowing that if the sum was not accepted, the Court would do another assessment which would yield even less, thereby coercing the Appellant to accept the inordinately low amount. The Appellant was thereby denied a fair opportunity to object to such a severe penalty, which denial amounted to a serious irregularity that caused the decision on costs to be unjust."

8. The Respondent has not filed any Respondent's Notice seeking to challenge any part of the judgment or to affirm it on different grounds.

DISCUSSION AND FINDINGS

9. In my judgment, the Appellant's grounds of appeal can be conveniently subsumed under the following broad categories:

A. **Whether the judge ought to have found that in all of the circumstances that "conspiracy to injure by unlawful means" was made out on the facts?**
B. **Whether the judge should have awarded a larger figure than $20,000 as compensatory damages?**

C. **Whether the judge should have awarded exemplary damages in the circumstances of this case?**
D. **Whether the judge erred by failing to award prejudgment interest on the damages from the date of the Appellant's termination on 29 September 2015 to the date of judgment on 8 March 2022?**
E. **Whether the judge erred by suggesting to the Appellant that accepting a gross sum of $60,000 in costs was advisable because the judge would otherwise tax the costs herself and likely award a lower figure than $60,000 during the taxation?**

Analysis

A. Whether the judge ought to have found that in all of the circumstances that "conspiracy to injure by unlawful means" was made out on the facts?

10. In her judgment, the judge only found that the Respondent was liable for the tort of conspiracy by *lawful* means. She found that the Respondent conspired with its employee, Mrs. Major, to injure the Appellant. In paragraph 150, she held:

> **"In my judgment, Mrs. Major and the Company acted in combination to induce John Bull and Bahamas Bus & Truck not to deal with Hope Insurance by offering a lower premium if they dealt directly with them. They acted accordingly by contacting and meeting with the requisite persons to make the offer and this resulted in the loss of commission to Hope Insurance and therefore Ms. Bain. The means used by the Company having been lawful, Ms. Bain must prove that their predominant intention was to injure her directly. It is not enough to prove that their objective was to take business from Hope Insurance and that the residual effect was to financially injure her."**

11. In paragraph 152 of her judgment, the judge further said: "*I think that the position is that the employee can be a party to conspiracy with his employer so long as he appreciates what the employer is doing*." It is to be noted that the judge did not find that Mrs. Major was acting as a "third party intermediary".

12. I must confess that I have grave doubts that the tort of conspiracy can be based upon an agreement between an employer and its employee to act in a certain manner. Conspiracy requires an agreement among two or more different persons. It is difficult to accept that an employer and its employee are two distinct parties. In **Crofter Hand Woven Harris Tweed Co. V Veitch** [1942] A.C. 435, which the trial judge referred to in her judgment, Lord Wright said at page 468, "*The fact that the sole trader employed servants or agents in the conduct of his business would not per se in my opinion make the conduct of others co-conspirators with him.*" In Clerk & Lindsell on Torts (Seventeenth Edition, Sweet & Maxwell 1995) the editors at paragraph 23-78 stated that "*It seems the better view that an employer is not ordinarily 'in combination' with its employees and that no charge of conspiracy can be brought when the latter merely goes about his business.*" In footnote 21

of paragraph 23-78, the editors of Clerk & Lindsell do note the different view expressed by Lord Simon (and relied upon by the judge), but opined that the view of Lord Wright was the better view. Significantly, there is no finding by the judge that Mrs. Major was doing anything other than merely going about her business as an employee of the Respondent, and thus it would seem that no charge of conspiracy should have been brought.

13. In this appeal, there is no challenge by the Respondent to the finding of conspiracy by lawful means. The only challenge is by the Appellant who contends that the judge ought also to have found a conspiracy to injure by *unlawful* means. The claim of conspiracy to injure by unlawful means was primarily based on an alleged breach of section 137 of the Insurance Act ("the Act") by the Respondent. Section 137 of the Act states:

Insurance Act

> "**137. (1) No insurer, and no officer, employee or agent of an insurer, and no broker or salesperson shall directly or indirectly make or attempt to make an agreement as to the premium to be paid for a policy other than as set forth in the policy, or pay, allow or give, or offer or agree to pay, allow or give, a rebate of the whole part of the premium stipulated by the policy, or any other consideration or thing of value intended to be in the nature of a rebate of premium, to any person insured or applying for insurance in respect of life, person or property in The Bahamas."** (Emphasis added)

14. However, it is apparent that the Appellant never pleaded a breach of section 137 of the Act in the Statement of Claim. There was no plea that "in breach of section 137 of the Insurance Act the defendant conspired with … "

15. The importance of proper pleadings was canvassed by this court in **Brandly Mortimer Roberts v Perfect Luck** SCCivApp. 106 of 2020:

> **"7. In Al Medenni vs. Mars UK Limited [2005] EWCA Civ 1041 Dyson, LJ giving the decision of the English Court of Appeal said:**
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> > **"[21] …It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.**

[22] <u>The starting point must always be the pleadings</u>. In Loveridge and Loveridge vs. Healey [2004] EWCA Civ 173, Lord Phillips MR said at paragraph 23:

> **'In McPhilemy vs. Times Newspapers Ltd. [1999] 3 ALL ER 775 Lord Woolf MR observed: <u>'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties</u>.'**

<u>It is on the basis of the pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary before trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this</u>. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."" (Emphasis added)

16. Thus, in my judgment, it is clear that the Appellant had a duty to clearly identify the particular statute that she alleged the breach of which gave rise to the conspiracy to injure by unlawful means. It cannot be ignored that the Appellant never specifically pleaded this point.

17. In **FM Capital Partners Ltd v Marino** [2018] EWHC 1768 (Comm) the elements of the tort of conspiracy to injure by unlawful means were carefully stated. Cockerill J at paragraphs 94 and 95 said:

> **"94. The elements of the cause of action are as follows:**
>
> **i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: Kuwait Oil Tanker at [111].**
>
> **ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: Kuwait Oil Tanker at [108]. Moreover:**
>
> > **a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see Kuwait Oil Tanker at [120-121], citing Bourgoin SA v Minister of Agriculture [1986] 1 QB: "[i]f an act is done deliberately and with knowledge of the**

consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them".

b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: Lonrho Plc v Fayed [1992] 1 AC 448, 465-466; see also OBG v Allan [2008] 1 AC 1 at [164-165].

c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: OBG at [166].

iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in OBG v Allan, referring to cases where:

"The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

iv) Concerted action (in the sense of active participation) consequent upon the combination or understanding: McGrath at [7.57].

v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: Revenue and Customs Commissioners v Total Network [2008] 1 AC 1174 at [104].

vi) Loss being caused to the target of the conspiracy.

95. However, a person is not liable in conspiracy if the causative act is something which the party doing it believes he has a lawful right to do: Meretz Investments NV v ACP Ltd [2007] EWCA Civ 1303; [2008] Ch 244, per Arden LJ (paragraphs [126]- [127]) and Toulson LJ (paragraph [174]); Digicel v Cable & Wireless [2010] EWHC 774 (Ch) at Annex I, paragraphs [117]-[118] (Morgan J)."

18. In **Meretz Investments NV v ACP Ltd** [2007] EWCA Civ 1303, Toulson LJ set out a defence to an action for conspiracy to injure by unlawful means:

"174. "…<u>it is a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests but did so in the belief that he had a lawful right to act as he did</u>. Just as the tort of conspiracy to induce breach of contract is not committed if the defendant believes that the outcome sought by him will not involve a breach of contract (the Mainstream case [2005] IRLR 964), so <u>a defendant should not be liable for conspiracy to injure by unlawful means if he believes that he has a lawful right to do what he is doing</u>." (Emphasis added)

19. Clearly the Respondent felt it had a lawful right to offer an insured a lower premium to ensure that it kept its business.

20. In the premises, although I consider that the judge was not required to address this issue given the deficiency in the pleadings, nonetheless the judge was at liberty to consider it, similarly as occurred in **Brandly Mortimer Roberts (supra)**. The trial judge held:

> **"[149] The Company was not guilty of rebating because <u>there was no evidence adduced that they returned (or offered to return) any payments to the insured persons to induce them to do business with it instead of Hope Insurance</u>. I agree with Mr. Farquharson that <u>nothing the Company and/or Mrs. Major did was unlawful per se</u>."** (Emphasis added)

21. I see no basis for setting aside the judge's finding. Even if the Respondent could conspire with its employee, the Appellant has not adduced any evidence tending to show that there was a breach of section 137 of the Act.

22. The Appellant further alleges that the Respondent breached the Data Protection Act by disclosing clients' private billing information. However, no specific section of the Data Protection Act is specified by the Appellant.

23. Finally, the Appellant relies on an alleged breach by the Respondent of section 1.2 of the agency agreement between Hope Insurance and the Respondent as the basis for asserting that there was an unlawful means conspiracy against the Appellant. Specifically, she argues that once the Judge found that Mrs. Major and the Respondent "*inexplicably denied the Appellant the opportunity to communicate on behalf of certain accounts at Hope even after Mr. McCardy confirmed that she was sponsored and thereby authorized*", the judge ought to have held that this act breached section 1.2 and that such unlawfulness of means satisfied the cause of action of conspiracy to injure, whether actionable or not by Hope Insurance.

24. Section 1.2 of the Family Guardian Insurance Company Limited Broker's Agreement provides that "*The Company authorizes the Broker to recruit and appoint suitable candidates for Group and Individual Health Insurance policies written by the Company*."

25. In my judgment, while the judge found that there had been an interference with the Appellant's ability to communicate, this does not rise to the level to conclude that the Respondent prevented Hope Insurance from recruiting and appointing the Appellant. There is no evidence that the Respondent demanded that Hope Insurance terminate the services of the Appellant, and thus it cannot be said that the Respondent interfered with Hope Insurance's ability to recruit and appoint suitable candidates.

26. In my judgment, the Appellant has not satisfied this Court that, in all of the circumstances, conspiracy to injure by unlawful means was made out on the facts. Accordingly, this ground of appeal fails.

B. Whether the judge should have awarded a larger figure than $20,000 as compensatory damages?

27. Just as with an appellate court's jurisdiction to interfere with findings of fact by a judge, an appellate court's ability to interfere with awards of damages is generally constrained. In **Wellesley Partners LLP v. Withers LLP** [2016] Ch. 529, Floyd LJ laid out the considerations for when an appellate court can interfere with a judge's assessment of damages:

> **"125. … <u>This court is notoriously reluctant to interfere with evaluative judgments of this kind in the absence of an error of principle</u>: see for example per Lord Hoffmann in BiogenInc v Medeva pc [19971 RPC 1. 45. Nowhere is this more so than in a judge's assessment of damages. Toulon LJ put it in this way in the Parabola case [20111QB 477, para 24:**
>
> > **"The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will therefore be slow to interfere with the judge's assessment. As Lord Wright said in Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601, 616-617: 'An appellate court is always reluctant to interfere with a finding of a trial judge on any question of fact, but <u>it is particularly reluctant to interfere with a finding on damages</u> which differs from an ordinary finding of fact in that i<u>t is generally much more a matter of speculation and estimate</u>. No doubt, this statement is truer in some cases than of others... It is difficult to lay down any precise rule which will cover all cases, but ... the court, before it interferes with an award of damages, should be satisfied that <u>the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.</u>'"** (Emphasis added)

28. During the course of the proceedings before this Court, the Appellant asserted that, as damages were at large, the judge ought to have awarded a much larger sum than $20,000 as compensatory damages. When pressed as to the amount of damages that ought to have been awarded, the Appellant asserted that a sum of $500,000 should have been awarded as compensatory damages.

29. This Court further inquired whether Counsel for the Appellant had proffered the sum of $500,000 to the judge; the Appellant admitted that they had not suggested this amount to the judge. This is evident in the following extracts from the Transcript of the proceedings before this Court. At page 31, lines 11 – 16 of the Transcript, the following exchange occurred:

> **"Query: <u>What did you say to her should be the amount of the damages</u>?**

MS. CLEARE: I showed her the-- I did not give a specific figure, but I showed her all of the indicators, and all of the indicators for the losses. So it was, you know, like I say, there was no - -okay." (Emphasis added)

And further at page 34, line 15 to page 35, line 2 of the Transcript:

"JONES, JA: Ms. Cleare, the $500,000 you are asking for was never put to the judge below, is that not so?
MS. CLEARE: That's true, my Lords, but, you know, she had all the tools to determine that. All of the lists of what I've showed you is what I put in my submissions to her and it was also in the evidence at paragraph 32.
THE PRESIDENT: Well, was there any time in the - the submissions that you made to the judge, did you tell her what you thought damages for the conspiracy ought to be, in terms of a figure?
MS. CLEARE: No, I didn't put an exact figure, but I gave her the evidence, and I gave her the measure to put together. " (Emphasis added)

30. Nonetheless, the Appellant sought to justify why $500,000 was the appropriate award. At page 32, line 20 - page 34, line 3 of the Transcript she argued:

"MS. CLEARE: I am asking you to award $500,000 based on $100,000 a year and based on the measure of damages that is in the FSSR contract for disability where someone is totally disabled. And we say she wasn't totally disabled but she was certainly disabled for a substantial length of time. And a broad brush approach would be
THE PRESIDENT: When you use the word disabled, what do you mean?
MS. CLEARE: Prevented, restricted. Clients were swayed to go and deal direct with Family Guardian. She lost some massive clients.
THE PRESIDENT: Is that what disabled in the contract means?
MS. CLEARE: Disability is not defined in that contract. But I am just saving that that is a measure in the industry.
THE PRESIDENT: You mean a reference to the provision for disability in the contract.
MS. CLEARE: Yes.
THE PRESIDENT: I am trying to figure out whether or not- - -what was the disability. And when you tell me what you say the disability is, I wanted to know whether or not that is a disability contemplated in the contract.
MS. CLEARE: No, I am not saying that it was contemplated that if they conspired to injure her after the contract that they would pay her damages of 5 years. But what I am saying is, in the industry they recognise that through no fault of their own, if one of their agents was disabled say, for example, in a car crash, but they had continuing clients that they were unable to service, that the Family Guardian would pay them those commissions for 5 years.
So I am just using as a yardstick to measure the kind of damage they inflicted on her was similar and the extent of the damages enduring for that amount of time." (Emphasis added)

31. In my judgment, counsel for the Appellant makes a rather quantum leap in attempting to equate the Appellant's circumstances as being akin to the disability of an individual who has been disabled in a car crash; clearly this is not an apt analogy. In my judgment, the Appellant has failed to justify why this Court should interfere with the judge's award and substitute $500,000, or any other sum.

32. I am not satisfied that the judge acted on any wrong principle of law, or misapprehended the facts, or made a wholly erroneous estimate of the damage suffered. In determining the sum, it must be recalled that damages for breach of contract were already awarded and that award is not challenged on this appeal. Awarding additional damages for conspiracy would in many ways duplicate the compensation awarded for the breach of contract claim. As such, this Court finds no basis upon which to interfere with the judge's award of $20,000.

C. Whether the judge should have awarded exemplary damages in the circumstances of this case?

33. The Appellant cited the case of **AXA Insurance UK plc v Financial Claims Solutions Ltd and others** [2018] EWCA Civ 1330 in support of its appeal that it should be awarded exemplary damages. In that case, the appellant insurer, Axa Insurance UK ("AXA"), was the subject of fraudulent claims for £85,000 by the respondents (who were a fake law firm) in respect of two road traffic accidents. The fraud was sophisticated, well-planned and brazen, and involved serious abuses of process of the court, including pretending that court documents had been served on Axa in order to enter default judgment. That case held that exemplary damages may be payable where a defendant calculates that the money he may make out of wrongdoing will exceed any damages that he would likely have to pay. Notably, that case also sets out that exemplary damages are awarded only in exceptional circumstances:

> "**15. The judge then cited the well-known passages from the speech of Lord Devlin in Rookes v Barnard [1964] AC 1129 at 1226-7 and 1228 in relation to the second category of case where exemplary damages might be awarded identified by his Lordship:**
>
> > **"Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff…It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the**

> **defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.**
>
> **…**
>
> **25. It is important to keep in mind that exemplary damages remain anomalous and the exception to the general rule. It would therefore be inappropriate to extend the circumstances in which they can be awarded beyond the three categories of case identified by Lord Devlin. As the passage from his speech which I have cited above makes clear, the second category only encompasses cases where the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the claimant. If that criterion is satisfied, exemplary damages may be awarded to deter and punish such cynical and outrageous conduct."** (Emphasis added)

34. After considering the principles for awarding exemplary damages, the judge declined to order exemplary damages on the basis that such an award would constitute an unreasonable level of damages in the Appellant's favor.

> **"[180] To make an award for exemplary damages, the conduct of the Company may be categorized as "malicious, oppressive, wanton and like adjectives. In my judgment, this is not such a case for me to make an award for exemplary damages. Courts are reminded that damages must be reasonable and ought not to be a windfall."** (Emphasis added)

35. In my judgment, the facts of **AXA (supra)** are such that the intent to defraud was manifest and intentional, even going so far as to involve a fake law firm and pretending to serve court documents as a precursor for seeking a default judgment. There is nothing in this case which even approaches the factual matrix and circumstances in **AXA** that would suggest that this is an appropriate case in which to award exemplary damages. Particularly with respect to the prevailing view that exemplary damages should be awarded only in the most exceptional circumstances, there is no reason to interfere with the judge's award of damages. Accordingly, this ground of appeal also fails.

D. Whether the judge erred by failing to award prejudgment interest on the damages from the date of the Appellant's termination on 29 September 2015 to the date of judgment on 8 March 2022?

36. The **Civil Procedure (Award of Interest) Act** sets out the framework for the award of prejudgment interest on damages:

> **"3. (1) In any proceedings tried in any court, whether or not a court of record, for the recovery of any debt or damages, the court may if it thinks fit, order that there shall be included in the sum for which judgment is given interest at**

such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment…" (Emphasis added)

37. In the Appellant's submissions, the Appellant stated that the judge appeared to have overlooked its claim for prejudgment interest, which was set out in its writ of summons. Accordingly, the Appellant is requesting that this Court award 5% interest on the damages from the date of the Appellant's termination on 29 September 2015 to the date of judgment on 8 March 2022.

38. In reply, the Respondent does not dispute that the judge appeared to not have addressed her mind to the issue of awarding prejudgment interest. Rather, the Respondent's contention seems to be that the rate of prejudgment interest sought is too high. Thus, the Respondent proffers the 2.4% that was awarded in **Balmoral Development v. Cottis Law** [2017] 1 BHSJ. No. 73 as an example of a more reasonable rate of interest.

39. In my judgment, given that there is no dispute by the Respondent that the judge may have overlooked the question of awarding prejudgment interest, this Court can exercise the discretion to award prejudgment interest. As such, prejudgment interest is awarded on the damages to the Appellant at a rate of 2.4% from the date the writ of summons was issued on 17 February 2016, to the date of judgment on 8 March 2022.

E. Whether the judge erred by suggesting to the Appellant that accepting a gross sum of $60,000 in costs was advisable because otherwise the judge would tax the costs herself and likely award a lower figure than $60,000 during the taxation?

40. The regime for costs orders in the Supreme Court is set out under order 59 of the Rules of the Supreme Court (RSC). O. 59, r. 2 of the RSC sets out that costs are at the discretion of the court, including the extent to which costs should be paid. O. 59, r. 9. of the RSC empowers the court to order a gross sum for costs rather than ordering that costs be taxed. However, once costs are ordered to be taxed, O. 59, r. 12 of the RSC empowers the Registrar of the Supreme Court ("the Registrar") to tax the costs.

Rules of the Supreme Court

"2. (2) The costs of and incidental to proceedings in the Supreme Court shall be <u>in the discretion of the Court</u> and that Court shall have full power to determine by whom and <u>to what extent the costs are to be paid</u>, and such powers and discretion shall be exercised subject to and in accordance with this order.

3. (1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceeding <u>except under an order of the Court</u>.

4. Costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings; and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

9. (1) Subject to this Order, where by or under these Rules or any order or direction of the Court costs are to be paid to any person, that person shall be entitled to his taxed costs.

(4) The Court in awarding costs to any person may direct that, instead of taxed costs, that person shall be entitled —

(a) to a proportion specified in the direction of the taxed costs or to the taxed costs from or up to a stage of the proceedings so specified; or

(b) to a gross sum so specified in lieu of taxed costs.

11. (1) Where an action, petition or summons is dismissed with costs, or a motion is refused with costs, or an order of the Court directs the payment of any costs, or any party is entitled under rule 10 to tax his costs, no order directing the taxation of those costs need be made.

12. The Registrar shall have power to tax —

(a) the costs of or arising out of any cause or matter in the Supreme Court;

(b) the costs directed by an award made on a reference to arbitration or pursuant to an arbitration agreement to be paid; and

(c) any other costs the taxation of which is directed by an order of the Court." (Emphasis added)

41. In the case at bar, the Appellant states that the Bill of Costs totaled $230,000 for professional charges. The judge indicated that she found this sum excessive and thus awarded $60,000 for professional charges. The Appellant asserts that this is an unreasonable reduction of 75% of the $230,000 claimed in the Bill of Costs.

42. The Appellant then went on to suggest that the judge threatened her by indicating that a taxation of the Bill of Costs *by the judge* would perhaps yield a lower sum than $60,000. The following exchange between the judge and the Appellant was extracted from pages 30 to 33 of the Appellant's Submissions:

"The Court: In terms of Costs, Ms. Cleare submitted a Bill of Costs for 3 -- sorry, $230,733.94, as Professional Charges. And Disbursements, in the sum of $10,675.25.

With respect to the Disbursements, I was able to make that Award. Of course, the $230,000, even if the client pays you that, the Court only deals with what is fair and reasonable with regards to the circumstances of this case. I (sic) Paragraph 185, I dealt with reasonable Costs. Some of the factors that the Court will look at, the care, speed and economy with which the case was prepared. We have none of that here. An Order that has been already made. The conduct of the Parties before -, well, during the proceedings. The

importance of the matter to the Parties. The novelty, weight and complexity of the case and the time reasonably spent on the case.

In that regard, again exercising my discretion, because Costs are entirely discretionary, I felt that a fair figure representing Costs is $60,000 plus Disbursements of $10,675.75 [sic].
Of course, I note that I have not given Mr. Farquharson any opportunity to allow/disallow the Bill of Costs that Ms. Cleare sent. So, I am not sure if you feel that my figure is unreasonable. Then I can just delete that there and ask that the Bill of Costs be taxed, if not agreed. That taxing, of course, will be done by the Taxing Master, the Registrar and not by myself. As it turns out, the Bill of Costs after Taxation, that I calculated, $70,675.75.
Either party has the right to object to that there. You may choose to go before the Registrar and deal with that aspect of it or you may accept the figure that I have suggested now and bring this matter to an end.
The Court: So, that part there will not change (damages). Costs is something that I can ask you to determine. Whether you feel that my — my reasonableness of Costs is unreasonable or whether I should leave it there and you don't have to go before a Registrar to tax Costs and to undergo another hearing, which again costs time and money. So, perhaps I should hear from you, Mr. Farquharson. Because you're the one, who could object, and Ms. Cleare also. Both of you could object.
Mr. Farquharson: My Lady, that sounds reasonable from our standpoint. I don't have the benefit of seeing the --the itemization. But it sounds reasonable to us, by way of Costs.
The Court: Yes. Ms. Cleare.
Ms. Cleare: With respect to Costs, my Lady, I would like to try my hand with Taxation. Because that allows the —
The Court: No, no. I am going to do the taxation.
Ms. Cleare: Okay.
The Court: So, I will do it. Because you may get less, if I go into Taxation.
Ms. Cleare: But the 25 percent Recovery out of Court --
The Court; It has nothing to do with what she pays you. What you - Ms. Cleare: No, no. I don't dispute that.
The Court: The complexity of the matter. The novelty. And really and truly -
M.s Cleare: But, my Lady. I thought you had said, we will go before a Registrar. That is what you had first indicated.
The Court: No, I am going to deal with it now.
Ms. Cleare: Okay.
The Court: Come to think of it, once it's going to go before the Registrar, it entitles a different ball game.
Ms. Cleare: Yes.
The Court: Once it comes before me, I will tax it. So, I am going to - since you're not going to accept my figures. Costs to be taxed, if not agreed, by the judge.
Ms. Cleare: Thank you, my Lady.
The Court: You are likely to get the lesser figure, okay.

Ms. Cleare: Well, if it's determined that it won't be item by item — The Court: No, I will -I will go through Item by Item. I've done that before.
Ms. Cleare: Well, I have to take instructions on that from Ms. Bain. The Court: I have done that before, item by item. And I have —
Ms. Cleare: Okay. And generally, what you're saying is, it's always less?
The Court: It could be less. I have you —I thought that you got a good amount in Costs.
Ms. Cleare: Okay. No, it's just that normally when I do taxations before the Registrar — -
The Court: They don't know the case.
Ms. Cleare: - in many cases, it's normally like a 75% recovery. So, it's a lot less for us.
The Court: No, but they don't know the case. That's why I don't allow it to go before the Registrar.
Ms. Cleare: Fair enough.
The Court: When I say they don't know I don't mean any disrespect to the Registrar. The Judge deals with the case. The judge has more idea of what costs should be. What are some difficult factors. What wasn't — and the only difficult area there was the conspiracy, that became very simple, once -
Ms. Cleare: Yeah, it did become simple in the end, my Lady.
The Court: It became very simple. I wasn't sure whether the Employee —I mean, an employer could conspire. But there is case law.
Ms. Cleare: Oh yeah.
The Court: To the effect that they could.
Ms. Cleare: Yes.
The Court: And that was determined very easily.
Ms. Cleare: Okay. So, my Lady, I'l take some instructions on that and get back to you.
The Court: Okay. I am going to leave it out though. I'm going to say, taxed to be — costs to be taxed by the Court, if not agreed.
Ms. Cleare: If not agreed at the summary determination or you are scrapping that determination?
The Court: Well, Mr. Farquharson was kind enough to tell you what was agreed. I thought when I gave you 12 months reasonable notice, you should have gotten 6. But I gave you 6 more with the 12 months.
Ms. Cleare: No, no, my Lady. I think we're missing the -
The Court: So, one will be reasonable in all respects. There was no case law. There was a case where a Magistrate was defamed in Dominica many years ago. And I gave him $5,000 in Defamation Fees.
Ms. Cleare: My Lady, I am not disputing any of the Damages.
The Court: Then why would you dispute costs? Why don't you take the 70,000 and bring an end to this case?
Ms. Cleare: Was I given a choice?
The Court: Well, I should hope so.
Ms. Cleare: So, my Lady, if you're holding me to my choice now, then I'll have to go with what you summarily assessed, when you read the Judgment out.

The Court: Yes. I did a summary assessment of it. I took all the factors. That's why I gave you all the disbursements. I looked at it. You have sent me the costs bill, which I have in my possession here. And then I could have gone lower than that. At one time, I thought of $50,000.00. But I did increase it to 60. <u>So, take it and leave now or</u> - -
Ms. Cleare: Yes, my Lady.
The Court: You will take it?
Ms. Cleare: Yes, my Lady.
The Court: Okay. All right. Okay.
Then finally:
The Court: Okay. So, I will include the amount of Costs as agreed. Okay. I Don't need to use the word, "Agreed".
Ms. Cleare: Yes.
The Court: I will say reasonable Costs, as I have found it. It would be the amount that I just stipulated.
Ms. Cleare: All right. Thank you, my Lady.
The Court: Okay." (Emphasis added)

43. In my judgment, it is clear that O. 59 of the RSC empowered the judge to determine to what extent costs were paid. However, it is also true that should the matter have proceeded to taxation, on the authority of O. 59, r. 12 (and as the judge suggested during the hearing) it was the Registrar who would have taxed the costs. However, the communication between the Appellant and the judge may have led the Appellant to consider that the judge had power to tax the costs, although this power clearly could not have derived from the RSC.

44. As such, in my judgment, it is not unreasonable to infer that the Appellant may have accepted the sum of $60,000 offered by the judge under duress, i.e. on the threat that if were not accepted, the judge would tax the bill herself (and not send it to the Registrar for taxation) in which circumstance she may get less as the judge had hinted. Although the judge had indicated that the taxation may likely yield a lower sum of $60,000, there still remained the possibility that a taxation (by the Registrar, who is the empowered taxing authority) may have yielded a greater sum than $60,000. An item-by-item examination of the legal work that the Appellant set out in the Bill of Costs may possibly have demonstrated that a sum higher than $60,000 was warranted; the taxation could also have resulted in a lower award than $60,000. Nonetheless, the Appellant ought to have been permitted to take this gamble and see whether the taxation before the Registrar would have yielded a more or less favourable sum.

45. In my judgment, the judge erred in informing the Appellant that her bill was too high without even hearing from the Respondent as to its reasonableness. The judge was wrong to threaten the appellant with taxation by herself in the event that she did not accept the sum of $60,000.00. This was exacerbated when she told the Appellant that she may get less than $60,000.00 on a taxation by the judge. This error effectively deprived the Appellant of having the Bill of Costs taxed before the Registrar. Accordingly, the Appellant succeeds

on this ground of appeal. The judge's award of $60,000 with respect to costs is set aside and this matter is remitted back to the Supreme Court for the Bill of Costs to be duly taxed before the Registrar.

Disposition

46. Save for the imposition of prejudgment interest on the damages to the Appellant at a rate of 2.4% from 17 February 2016 to 8 March 2022, and the remission of the costs issue to the Supreme Court to allow the Bill of Costs to be taxed before the Registrar, this appeal is otherwise dismissed.

47. While the usual order is that costs follow the event, the Appellant was largely unsuccessful in this appeal. In the premises, we make no order as to costs at this time. However, we invite the parties to provide written submissions to this Court on the payment of costs within two weeks of the date of this Judgment.

The Honourable Sir Michael Barnett, P

48. I agree with the disposition of this appeal.

The Honourable Mr. Justice Jones, JA

49. I also agree with the disposition of this appeal.

The Honourable Mr. Justice Evans, JA