COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/00217

BETWEEN

JENNIFER BAIN

Plaintiff

-AND-

FAMILY GUARDIAN INSURANCE COMPANY LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Ms. Camille Cleare of Harry B. Sands, Lobosky & Co. for the Plaintiff. Mr. Leif Farquharson QC and Mr. John Minns of Graham Thompson for the Defendant

Hearing Dates: 16 July 2018, 20 July 2018, 22 November 2018, 25 November, 17 December 2020

Breach of contract – Independent contractor – Whether one party was entitled to terminate the contract – Tort by unlawful means

Tortious conspiracy – Ingredients of tort – Conspiracy to injure - Unlawful means conspiracy – Whether the Defendant and its co-conspirator had the predominant intention of injuring the Plaintiff

Defamation – Whether a letter alleging improper use of client information was defamatory – Intention irrelevant to defamation – Privilege - Qualified – Whether the Defendant had malice to defeat the defence of qualified privilege

The Plaintiff was a Sales Agent of the Defendant's insurance company. The Defendant terminated the Plaintiff's services because of her physical absence from the office and from the jurisdiction and for her prolonged anticipated absence when she would commence a course of study abroad. The Plaintiff alleged that the termination constituted

a breach of contract. The Defendant denied that it breached the contract and asserted that it was entitled to terminate under the contract.

The Plaintiff also alleged that, after the termination, the Defendant conspired with one of its Sales Agents to financially injure her by willfully acting to prevent her from earning commission and that the Company maliciously published libelous words of her in a letter which accused her of unlawfully using client information to solicit customers. The Defendant denied both assertions, contending that its actions, after her termination, were not intended to injure the Plaintiff, but merely not to lose customers. The Company alleged that its letter was qualifiedly privileged from defamation because it was written as a result of a bona fide concern that the Plaintiff was unlawfully soliciting customers.

HELD: The Defendant breached the contract since it incorrectly relied on the termination clause. The Defendant also conspired with its intermediary to injure the Plaintiff by lawful means and defamed her by writing a letter which attributed to her dishonesty in her profession. The Plaintiff is therefore entitled to damages for breach of contract equivalent to 12 months' notice. For conspiracy, she is awarded damages of $20,000 which are fair and reasonable. For defamation, she is awarded damages in the sum of $25,000 which meet the justice of the case. No award of exemplary damages is made. Cost is taxed at $60,000 representing professional charges and $10,675.25 as disbursements.

1. The Plaintiff was an independent contractor engaged by the Defendant to sell insurance. How she secured new business was not regulated by her Agreement. Her overriding objective was to secure business and to ensure that the business she already secured would be renewed. Accordingly, she was entitled to choose how she would achieve those objectives. If the absence would have had the effect that the Defendant anticipated, the termination of the contract was premature. The Defendant ought to have waited until the absence had the effect of breaching at least one of her obligations.

2. Damages must not be too remote. The loss sought to be recovered must either arise naturally from the breach of contract, or must have reasonably been in the contemplation of both parties at the time of the contract as a consequence of the breach.

3. Although the Defendant was entitled to terminate the contract for behaviour by the Plaintiff which was in the Defendant's opinion prejudicial to its interests, the opinion had to be reasonably held in the context of misconduct.

4. Where a contract contains no express provision for its determination, a term will readily be implied for its determination by reasonable notice. In this case, the Plaintiff, a vital person in the Defendant's service is entitled to 12 months' notice

after deducting commissions and salaries from other employments in her "duty" to mitigate loss: **Chitty on Contracts, Vol. 1 General Principles (28th Ed), 1999** at para 13-025.

5. The Defendant could be a co-conspirator with its employee so long as the employee appreciated what the employer was doing even if he was following orders: **Crofter Hand Woven Harris Tweed Co. V Veitch** 1942 SC (HL) 1 applied.

6. For lawful means conspiracy, the Plaintiff must prove (i) a combination between two or more persons (ii) intention to injure the Plaintiff (iii) the acts having been carried out in accordance with the agreement (iv) which resulted in loss or damage: **Crofter Hand Woven Harris Tweed Co. v Veitch** 1942 SC (HL) 1 applied. For this type of conspiracy, proving that the Defendant's predominant intention was injuring the Plaintiff is paramount.

7. A letter which accused the Plaintiff of improperly using client information contrary to the Data Protection Act imputed dishonesty and was therefore defamatory.

8. Qualified privilege did not apply because the circumstances of the letter were not such that the publisher sent it as a legal duty or interest: **David v Hosany** [2017] EWHC 2787 (QB) applied.

9. The Defendant published the letter with malice since its dominant motive for the letter was to injure the Plaintiff: **Horrocks v Lowe** [1974] 1 All ER 662 applied.

10. In assessing damages for defamation, the general rule is that the damages should be commensurate with the wrong suffered. Considerations for determining a commensurate amount include damage to his reputation, vindication for his good name; and take account of distress, hurt and humiliation which the defamatory publication has caused. The most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people: **John v MGN Ltd** [1997] QB 586 applied

11. Exemplary damages may be awarded for negligence only in those cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly taking that risk - **A v Bottrill** [2002] UKPC 44 distinguished.

JUDGMENT

Charles J

Introduction and overview

[1] By Specially Indorsed Writ of Summons filed on 18 February, 2016 and amended after the trial pursuant to the Court's Order dated 15 August 2019, the Plaintiff ("Ms. Bain") brought this action against Family Guardian Insurance Company Limited ("the Company") after it terminated the Agreement which established Ms. Bain's relationship with the Company as a Sales Agent. She sued for breach of contract, conspiracy to cause injury and defamation.

[2] She was terminated because the Company claimed that by her absence and future absence from the office and from The Bahamas, she breached some of her obligations under the Agreement. Ms. Bain asserted that her productivity was not impacted by her physical absence which was not a requirement and therefore the Company breached the contract when it terminated her without proper grounds provided in the contract. The Company denied liability and maintained that Ms. Bain would have been unable to satisfy the term of the Agreement which required her to devote all of her time, talents and energies to the business of the Company exclusively and that she acted prejudicial to their interests.

[3] Ms. Bain asserted that, after her termination, the Company conspired with its intermediary and employee, Alana Major ("Mrs. Major") to cause a loss of commission to her. The Company denied conspiracy and stated that the actions complained of were not taken with the purpose of injuring Ms. Bain.

[4] Ms. Bain alleged that a letter sent to her by Mrs. Major on behalf of the Company was defamatory of her in her career. The Company denied that the letter bore any defamatory meaning and contended that the complaint made in the letter was a legitimate concern. They also relied on the defence of qualified privilege, to which Ms. Bain alleged malice.

Background Facts

[5] Ms. Bain was, at all material times, a licensed insurance agent and one of the Company's Financial Services Sales Representatives ("FSSR" or "Sales Agent"). The Company is incorporated under the laws of The Bahamas and is a licensed insurance company. On 1 October 2011, Ms. Bain and the Company entered into a written Financial Services Sales Representative Agreement ("the Agreement"). Under the Agreement, Ms. Bain was expressly authorised, as an independent contractor, to solicit applications for insurance products provided by the Company.

[6] Under the Agreement, Ms. Bain had to comply with a number of responsibilities and obligations. Section 7 of the Agreement sets out Ms. Bain's responsibilities and obligations as a Sales Representative. It provides:

> **"In acting as the agent of the Company, the FSSR hereby agrees to comply with the following obligations:**
>
> **(i) …**
> **(ii) …**
> **(iii) …**
> **(iv) to devote all of his or her time, talents and energies to the business of the Company exclusively and not to engage in any business with any other person, company or organization, which is directly or indirectly in competition to the business of the Company, or seek to promote the business or engage in any business with any other person, company or organization, which is directly or indirectly in competition to the business of the Company;**
>
> **(v) not to persuade or attempt to persuade any other FSSR to engage in any business with any other person, company of organization, which is directly or indirectly in competition to the business of the Company;**
>
> **(vi) Not to persuade or attempt to persuade any policyholder to discontinue their policy or otherwise do anything prejudicial to the Company's business or interests, or to the interests of the policyholders;**
> **(vii) …**
> **(viii) …**
> **(ix) …**
> **(x) …**

(xi) To act loyally and faithfully in all matters relating to the Company's business and obey all orders and instructions from the Company. In the absence of any such orders or instructions in relation to any particular matter the FSSR will act in such a manner which is at all times beneficial to the Company and the policyholders' interest;…."

[7] Clause 12 of the Agreement provided for the termination of the Agreement.

> **"12. (a) This Agreement will terminate forthwith upon written notice from the Company to the FSSR in any of the following circumstances:**
>
> **(i) *Non-compliance* – In the event that the FSSR commits any act of fraud, misrepresentation or dishonesty or fails to fulfill the terms of the Appendices hereof or fails to comply with the laws of the Commonwealth or the regulations of the Insurance Commission of the Bahamas or breaches any of the terms of this Agreement;**
>
> **(ii) *Misconduct* – In the event that the FSSR is guilty of any conduct which in the opinion of the Company is prejudicial to the Company's interests.**
>
> **(iii) …..**
>
> **(iv) ….."**

[8] Clause 13 speaks to the effect of termination.

[9] Appendix 1 of the Agreement provided for commissions to be split between two or more Sales Agents. It provides as follows:

> **"*(f) Split Commissions***
>
> **When a credit for a policy is divided between two or more Financial Services Sales Representatives, the Commissions on the policy will be similarly divided. The Financial Services Sale Representative will have no rights to any commission payable with respect to a policy issued pursuant to an application completed by another Financial Services Sale Representative of The Company Insurance Company Limited Ltd. unless such other Financial Services Sales Representative acknowledges such right. Additionally, the agreed percentage split between the FSSR's involved will also be used to account for the Premiums on the Policies that will be reflected on the report for both FSSR's."**

[10] Ms. Bain was not paid a fixed salary but was paid commission on sales and renewals. She was not required to work fixed or minimum days or hours. She had no entitlement to vacation pay, overtime, base salary or sick leave.

[11] Sometime in June 2015, Ms. Bain verbally advised her immediate supervisor, Mr. Wendell Smith, the Company's Vice-President of Financial Services ("Mr. Smith") that she was going to pursue a Master's Degree in Orlando, Florida, USA in September 2015 for 16 months. The commencement date for her studies was subsequently changed to January 2016.

[12] On 22 June 2015, Mr. Smith emailed Ms. Bain requesting further details on her proposed move including (i) the time of departure; (ii) the length of her stay; (iii) whether she will be seeking employment whilst abroad; (iv) how will the business be serviced and (v) how often would she commute .

[13] Later that day, Ms. Bain wrote to Mr. Smith setting out the details and providing a proposal as to how she would work while out of the jurisdiction. She advised that she was not seeking employment otherwise and she would return for at least 9 days every month and for 18 days in December, 12 days in March and the entire months of June and July and half of August; that she would spend a total of more than 6 months in The Bahamas during the school year. She said that she would have remote access while away and that she had made arrangements to split commissions with four (4) other agents who agreed to write new policies when necessary.

[14] Sometime in August 2015, Ms. Bain went to Orlando to get her children settled in school and college. She had not yet started the program. She said that she was staying extra time because someone who she had "put in jail" was being released soon. She said that she wanted to see whether he was going to continue to torment her. She made the Senior Vice President of the Company, Ms. Higgs aware of this.

[15] By letter dated 8 September 2015, Mr. Smith wrote to Ms. Bain stating that her move to the USA was not approved on the terms she proposed. As a result, he proposed a variation of the Agreement in the following terms:

i. The variation would be valid until March 2017 or her earlier return;
ii. With respect to the Medical Insurance, her existing and new BahamaHealth business would be transferred to the Client Services Unit of the Group Health Division for servicing. Accordingly, all commissions generated would be split 50/50 with the company
iii. With respect to life insurance, she would be required to temporarily transfer the business to another agent until her return. The service fee would be paid from her commissions
iv. Her right to an office and parking space would be withdrawn.

[16] By email later that day, Ms. Bain asserted that she was not in breach of her current contract and refused the variation proposed by Mr. Smith.

[17] On 9 September 2015, the keys to Ms. Bain's office, which was held by her marketing assistant, Ms. Chevette Charlton, was taken away from her.

[18] By letter dated 10 September 2015, Mr. Smith again wrote to Ms. Bain. He advised her that the Company considered her to be in breach of the Agreement. He outlined the instances of the alleged breaches:

> **"In my response I am highlighting the facts where you breached your Sales Representative Agreement.**
>
> - **You left without proper notification.**
> - **You have been away from Family Guardian for 42 days without request for special or vacation leave, which did not position us to make the necessary arrangements to your portfolio or to properly assess the impacts.**
> - **You plan to enroll as a full-time student in the United States of America and as a result, you cannot devote all your time, talents and energies to the business of The Company**

exclusively as your Sales Representative Agreement demands.

- **Your move created a variation in your Agreement which could only be approved in advance, in writing, by an authorized officer of the Company.**

- **Your proposal to pay the full salary of a marketing assistant is unfortunately not feasible and there was no alternative provided to address client support, hence, the proposition provided.**

- **Due to the foregoing, Family Guardian is within its rights to cancel your Sales Representative Agreement. However, Family Guardian has offered you an exceptional alternative which was outlined in my earlier email.**

- **I recommend that you review the proposal from Family Guardian and respond within 5 working days, failing to do so would encourage the Company to act in its best interest."**

[19] By letter dated 17 September 2015, Ms. Bain responded to Mr. Smith's letter rejecting Mr. Smith's assertion that she breached the Agreement for any of the reasons outlined in the 10 September 2015 letter or otherwise. She did not accept the changes proposed by Mr. Smith in his letter of 8 September 2015.

[20] Ms. Bain returned home in September 2015. She attended the Company's mandatory Founder's Day celebration.

[21] By email dated 22 September 2015, Ms. Bain notified Mr. Smith, Ms. Higgs, her marketing assistant and 2 other persons that she would be "*out of office beginning tomorrow until October 14th …*"

[22] By letter dated 29 September 2015, signed by Mr. Smith and emailed to Ms. Bain, the Company terminated Ms. Bain's services, stating as follows:

> **"Dear Jennifer,**
>
> **I acknowledge receipt of your letter dated September 17, 2015.**
>
> **As previously noted in my letter to you dated September 10, 2015, there were clear expectations of you as an Executive Agent which you**

have failed to adhere to. Our attempts to work with you to identify a reasonable compromise have not been accepted by you and you have continued to make unilateral decisions without proper, respectful and professional engagement.

In addition to the 42 days you have already been absent in the past two and a half months, we note your further decision to be absent from the office with effect from September 23 to October 14 despite the communications that have been provided to you and your understanding of the Company's position.

We wish to therefore advise you that as you have breached your contract with the Company and have abandoned your duties, the Company has cancelled your sales agreement with immediate effect….

Sincerely,

Wendell Smith,
Vice President
Financial Services."

[23] At the time of Ms. Bain's termination, John Bull (along with other clients) were enrolled in BahamaHealth Group Insurances sold through the Company with its agent/broker as Ms. Bain. Well before her termination, the Company offered John Bull renewal rates for the upcoming year. The commission was 4% payable to Ms. Bain.

[24] Shortly after Ms. Bain's termination, the Company informed her clients that she was no longer working with the Company and that another Sales Agent would replace her.

[25] Sometime early in October, some of Ms. Bain's clients (including the John Bull and Bahamas Bus & Truck groups) wrote to the Company requesting that their agent/broker be changed to Hope Insurance Insurance Agents and Brokers Limited ("Hope Insurance"). Hope Insurance was an independent contractor engaged by the Company to act as agent/broker.

[26] On 7 October 2015, Ms. Bain entered a Sub-Agency Agreement with Hope Insurance. By that agreement, she would earn an 80% commission on the business she brought to Hope Insurance.

[27] Notwithstanding the change of broker requests, Mrs. Major, Senior Manager of Group Sales, contacted John Bull without Hope Insurance's knowledge to advise them that they had the option to eliminate Hope Insurance and enroll directly through the Company. She also offered a revised renewal rate. The revised rate was lower because the commission offered to the broker (Hope Insurance) was reduced to 2%.

[28] Mrs. Major had a meeting with the John Bull representative in the absence of and without the knowledge of Hope Insurance. John Bull elected the revised rate but insisted that Hope Insurance remain the broker of record. Hope Insurance accepted the lower commission rate.

[29] Additionally, Mrs. Major contacted a person affiliated with the Bahamas Bus & Truck group and successfully convinced them to abandon Hope Insurance as its broker and enroll directly through the Company.

[30] By letter (attached to email) dated 9 October 2015, Mrs. Major wrote Ms. Bain on behalf of the Company complaining that she improperly provided clients' information to Hope Insurance. She copied Mrs. Michele Fields and Ms. Patrice Rolle, the Superintendent and the Manager of the Intermediary & Market Conduct Unit of the Insurance Commission of The Bahamas ("the Insurance Commission") on the email. The letter alleged that the recent appointment of Hope Insurance as broker of record for several policies arose as a result of Ms. Bain disclosing client information. Mrs. Major demanded that Ms. Bain 'cease and desist'. She referenced the Data Protection (Privacy of Personal Information) Act which prohibits persons from using information obtained without authority.

[31] By email dated 2 December 2015 to Mrs. Major, the President of Hope Insurance, Cardinal McCardy ("Mr. McCardy") confirmed that Ms. Bain was being sponsored

by Hope Insurance and was therefore authorized to represent the groups listed. He requested that she be allowed to communicate with respect to specific group policies. The following day, Mrs. Major responded to Mr. McCardy's email denying the request. It read:

> **"Good day Cardy,**
>
> **Please be advised that we are unable to accommodate this request. Our agreement maintains with Hope Insurance Insurance (Cardinal McCardy) and we will communicate with you directly pertaining to these accounts."**

[32] Ms. Bain had a mortgage with the mortgage department of the Company. By email dated 31 December 2015, Ms. Bain asked whether the Company would accept monthly payments of $2,500 for her mortgage. Her request was denied. By letter dated 16 February 2016, the Company demanded vacant possession of the mortgaged premises as a result of her falling into arrears. By email that day, they requested information on her intention to pay. It demanded full payment failing which they would exercise its power of sale by advertising the property for sale.

[33] As she was no longer worked with the Company, she no longer benefitted from the preferable interest rate on the mortgage.

The issues

Breach of contract

[34] In my opinion, the following inter-related issues arise for determination in respect of the breach of contract claim namely:

1. Was Ms. Bain's absence itself a breach of contract?

2. Whether the concern caused by Ms. Bain's absence and future absence was a valid reason for The Company terminating the Agreement?

3. Whether the absence and future absence had the effect of breaching her obligation:
    i. To act loyally and faithfully;

ii. To devote all her time, effort and talents; and
iii. Not to act in a manner which was prejudicial to the Company's business or interests or to the interests of the policyholders?

4. Whether the Company could terminate for misconduct under Clause 12 (a) (ii) and

5. Did Ms. Bain suffer loss and damage? If she did, what is the amount of damage suffered?

Conspiracy to injure

[35] The following sub-issues arise for determination namely:

1. Did the Company (a) unlawfully conspire with Mrs. Major; (b) with intent to injure Ms. Bain?

2. If so, did Ms. Bain suffer loss and damage?

3. If she did, what is the quantum of loss and damage suffered?

Defamation

[36] Here, the following sub-issues fall for consideration namely:

1. Were the words in the 9 October 2015 letter from Family Guardian to Ms. Bain and copied to the Insurance Commission, defamatory of Ms. Bain?

2. If so, was the said letter written on an occasion of qualified privilege?

3. If written on an occasion of qualified privilege, was the said letter done with malice?

4. If the said letter was defamatory of Ms. Bain and not written on an occasion attracting qualified privilege, did Ms. Bain suffer loss and damage?

5. If so, what is the measure of damage suffered?

The evidence

[37] Ms. Bain gave evidence on her own behalf. Kerry Higgs and Mrs. Major gave evidence on behalf of the Company.

Jennifer Bain

[38] Ms. Bain filed two Witness Statements on 17 July 2017 and 20 November 2017 respectively, which stood as her evidence in chief at trial. She has been working in the insurance industry for about 20 years and she is a fully licensed and qualified insurance agent. She testified that she spent all of her time, effort and talent in selling the Company products and she had no other means of income. From 2013 to 2015, she was considered a high qualifier within the Company's incentive scheme because she had generated enough income and First Year Commissions to qualify for "Million Dollar Round Table" status which entitled her to the benefit of an office space and a covered parking space at the Company premises for her exclusive use.

[39] Ms. Bain also testified that she had never been restricted to performing her sales administration in any specific manner or place other than she had a remote login access to the webcapsil which is the Company's portal which stores client information and files and facilitates meetings. She also had a designated Company's email address from which she conducted the sales business.

[40] She further testified that much of her business was performed outside of working hours and so she never had to take time off because she had never been subject to time in office and could access email and the portal remotely. She said that she was an independent sales agent and, as such, in previous years, she had taken time off and travelled without having requested vacation or special leave. She said that her only requirement was to meet the minimum standards of production which she could and had achieved outside of the office. She maintained that she had been out of the jurisdiction for periods longer than the absence complained of by the Company in the termination letter. She provided copies of her stamped passport in support.

[41] According to Ms. Bain, her absence from the office never became an issue until 8 September 2015 when she received the letter from Mr. Smith in response to her advising how she would work abroad.

[42] Additionally, Ms. Bain stated that, the day after she rejected Mr. Smith's proposed variation, her marketing assistant, Ms. Charlton informed her that her key had been confiscated by management and that her parking space, which she permitted Ms. Charlton to use, had been assigned to someone else. That notwithstanding, she continued to secure new business both individually and working with other agents.

[43] Ms. Bain testified that the accusation that she had not addressed "client support" was untenable for two reasons: (i) historically, client support is provided to all agents by the Company whether the agents were in or out of the office. A portion of the premium includes a loading for administration which includes specialized customer service representatives; (ii) notwithstanding her absence from the island, she was easily accessible to her clients. All of her clients have her cell number and she had a Cable Bahamas landline which was forwarded to the USA in her absence. All of her contact information was left on the Company phone voicemail in the event that someone sought to contact her there. She and her marketing assistant were also in contact on a daily basis. She said that servicing clients was not an obligation of hers at the Company. She explained that premiums are structured to cover administrative costs which would be used to pay expenses of the Company including salaries of customer service representatives hired directly by the Company.

[44] Ms. Bain stated that sometime in July 2015 after she advised Mr. Smith that she would be leaving the jurisdiction for schooling, Mr. Smith suggested that she hire her own assistant to address the concerns of clients being serviced in her absence. Initially she felt like she shouldn't because servicing wasn't her obligation. He asked her to think about it and recognizing the poor service the Customer Service Representatives ("CSR's") gave in the past, she agreed.

[45] She said that when she emailed her colleagues on 22 September 2015 to advise them that she would be out of office the following day until 14 October 2015, nothing more was said to her at the time.

[46] Ms. Bain said she is unaware of how the 42 days of consecutive absence was calculated which was one of the reasons for the termination of the contract. She said she never had an attendance record for payroll or otherwise; that she logged into the webcapsil as needed, seven days a week and at all hours of the day.

[47] Ms. Bain contended that, in 2014, she earned B$345,593.00 for product commissions, referral fees, “Million Dollar Round Table” commissions and bonuses.

[48] According to her, had her Agreement with the Company continued, she would have been making an average of about $23,125 per month comprised of $17,500 in Group Medical Renewals and overrides, $2,500 in Individual Life Renewals Company and minimum requirements for Individual life which she was required to make would have been $3,125 including overrides. After the reductions in her commission, loss of business and having to share commissions with Hope Insurance her income was reduced to approximately $6,500 per month. Additionally, she said, she lost the ability to earn quarterly sales bonuses and annual growth which amounted to approximately $50,000 the previous year.

[49] Ms. Bain stated that the practice at the Company when agents left was to contact the current agent and to allow them five (5) days within which to try to contact their client to retain their business. Only then would another agent be appointed. She asserted that it was only with respect to her that the Company departed from that practice.

[50] Under cross-examination by learned Queen’s Counsel, Mr. Farquharson, who appeared for the Company, Ms. Bain accepted that her job as an insurance agent included responsibility of a certain level of client servicing or support. She

explained "*A certain level, like I said, because would have to understand how the company works to know what level of customer service I can give*."

[51] She accepted that agents are sometimes required to meet with policy holders or potential customers face to face.

[52] In an effort to demonstrate Ms. Bain's abandonment of customer care by virtue of her move, Mr. Farquharson referenced an email from a representative of a Group Insurance client which read "*Good morning, Jennifer, I did not hear from you on Monday. Our group in discussion over the BH [Bahama Health] increases*." Ms. Bain accepted that they did not switch to Hope Insurance after the Agreement was terminated. She explained that they switched to a broker prior to the termination of the Agreement.

[53] Ms. Bain accepted that there was an annuity meeting which she missed. When asked whether she missed a Compliance Training, she said that she rescheduled it to 30 November 2015.

[54] She accepted that she did not attend an Executive Agents meeting held on 12 August 2015 but she said that those meetings could be called into. She also accepted that she did not attend the Compliance Training which was scheduled for 3 September 2015 since she was not scheduled to return until 17 September 2015. She said that it was rescheduled in any event.

[55] On re-examination, Ms. Cleare who appeared as Counsel for Ms. Bain, sought clarification on the level of customer service she could provide having regard to the operation of the Company. Ms. Bain answered that she has no access to any company records save for pay to date with clients; that she refers the customer service matters that usually arise are payment of claims, billing issues to CSR's because she cannot answer the questions. She said that, in respect of customer service, all she can do is agitate the CSR's which can be done by email and phone.

[56] With respect to the trainings, she stated that they are hosted often to accommodate the fact that people may not be able to attend at short notice. She said that she directly contacted the person who arranges the training sessions and got a rescheduled date of 30 November. According to her, it was usual for people to call into meetings since they were often scheduled last minute.

Kerry Higgs

[57] Ms. Higgs filed a Witness Statement on 5 September 2017 which stood as her evidence in chief at trial. She testified that, at the time of the filing of her Witness Statement, she was employed as Senior Vice- President of the Company. By virtue of that position, she was responsible for supervising the Human Resources Department.

[58] Ms. Higgs stated that Ms. Bain's 22 June 2015 proposal to Mr. Smith as to how she would conduct her business while away was unsatisfactory to the Company. She said that it was generally felt that it is difficult to service clients when one is out of the jurisdiction. She said that since Ms. Bain was engaged specifically for the purpose of marketing and selling insurance products locally, there was a major concern as to how she would do this if she was out of the country and how she would obtain more business since most of the Company's policyholders and potential policyholders live in The Bahamas.

[59] Ms. Higgs said that following Ms. Bain's proposal, senior management of the Company discussed challenges presented by Ms. Bain's absence from the country especially in terms of client servicing and the generation of future sales. There was also a concern that other agents might make similar requests.

[60] She said that the Company's decision to terminate Ms. Bain was based on the concerns of client support having regard to her previous absence from the jurisdiction and her future absence. She further explained that since Ms. Bain was engaged specifically for the purpose of marketing and selling insurance products locally, there was a concern as to the impact that being out of the country for

extended periods would have on her ability to generate new business. Additionally, said Ms. Higgs, there was a concern that the situation involving Ms. Bain could also set a bad precedent for the other Sales Agents.

[61] Ms. Higgs insisted that the Company made the effort to try to accommodate Ms. Bain's study abroad while addressing its own concerns which was not accepted by Ms. Bain. According to her, the Company offered an amendment to the Agreement She said that the Company felt that the state of affairs which existed at that time was not in its best interests or the best interests of its clients.

[62] Under cross-examination by Ms. Cleare, Ms. Higgs accepted that Ms. Bain was recognized as a member of the Million Dollar Round Table which is a membership recognized as the international standard of sales excellence in the life insurance industry and an exclusive honour achieved by a small percentage of life insurance and financial services advisors worldwide.

[63] With respect to client support, Ms. Higgs said that Sales Agents were assisted with sales by marketing assistants. She said that the Sales Agents are responsible for providing customer service. She agreed that once the policy is signed it goes to the Operations Department.

[64] When questioned whether, notwithstanding absence, Ms. Bain had still been performing by bringing clients in and servicing clients and whether there were any complaints, Ms. Higgs responded "*I don't know if she was able to service clients. I think that was the chief concern. The communication was definitely not the best during that period*."

[65] Ms. Higgs said that it is her understanding that Ms. Bain's Agreement required her to be in The Bahamas. When it was suggested to her that there was no provision in Ms. Bain's Agreement which required her to report physically; that she is measured by her continuing consistency through her relationship with existing clients and her renewal and sales, Ms. Higgs highlighted that the Agreement

stipulated that she was to attend all meetings and to act in the best interest of the Company.

[66] Ms. Higgs agreed that a concern was that other people might think they could relocate. She did not agree that the office was for Ms. Bain's own convenience as opposed to mandatory; that she could carry out her work as she saw fit.

[67] Under cross-examination, she was asked whether there was anything to indicate that her sales production was down, Ms. Higgs said "*I actually don't have her sales information at my fingertips but I know there were concerns about the amount of time she would have been out of office, and the client issue*."

[68] It was further suggested to Ms. Higgs that there is no objective evidence that she was not performing in accordance with her contract. Ms. Higgs responded "*I think her absence would speak to the contrary.*" Ms. Higgs said that the concern surrounding Ms. Bain's ability to service her clients which arose from July to mid-September was in Mr. Smith's discretion.

Alana Major

[69] Mrs. Major filed a Witness Statement on 4 September 2017 which stood as her evidence in chief at trial. She testified that, at the material time, she was Senior Manager of the Sales Group Division at the Company. She is also a licensed insurance salesperson. Her evidence focused on the allegations of defamation and conspiracy.

[70] Mrs. Major testified that the Company has both Commissioned Agents and Salaried Agents. She is a licensed salesperson and is entitled to sell insurance products directly.

[71] She said that the Company had no such practice of allowing former agents 5 days to win clients and that it was not unusual to assign new agents to the accounts. She alleged that when Ms. Bain left, there was a real concern among senior management that Ms. Bain would take her clients with her, which was the reason

they assigned new agents and sought to incentivize them to deal directly with the Company. She added that another reason for assigning new agents was because group medical policies require urgent action in terms of servicing and administration since people's health are at risk.

[72] Under cross-examination, she accepted that when a client remains insured through BahamaHealth through Hope Insurance, the business has not been taken away because the Company still retains the business of insurance with that client.

[73] She acknowledged that the emails showed that when Ms. Bain resigned from the Company in 2009 to go to Lampkin & Co., John Bull was not assigned to another agent. They were assigned to Lampkin & Co. as was their request. She also acknowledged that she had no reason to believe that the change of broker letter was not honoured in respect of John Bull in 2011 when she came back to the Company.

[74] Mrs. Major said that the reason that the change of broker requests to Hope Insurance were not being honoured immediately was because the Company wanted to ensure that they understood what the options which were available to them.

[75] Mrs. Major maintained that the reason for contacting the John Bull and Bahamas Bus and Truck groups and for offering lower rates was purely to retain the business at the Company.

[76] She said that the reason for denying Ms. Bain the opportunity to communicate on behalf of the accounts per Mr. McCardy's request was because her registration status had not be proved.

[77] With regard to her letter alleging improper use of client information, Mrs. Major's evidence was that the Company was genuinely concerned when most of Ms. Bain's former clients changed their broker to Hope Insurance. She said that some of Ms. Bain's former clients indicated that Ms. Bain was to be their agent and

referenced conversations they had with her concerning their policies. Mrs. Major said that Ms. Bain was not supposed to provide client information to anyone else; that the Company owed duties to protect customer information and was concerned to prevent unauthorised use of client information. She asserted that the Company believed that Ms. Bain had improperly disclosed or used client information resulting in Hope Insurance's appointment as broker for a number of policies.

Analysis and findings

[78] Having had the opportunity of seeing and observing the demeanour of the witnesses as they testified and analyzing all of the evidence including the documentary evidence, I find that all of the witnesses gave convincing evidence as they saw it. Most of the facts were undisputed. The parties do not dispute the fact that Ms. Bain was abroad in July, August and some of September of 2015 and had planned to also be abroad in October and then again when her program would begin in January 2016. Rather, the disputes between the parties with respect to the breach of contract claim are: (i) whether Ms. Bain's presence in The Bahamas was required by the Agreement and (ii) whether Ms. Bain breached any of her obligations under the Agreement, thereby entitling the Company to terminate the Agreement.

[79] Although I found Ms. Higgs to be a credible witness, there were times when she appeared evasive and sought to advocate for the Company with respect to the issues of client care and the impact of Ms. Bain's absence from the office.

[80] With respect to the issue of Ms. Bain's physical presence at the office, I prefer Ms. Bain's evidence to that of the witnesses for the Company. I accept Ms. Bain's evidence that she was not restricted to performing her sales administration in any particular manner; that no requirement of physical presence was imposed on her prior to September 2015; that her main requirement was to meet minimum standards of productivity and that she had always taken time off and travelled without requesting vacation or special leave. This is supported by the fact that she was an independent contractor as opposed to an employee of the Company and

also by the Agreement, which, in my considered opinion, did not require her to be present in the office. I accept Ms. Higgs' evidence which highlighted Ms. Bain's requirement under the Agreement to attend all meetings but I also accept Ms. Bain's evidence that, during her absence, she rescheduled or called into all meetings and that it was common for other agents to do so.

[81] The parties disputed the extent to which Ms. Bain as a Sales Agent was responsible for client care. I accept Ms. Bain's evidence that the Company itself provides most of the client care – that the cost of customer care is structured to cover the cost of client support by CSR's who are hired by the Company. I also believe that Ms. Higgs exaggerated the extent to which agents are responsible for providing client support. The fact that agents are independent contractors is supportive of the conclusion that they are only minimally responsible for client care. I prefer Ms. Bain's evidence that she was responsible for client care to "*a certain leve*l" as opposed to Ms. Higgs' evidence that CSR's were not primarily responsible for client care. Further, contrary to Ms. Higgs' evidence, I believe that, overall, most of the customer service with BahamaHealth is done via email and telephone. At the end of the day, Ms. Bain was a Sales Agent whose primary duty was to sell insurance products and to ensure the renewal of existing business.

[82] The only factual dispute related to the conspiracy allegation: what was the Company's intention in dealing with Ms. Bain's former clients? I found Mrs. Major evasive though not incredible with respect to the evidence on conspiracy. As a result, I preferred the evidence of Ms. Bain to that of the witnesses for the Company save for Ms. Bain's evidence that the Company had a practice of allowing agents to win their clients to the extent she adduced. I do, however, believe that the Company made an extra effort to replace her after her termination.

Issue 1: Was Ms. Bain's absence and future absence a breach of the Agreement?

[83] Ms. Bain asserts that she had not, by her absence and/or future absence or any other action, failed to comply with her obligations under the Agreement or acted in

a manner which was prejudicial to the Company's interests. As a result, she contends that the Company was not entitled to terminate her employment.

[84] Mr. Farquharson submitted that the Company properly terminated the Agreement under two of the termination provisions in the Agreement: namely (i) misconduct under 12(a)(ii) and (ii) non-compliance under 12(a)(i). With respect to the latter termination provision, according to the Company, Ms. Bain breached her obligations under the said Agreement. In his submissions, Mr. Farquharson cited the following obligations which the Company alleged that Ms. Bain breached namely:

a. Failed to devote her time, talents and efforts to the business of the Company exclusively;
b. Acted in a way which was prejudicial to the Company's business or interests, or to the interests of the policyholders;
c. Failed to act loyally and faithfully in all matters relating to the Company's business and obey all orders and instructions of the Company;
d. Failed to act in a matter which was beneficial to the Company and the policyholders' interest; and
e. Failed to maintain the Company's minimum standard of production as outlined in the Appendices to the Agreement or otherwise as notified by the Company.

[85] The last allegation was not pleaded as an instance of Ms. Bain's alleged breach. As the parties are bound by their pleadings, I cannot consider the submission that she failed to maintain the Company's minimum standard of production.

[86] Mr. Farquharson submitted that Ms. Bain's obligations as a Sales Agent were to be carried out in The Bahamas. Ms. Cleare, on the other hand, submitted that the cumulative effect of the Agreement and the policies and procedures of the Company were such that Sales Agents (Ms. Bain) could work flexibly so long as they maintained minimum standards of production and the job naturally extended "away from the Company" effectively to "stay on the road". Therefore, the following

question arises: was Ms. Bain prohibited from performing her duties outside of The Bahamas? The answer must be determined by referring to the Agreement itself, the Company practices and the general nature of Ms. Bain's job.

[87] The Agreement does not mention minimum hours or days for physical presence in the office either expressly or by necessary implication. It does not deal with the manner by which the Sales Agents should carry out their duties. This is not surprising since, as Ms. Cleare stated, the duties of a Sales Agent are that they are very often out of the office. It was not a requirement of the Agreement to be in The Bahamas and I am also convinced that it was not a policy of the Company to require Sales Agents to be present in office.

[88] I agree with Ms. Cleare that the cumulative effect of the Agreement and the policies and procedures of the Company was such that Sales Agents could work elastically so long as they maintained minimum standards of production and that the job naturally extended "away from the Company" effectively to "stay on the road".

[89] I am satisfied that, prior to the declaration of her plan to study, Ms. Bain had been out of the jurisdiction for periods longer than the amount complained of by the Company with no issues. The fact that Agents were encouraged/required to have cell phones and cars gives credence to Ms. Bain's position.

[90] I am persuaded that it was not unusual for Sales Agents to be away from the office for extended periods. I see no difference between being out of office and out of the jurisdiction so long as Ms. Bain made herself available (which I find that she did).

[91] I note Mr. Farquharson's submission that the Company did not envision Ms. Bain remaining abroad for extended periods since the insurance company is located in The Bahamas along with most of its customers and potential customers. He said that it is therefore difficult to envision how Ms. Bain could have successfully carried out her duties away from The Bahamas.

[92] It is irrefutable that Ms. Bain was an independent contractor engaged by the Company to sell insurance. How she secured new business was not regulated by her Agreement. Her overriding objective was to secure business and to ensure that the business she already secured would be renewed. Accordingly, I think she was entitled to choose how she would achieve those objectives.

[93] The single argument available to the Company (which they used) with respect to the Agreement requiring Ms. Bain's presence is that the Agreement requires that they attend all meetings and trainings. As I have already stated, I am convinced that during her absence, Ms. Bain rescheduled or called into all meetings and that it was common for other agents to do so. Her absence did not prevent her from fulfilling her duty to attend meetings and training sessions.

Issue 2: Whether the concern caused by Ms. Bain's absence and future absence was a valid reason for the Company to terminate the contract

[94] Mr. Farquharson argued that Ms. Bain's absence and future absence concerned the Company about how she would secure business and properly provide client support.

[95] A great deal of Ms. Higgs' evidence was that Ms. Bain's absence from July to September 2016 and her future absence starting in January 2016 at the commencement of her program generated concern as to how she would properly address client support. Ms. Cleare submitted that there was no actual inability or failure to work to the required standard; that the Agreement was terminated on the basis of a breach which the Company anticipated would occur by virtue of Ms. Bain's absence and /or future absence. I agree.

[96] If the absence would have had the effect that the Company anticipated, the termination of the contract was premature. Then, the Company ought to have waited until the absence had the effect of breaching at least one of her obligations.

[97] The Company did not even plead that the absence and expected absence had actually caused a reduction in the quality of client support but only that it caused a

concern that same would occur. The mere concern of her ability to address client care in the absence of actual failure is unsustainable.

Issues 3 and 4: Did Ms. Bain breach any of her obligations under the Agreement and was the Company entitled to terminate her under the misconduct clause?

[98] Issues 3 and 4 are inter-related and can be subsumed under this sub-head.

[99] Mr. Farquharson submitted that it was not envisioned by the parties that Ms. Bain would have pursued full-time studies abroad or remained abroad for extensive periods of time.

[100] The parties disputed the level of client support for which Ms. Bain was responsible: whether her absence affected it so much that she breached any of those obligations. In my judgment, the level of client support for which Ms. Bain was responsible was exaggerated by Ms. Higgs. In my opinion, her primary role was securing business and renewals for the Company and her focal role with respect to policyholders/customers was to answer questions with respect to their policies. The Company itself has CSR's. That said, I do not think that Ms. Bain's absence could have affected or was going to affect her ability to fulfill the level of customer support for which she was responsible, especially having regard to the reasonableness of her proposal. She made herself available by phone and email and undertook to return to the jurisdiction for 9 days out of every month, 18 days in December, 12 days in March and the entire months of June, July and half of August 2016. She also made provisions for other agents to underwrite policies in the event that she could not and it was open to her under the Agreement to split commissions for same with these agents.

[101] Also relevant is Ms. Bain's evidence (which I accept) that prior to her decision to relocate to Florida, she had been out of the jurisdiction for periods longer than the 42 days complained of by the Company and that, at no time prior to her announcement, did the Company complain that she had been or would be unable to render satisfactory client support.

[102] Mr. Farquharson submitted that Ms. Bain was not loyal when she left the jurisdiction for an extended period unapproved, when she left notwithstanding that Mr. Smith advised her that her leave was not sanctioned by the Company and when she refused to accept the offer for variation of the Agreement. Obligation 7 (xi) is to act loyally and faithfully in all matters **relating to the Company's business**. This does not mean that the Sales Agent breaches the obligation by merely not complying with the Company's wishes. What the Sales Agent is obligated to act loyally toward is the Company's business, not the Company's agents, as Mr. Farquharson suggested.

[103] Mr. Farquharson fought very hard to argue that Ms. Bain's absence and future absence would result in the breach of Clause 7(iv) which provides:

> **"to devote all of his or her time, talents and energies to the business of the Company exclusively and not to engage in any business with any other person, company or organization, which is directly or indirectly in competition to the business of the Company or seek to promote the business or engage in any business with any other person, company or organization, which is directly or indirectly in competition to the business of the Company."**

[104] I have already stated that the Company's anticipation/probability that Ms. Bain might breach the obligation was not a valid ground for termination. In any event, Ms. Cleare correctly pointed out that Clause 7(iv) is a non-compete clause. In both the Statement of Claim and Submissions, Counsel highlighted only the beginning of the clause – *to devote all of his or her time, talents and energies to the business of the Company exclusively* but the remainder of the clause changes the overall effect, making it a non-compete clause.

[105] I now turn to the question of whether Ms. Bain's behaviour was, as Mr. Farquharson argued, prejudicial to the Company's interests. His argument in that regard was two-fold namely: (i) it resulted in a breach of Clause 7(vi) which then entitled the Company to terminate the Agreement and (ii) it is itself a ground for termination under Clause 12 (a)(ii), the clause providing for the standard of "prejudicial to the Company's interests" to be subjective to the Company.

[106] Clause 7(vi) states that the Sales Agent is obligated:

> **"not to persuade or attempt to persuade any policyholder to discontinue their policy or otherwise do anything prejudicial to the Company's business or interests, or to the interests of the policyholders."**

[107] Mr. Farquharson urged the Court to find that Ms. Bain's action were prejudicial to the Company's business or interests or to the interests of the policyholders. Read as a whole, it is clear that the mischief the clause seeks to address is the possibility of Sales Agents actively taking business away from the Company.

[108] Mr. Farquharson argued that, in addition to the instances of non-compliance which he said entitled the Company to terminate the relationship under Clause 12(a)(i), the Company was entitled to terminate under Clause 12(a)(ii) which provides for the Company to terminate the Agreement for:

> **"Misconduct – In the event that the FSSR is guilty of any conduct which in the opinion of the Company is prejudicial to the Company's interests."**

[109] Of particular importance, said Mr. Farquharson, is the fact that the standard for what is prejudicial to the Company's interests is subjective. In my judgment, however, that opinion ought to be reasonably held. Mr. Farquharson emphasized only a portion of the clause and omitted "misconduct". The actual ground for termination is misconduct. The words that follow elucidate what misconduct means for the purposes of termination of the Agreement. It follows that the word "misconduct" is indispensable and the determination of whether the Company was entitled to terminate on this ground should be made against that backdrop.

[110] I accept the Company's evidence of the communication to Ms. Bain which clearly suggested that she had failed to provide a response to the customer. However, without more, this certainly does not rise to the standard of neglecting client support. To my mind, this was not a ground for the Company to reasonably articulate that she was acting contrary to their interests. Save for this letter, the Company adduced no cogent evidence to suggest that Ms. Bain's sales had fallen

to give credence to the allegation that she had not devoted all of her time, talent and energies or had acted prejudicial to the Company's business. As stated, this was her primary role. I note that, as the Plaintiff in this matter, Ms. Bain bears the burden of proving that the Company wrongfully terminated the Agreement but Ms. Cleare has correctly sought to do so by highlighting the lack of evidence for the Company to reasonably conclude that she acted prejudicially.

[111] As stated, Ms. Bain was entitled to secure business how she saw fit and with respect to her anticipated absence, she gave a reasonable undertaking.

Issue 5: Damages

[112] In paragraph 17 of her Amended Writ of Summons made pursuant to a Ruling of the Court on 15 August 2019, Ms. Bain alleged that she has been deprived of the ability and/or rendered totally disabled from servicing her existing clients and growing the business and has suffered the following loss and damage which she particularized as:

PARTICULARS OF LOSS AND DAMAGE

i.	Product commissions, referral fees, "Million Dollar Round Table" commissions and bonuses which totaled $345,593.00 in 2014 from 30 September 2015 and continuing	**$345,593.00 and continuing**
ii.	Loss of Disability Benefit of payment of commission for 5 years if the FFSR becomes totally disabled during the pendency of the Agreement	
iii.	Loss of preferable rate of interest on her home mortgage principal of $290,000.00 from 5.75% to 7.75% from 1 October 2015 and continuing. Thereby increasing the amount of interest payable Over the remaining 22 years from $221,712.30 to $315,032.83; a difference of $93,320.53	**$93,320.53**
iv.	Loss of Family Guardian contributions for vesting in Pension	**$51,973.54**

[113] Ms. Bain further alleged that she benefitted from a Group Medical Benefit. Since the termination, she had to change her insurance coverage to an Individual

Medical Benefit which increased her monthly premium to $1,381.03; and an additional 1% override on all group premiums, which she said resulted in a loss of approximately $3,000 per month upon the termination of the Agreement.

[114] The objective of an award of damages is to put the party in the position that they would have been in had they not sustained the loss: **Livingstone v Raywards Coal Co.** (1880) 5 App. Cas. 25 Page 39.

[115] The basic principles governing recoverable loss for breach of contract are well settled. In **Hadley v Baxendale** (1854) 9 Exch. 341, Alderson B stated:

> "**Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it".**

[116] Damages must not be too remote. The loss sought to be recovered must either arise naturally from the breach of contract, or must have reasonably been in the contemplation of both parties at the time of the contract as a consequence of the breach.

[117] In situations such as the present case, the issue is not whether or not damages should be recovered but the way in which such damages should be calculated.

[118] Ms. Bain particularized her claims for damages in paragraph 17 of her Amended Writ of Summons.

[119] In support of her contention that she is entitled to damages in the form of commissions and associated benefits for 5 years, Ms. Bain relied upon the provisions of the Agreement addressing death and total disability of a FFSR whilst in the service of the Company: Clauses 13 and 14.

[120] Mr. Farquharson submitted that in the first place, the Company never "accepted" that it was contractually obligated to pay commissions for a period of 5 years as suggested by Ms. Cleare. Mr. Farquharson argued that the Company only become obligated to pay a FFSR up to 5 years of commissions which would have otherwise been payable in two discrete fact-situations namely death or total disability (i.e. whilst still in active service of the Company). According to Mr. Farquharson, it is equally plain that the Company did not contractually agree to pay such commissions to a FFSR in the event of separation from the Company for other reasons. I agree with Mr. Farquharson that it is a serious error to assert or suggest otherwise.

[121] In addition, the law is trite that he who asserts must prove. With respect to her particularized claim for damages arising from breach of contract, firstly, they are all too remote and, in any event, the Company did not contractually agree to pay such commissions for 5 years which would have otherwise been payable in two distinct situations while the FFSR is still in the service of the Company.

The correct basis for assessing damages

[122] The Agreement was not expressly stated to be for a fixed period of time. Although it commenced on 1 October 2011, it was silent as to its precise duration because she was an independent contractor. Independent contractors are not considered employees protected by the Employment Act.

[123] That being said, it is trite that where a contract contains no express provision for its determination, a term will be implied for its determination by "reasonable notice". In **Chitty on Contracts, Vol. 1 General Principles (28th ed), 1999** at para 13-025, the learned authors stated:

> **"Implied term as to duration of contract: A contract which contains no express provision for its determination may yet be determined by reasonable notice on the part of one or both of the parties. The question whether a contract can be determined in this way is often said to depend upon the implication of a term, although it is probably better to regard it as depending upon the true construction of the agreement. Nevertheless, since *ex hypothesi*, the agreement contains**

> **no provisions expressly dealing with determination, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in a wider sense, of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement…. Similar constructions have been adopted in the case of contracts between employer and employee, between principal and agent, and between solicitor and client in respect of an indefinite retainer."** [Emphasis added]

[124] Mr. Farquharson compared the situation with regards to the employment context in The Bahamas where a supervisory employee may be terminated upon receipt of (a) one month's notice (or one month's basis pay in lieu thereof; and (b) one month's basic pay for each year up to 48 weeks: section 29(1) (c) of the Employment Act, 2001. Mr. Farquharson submitted that, by way of analogy, and using the period of October 2010 to October 2015 as the operative period of Ms. Bain's engagement, if an employee, she would have been entitled to approximately six month's basic pay by way of severance.

[125] Mr. Farquharson argued that a reasonable period of notice will be in the region of 6 months and any damages flowing from such breach should be limited accordingly. According to him, the period ought not to exceed a year. I agree.

[126] Furthermore, says Mr. Farquharson, the commission and other remuneration that Ms. Bain earned during her engagement with Hope Insurance from each of the policies she allegedly suffered loss must be deducted from this sum. Otherwise, she would effectively be receiving two commission payments on each such policy (i.e. one commission she would have earned if she had remained engaged with the Company and a second commission paid to her by Hope Insurance on the same policies). In addition, any earnings Ms. Bain obtained from other employment (a teacher in the US) should also be deducted from any such award of damages.

[127] Although not pleaded, the issue of mitigation was put to Ms. Bain in cross-examination. I ought to consider it, as it is a legal issue which follows from any assessment of damages.

[128] Strictly speaking, when a party is faced with another's breach of contract and suffers loss as a result, the law does not impose a proactive obligation on the former to minimize that loss per se. If that party does not take reasonable steps to minimise loss, however, any claim brought for damages may be reduced as a result. In common parlance, this principle of the law of damages is known as the duty to mitigate.

[129] Ms. Cleare submitted that the damages she sustained were mitigated, in part, by her salary earned as a teacher for one year during the pendency of her right to work under a student visa in the USA wherein she earned $39,000.00 after taxes. In this regard, says Ms. Cleare, Ms. Bain has taken reasonable steps to mitigate her damages which were frustrated by the Company through its interference in her ability to continue to sell insurance to her existing and future clients.

[130] Having given this matter much thought, I am of the opinion that she was a vital person in the Company and the matters leading up to her unfortunate cancellation of her employment could have been avoided. She should have been given a chance to work remotely. Indeed, since the Covid 19 pandemic has changed the world, working remotely is now the norm. This issue may not have arisen post March 2020. That said, in my judgment, a reasonable period of notice would be 12 months.

[131] There are also deductions to be made from the eventual award as a result of commission paid to her by Hope Insurance and from being a teacher for one year in the United States.

[132] I shall leave the assessment of damages under this sub-head in the competent hands of both Counsel.

Conspiracy to injure

[133] Ms. Bain alleged that the Company conspired with its intermediary, Mrs. Major to cause a loss of commission to her by influencing John Bull to dissuade it from using Hope Insurance as its broker. The Company denied conspiracy and asserted

that the actions complained of were not taken with the purpose of injuring Ms. Bain. The parties did not dispute the facts. The only dispute related to the Company's intention in offering lower premiums to Ms. Bain's former clients if they did not use Hope Insurance but instead used the Company as its broker as well as insurer.

[134] Ms. Cleare argued that the acts of Mrs. Major (and the Company) were unlawful and they had the intention to cause harm to Ms. Bain. On the other hand, Mr. Farquharson argued that their acts could not be conspiracy because (i) Mrs. Major was the Company's employee and was therefore precluded from being a co-conspirator (ii) their intention was to retain John Bull as a client, not to injure Ms. Bain and (iii) none of their acts were unlawful.

[135] Therefore, the issue is whether the Company was guilty of conspiring with Mrs. Major to cause financial loss to Ms. Bain or, in other words, whether the Company conspired with Mrs. Major to cause financial loss to Ms. Bain.

[136] Ms. Cleare submitted that the Company and Mrs. Major conspired to cause financial loss/injury to Ms. Bain by (i) seeking to induce John Bull and Bahamas Bus & Truck groups to abandon Hope Insurance as its broker; and (ii) alternatively, in failing to coax Hope Insurance to abandon Ms. Bain, by lowering the commission to be received by Hope Insurance and consequently, Ms. Bain. Ms. Cleare further submitted that Mrs. Major was acting in her capacity as a sales intermediary and not as an employee when she offered the revised renewal rate. By offering the new rate to John Bull *after* they had already requested that their broker of record be changed to Hope Insurance, she argued that they intended to induce John Bull to deal directly with the Company instead of using Hope Insurance as a broker. She urged the Court to find that Mrs. Major and the Company knew that Ms. Bain had a financial interest in John Bull (along with other former clients of hers) changing its broker to Hope Insurance.

[137] Mr. Farquharson submitted that the conspiracy to injure cause of action could not be made out for two reasons: (I) Mrs. Major could not be the Company's co-

conspirator because employees cannot be co-conspirators with their employer; and (ii) the Company's predominant intention was not to financially injure Ms. Bain, but to retain a significant customer. Ms. Cleare argued that employees are not prevented from being co-conspirators with their employees and cited **Crofter Hand Woven Harris Tweed Co. v Veitch** 1942 SC (HL) 1 in support. In any event, said Ms. Cleare, notwithstanding that Mrs. Major was an employee of the Company, she was acting in her capacity as a third-party intermediary pursuant to the Insurance Act which requires insurance companies to Act through a third party.

Law on conspiracy

[138] **Butterworth's Common Law Series: The Law of Tort Second Edition**, defines tortious conspiracy at para 29.68:

> **"A tortious conspiracy is an unlawful combination of two or more people, intended to cause and in fact causing injury to the claimant. The tort takes three forms: conspiracy to do an unlawful act ("unlawful act conspiracy"), conspiracy to injure by unlawful means ("unlawful means conspiracy"), and conspiracy to injure by lawful means ("Simple conspiracy to injure")."**

[139] The Court in **Kuwait Oil Tanker Company SAK v Al Bader and others (H Clarkson & Company Limited and others, third parties)** [1998] Lexis Citation 3417 dealt with the tort and although the tort alleged in that case was conspiracy by unlawful means, the Court set out the essential elements for conspiracy to injure by lawful means. The most important thing for the plaintiff to prove is the defendants' predominant intention to cause him injury:

> **"It is now well established that for a combination which employs exclusively lawful means to be actionable as conspiracy the plaintiff must plead and prove that the defendants' predominant intention was to cause him injury."**

[140] There are four main elements of the tort of lawful means conspiracy: (I) a combination between two or more persons (ii) intention to injure the Plaintiff (iii) the acts having been carried out in accordance with the agreement (iv) which resulted in loss or damage. Viscount Simon in **Crofter Hand Woven Harris Tweed**

Co. v Veitch [1942] A.C. 435(HL) explained when lawful means conspiracy applies at page 445

> **"If that predominant purpose is to damage another person and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person."**

[141] Moore-Bick J in **Kuwait Oil Tanker** [supra] referred to the speech of Viscount Simon in **Crofter** [supra] at page 444:

> **"On this question of what amounts to an actionable conspiracy 'to injure' (I am assuming that damage results from it), I would first observe that some confusion may arise from the use of such words as 'motive' and 'intention'. Lord Dunedin in *Sorrell v Smith* appears to use the two words interchangeably. There is the further difficulty that, in some branches of the law, 'intention' may be understood to cover results which may reasonably flow from what is deliberately done, on the principle that a man is to be treated as intending the reasonable consequences of his acts. Nothing of the sort appears to be involved here. It is much safer to use a word like 'purpose' or 'object'. the question to be answered, in determining whether a combination to do an act which damages others is actionable, even though it would not be actionable if done by a single person, is not 'did the combiners appreciate, or should they be treated as appreciating, that others would suffer from their action,' but 'what is the real reason why the combiners did it?' Or as Lord Cave puts it, 'what is the real purpose of the combination?' The test is not what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realize or should realize will follow, but what is in truth the object in the minds of the combiners when they acted as they did. It is not consequence that matters, but purpose; the relevant conjunction is not "so that" . . .' but 'in order that'."**

[142] For lawful conspiracy, the importance of proving that the conspirators had the predominant objective/purpose of injuring or causing loss/damage to the Plaintiff even through lawful means is amplified. Where the tort is lawful means conspiracy the need to show intention becomes more important than in circumstances where the conspiracy is carried out be unlawful means.

[143] The difference between the two types of conspiracy was explained by Lord Bridge in **Lonhro plc v Fayed and others** [1992] 1 AC 448 at page 466:

> **"The reasoning in these passages is both clear and cogent. Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff 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; it is sufficient to make their action tortious that the means used were unlawful."**

[144] In **Crofter**, Viscount Simon said that employees carrying out employers' orders are not exempt from being co-conspirators if he appreciated what the employer was doing at page 549:

> **"The respective position of the two men in the hierarchy of trade union officials has nothing to do with it. Even if Mackenzie could be regarded as only obeying orders received from his superior, the combination would still exist, if he appreciated what he was about."**

[145] However, it should be noted that, in that case, the type of conspiracy being contemplated by the Court was unlawful means conspiracy. It is not certain whether the position obtains in lawful means conspiracy.

Whether the Company conspired with Mrs. Major to cause Ms. Bain financial loss?

[146] Ms. Cleare submitted that the Company's offering the lower commission was unlawful because (i) it was a breach of the Agency Agreement between the Company and Hope Insurance and (ii) it was rebating which is prohibited under section 137 of the Insurance Act. Even if the act was a breach of the Agency Agreement, it is actionable only by Hope Insurance. Ms. Bain was not privy to the Agency Agreement which was only between the Company and Hope Insurance.

[147] Section 137 of the Insurance Act prohibits the grant of rebates. It provides:

> **"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".**

[148] An insurer or other person who contravenes this section is guilty of an offence.

[149] The Company was not guilty of rebating because 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. I agree with Mr. Farquharson that nothing the Company and/or Mrs. Major did was unlawful per se. Accordingly, the type of conspiracy to be applied must be lawful means conspiracy.

[150] 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.

[151] The disputes arising from the parties' submissions are (i) Whether Mrs. Major can be a co-conspirator and (ii) whether the parties had the predominant intention of causing Ms. Bain financial loss.

[152] Ms. Cleare argued that Mrs. Major is not prevented from being a co-conspirator by being the Company's employee. In any event, she urged the Court to find that Mrs. Major was acting in the capacity as a third-party intermediary and not as an employee of the Company. 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.

[153] I find it difficult to accept Mrs. Major's evidence that she was unaware that Ms. Bain was working at Hope Insurance. The fact that almost all of her former clients requested that their broker be changed to Hope Insurance was overwhelming evidence to have indicated that she had a financial interest in Hope Insurance. Further, as Mrs. Major herself stated, it was common when agents left the firm for their clients to go with them. Ms. Bain's uncontroverted evidence that her clients followed her to Lampkin & Co. in 2009 and then returned with her to the Company in 2011 is probative. I believe that the Company made an extraordinary effort to prevent Ms. Bain's clients from leaving. They notified her clients very soon after she was terminated that she had left. This combined with the fact that they assigned new agents very quickly demonstrates that they did not want her clients to go with her. Indeed, this was done before it was apparent that she was working with Hope Insurance, which suggests that they had an intention to prevent her (as distinguished from Hope Insurance) from benefitting from her former clients.

[154] It is, however, probable that the Company was merely trying to retain significant clients as Mrs. Major said. While I do not completely accept that the Company had a rigid practice of allowing agents time to win their clients back to the extent that Ms. Bain suggested, I do, however, believe that they made a special effort in relation to Ms. Bain to prevent her than with other agents. The Company's intention to injure Ms. Bain specifically was further demonstrated by the fact that they contacted John Bull and Bahamas Bus & Truck *after* the letters requesting Hope Insurance to be broker of record were submitted. This is exacerbated by Mrs. Major's denial of Mr. McCardy's request to allow Ms. Bain to communicate on behalf of certain accounts after he had confirmed that the brokerage was sponsoring Ms. Bain. The explanation given by Mrs. Major that the Company's agreement was only with Hope Insurance is not, in my judgment, justifiable having regard to the fact that Hope Insurance confirmed her sponsorship and therefore her authorisation to communicate. That confirmation given, she had no reason to not communicate, which heavily suggests that Mrs. Major and/or the Company were trying, at the very least, to make Ms. Bain useless at Hope Insurance.

[155] As the accounts specified by Mr. McCardy were clients with whom Ms. Bain had worked previously, I believe that Mrs. Major/the Company knew that she would benefit from commission on those accounts. The fact that Hope Insurance accepted the change in commission to the John Bull policy is not relevant to the intention to injure Ms. Bain specifically as she alleges. Ms. Cleare submitted that the Company's malice was further demonstrated when it sought to exercise its power of sale over the mortgaged premises. I do not consider this a contributing factor, as Ms. Bain had fallen into arrears.

[156] Taken together, all of the facts show that the predominant intention of Mrs. Major and/or the Company was to prevent Ms. Bain from benefitting financially. They ought to have expected that her clients would go with her.

Damages for conspiracy:

Pecuniary and non-pecuniary damages

[157] Ms. Cleare submitted that, in addition to the pecuniary damages to which Ms. Bain is entitled as a result of the conspiracy to injure her (the amount she made after her commissions at Hope Insurance being reduced), she is entitled to non-pecuniary damages commensurate with all of the circumstances of the tortious wrong. She cited **Pratt v British Medical Association** [1919] 1 KB 244 at page 281:

> **"The plaintiffs are not limited to actual pecuniary damages suffered by them. The court or jury, once actual financial loss be proved, may award a sum appropriate to the whole circumstances of the tortious wrong inflicted."**

At 282:

> **"I cannot ignore the deliberate and relentless vigour with which the defendants sought to achieve the infliction of complete ruin. I must regard not merely the pecuniary loss sustained by the plaintiffs by the long periods for which they respectively suffered humiliation and menace."**

[158] In that case, the British Medical Association and members of the association ostracised the plaintiffs, who were medical men by threats and coercive action. As a result, the plaintiffs suffered financial loss in their profession.

[159] To my mind, the case of **Pratt** is distinguishable. The actions of the Company do not warrant non-pecuniary damages.

[160] I will assess pecuniary damages for conspiracy in the amount of $20,000 which I consider to be fair and reasonable.

Defamation

[161] Ms. Bain alleged that the 9 October 2015 letter was defamatory of her, as it brought her reputation as an honest insurance agent into disrepute by compromising her integrity. The Company says that the content of the letter was not defamatory. Without admitting defamation, they rely on qualified privilege to which Ms. Bain asserts malice.

[162] The parties do not dispute the facts but Mrs. Major's evidence as to the intention of the letter is relevant. Ordinarily, the intention of the alleged defamer is irrelevant, but it becomes relevant where the defendant (in this case, the Company) pleads qualified privilege. In addition, the Company does not assert that the content of the letter was true. The Company argued, that at the time of the letter, they believed that Ms. Bain had been improperly using client information but they asserted it as a mere explanation for why it was qualified privilege.

[163] Defamation is defined in the case of **Sim v Stretch** [1936] 2 All ER 1237 as untrue publication that would tend to lower the plaintiff [Ms. Bain] in the estimation of right thinking members of society. Libel is actionable per se. The defamation must be false. Therefore, proof that it is true by a defendant is a full defence. Qualified privilege is also a full defence to defamation. The common law defence was explained in **David v Hosany** [2017] EWHC 2787 (QB) at paragraph 4.2**:**

> **"One of the most commonly used defences is that of the common-law qualified privilege. This focuses not so much on the content of the**

> **words complained as on the occasion on which they were published. Were the circumstances such that the publisher had a legal, social or moral duty or interest to make the publication, and the publishee a corresponding duty or interest to receive it? If so, the publication took place on an occasion of qualified privilege, the qualification being that the publisher must not be actuated by express malice. But unless the claimant can prove malice, the defendant will have a complete defence."**

[164] The test for express malice which would negate the qualified privilege defence were most succinctly set out in **Horrocks v Lowe** [1974] 1 All ER 662 at 669:

> **"Express malice is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty in bona fide protection of his own legitimate interests."**

Whether the 9 October 2015 letter was defamatory of Ms. Bain

[165] I agree with Ms. Cleare that the letter was defamatory because the effect of accusing Ms. Bain of improperly using client information contrary to the Data Protection Act was to impute dishonesty onto her in her professional capacity.

[166] That said, the next issue I have to deal with is whether the Company can rely on qualified privilege to absolve itself from liability. As the *occasion* of the words published is the main consideration for qualified privilege, the circumstances which gave rise to it are relevant. The circumstances which gave rise to the letter may have been such that the Company had a legal duty or interest to write and the Insurance Commission a corresponding duty or interest to receive it. It is probable since, as Mr. Farquharson submitted, the Company owed duties of confidentiality to their policyholders and the Insurance Commission was responsible for regulating the insurance market in The Bahamas. There are, however, also circumstances which go to show that the Mrs. Major/the Company did not actually believe that there was a legitimate complaint or a bona fide duty to write.

[167] In addition to the duties/interests of the Company as the publisher and the Insurance Commission as publishee, a relevant consideration for qualified privilege is whether Mrs. Major and/or the Company actually believed that Ms. Bain was improperly using client information to gain business for Hope Insurance. In my judgment, this is where the Company fails to prove that qualified privilege attaches to the letter.

[168] Mr. Farquharson argued that Mrs. Major/the Company said that they genuinely believed that Ms. Bain was improperly using client information to gain business for Hope Insurance because Ms. Bain's former clients had referenced conversations they had with her about their policies and because a significant amount of her clients had appointed Hope Insurance as their broker of record. However, Mrs. Major herself said that it was common for agents to try to take clients when they left the Company and that was the reason why she contacted Ms. Bain's clients after her termination. Further, as Ms. Cleare correctly pointed out, Ms. Bain had clients go with her both when she left the Company in 2009 to go to Lampkin & Co. and when she returned to the Company in 2011. Therefore, I do not accept the Company's argument that the letter was genuinely written because it was unsure of Ms. Bain's status.

[169] Mr. Farquharson submitted that the uncertainty of Ms. Bain's "status" or affiliation with Hope Insurance at the time as an indication of the Company's belief that Ms. Bain was improperly using client information. Mr. Farquharson argued that Mrs. Major/the Company could have reasonably believed that Ms. Bain was inappropriately using client information because, at that time, Hope Insurance had not yet confirmed its sponsorship of Ms. Bain and that her registration status was uncertain. It is true that Hope Insurance had not yet confirmed the sponsorship. However, if this were a genuine cause for concern at the time, surely it would have been mentioned in the letter. It was not. The fact that the Company was losing Ms. Bain's former clients to Hope Insurance would have, in my judgment, made it abundantly clear that she was affiliated with Hope Insurance. Mrs. Major claimed that, before writing the letter, she asked Mr. McCardy whether Ms. Bain was

affiliated with Hope Insurance and that he professed ignorance on the matter and consistently denied affiliation. However, she did not proffer any evidence of her asking Mr. McCardy about the relationship and although several of the email correspondence of Mr. McCardy were adduced, nothing verified denial of Ms. Bain's affiliation. The general tone of the letter makes it abundantly clear that the actual mischief which the Company was seeking to address was Ms. Bain "soliciting business away from the Company". The letter did not suggest that Ms. Bain was unauthorized to use client information. All things considered, it is more likely than not that Mrs. Major and/or the Company believed that Ms. Bain was not doing anything improper.

[170] As I have found that the circumstances of the letter were not such that qualified privilege can be relied on by the Company, the issue of whether the letter was written with malice that would negate the defence falls away. However, if I am wrong as to whether they can rely on the defence, I believe that the letter was written with malice.

[171] I think the intention to injure Ms. Bain was the dominant motive for the letter. As stated, I do not think that Mrs. Major nor the Company believed that the complaint was legitimate. As Mrs. Major admitted in her evidence, the reason for going after Ms. Bain's former clients after they left was because the Company was concerned about her "pulling away" clients. It was common for that to happen and Ms. Bain had done it before. She was a successful insurance agent. I think this was also the motive for writing the letter: to intimidate her with the objective of having her unable to deal with her former clients. I think that Mrs. Major's actions after the letter are also relevant since they demonstrate her malice: the fact that she inexplicably denied Ms. Bain the opportunity to communicate on behalf of certain accounts even after Mr. McCardy confirmed that she was sponsored and thereby authorized.

[172] With respect to damages, Ms. Cleare properly cited the leading authority of **John v MGN Ltd** [1997] QB 586. The Court of Appeal set out the considerations for the amount of damages to be recoverable for defamation. The general rule is that the

damages should be commensurate with the wrong suffered. The Court gave guidance on the considerations for what commensurate is:

> **"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation, vindicate his good name; and take account of distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look at an award of damages to vindicate his reputation; but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libelous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologize, or cross-examines the plaintiff in a wounding or insulting way."**

[173] I agree with Ms. Cleare that the imputation of dishonesty on Ms. Bain was grave since insurance agents are fiduciaries, honesty being integral to their integrity. I also agree that the gravity was exacerbated by the fact that it was directly related to her professional reputation.

[174] However, the extent of the publication was limited, as only two people were copied on it. While the Company has not retracted the letter, they have not asserted truth and has acknowledged falsity (though not to the publishees).

[175] Regarding a fair assessment of damages for defamation, since the extent of the publication was limited but the impact of Ms. Bain's integrity enormous, and ensuring that the sum is reasonable and not a windfall, in my judgment, a sum of $25,000 is fair and reasonable.

Exemplary damages

[176] Exemplary damages are generally 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. Ms. Cleare referred to the Privy Council case of **A v Bottrill** [2002] UKPC 44. Lord Nicholls of Birkenhead, in delivering the majority judgment of the Board, with regards to exemplary damages dealt with the scope of exemplary damages in cases of negligence at paras 17 to 19. At para 17, he stated:

> **"The Court of Appeal, in a judgment given by Richardson P on behalf of himself and Gault and Blanchard JJ, defined the scope of exemplary damages in cases of negligence as follows [2001] 3 NZLR 622, 641 (in paragraph 62):**
>
> > **"... exemplary damages may be awarded for negligence only in those cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly taking that risk. That inquiry involves an objective assessment of whether the defendant's conduct amounted to deliberate or reckless risk taking and so whether in that latter situation he or she was subjectively reckless. That test of conscious risk taking will be satisfied where on an objective assessment the defendant had an actual appreciation of the risk or was recklessly indifferent to the consequences and must be taken to have been content for the consequences to happen as they did. And where the particular risk was obvious but there is an absence of evidence as to the defendant's actual state of mind, the circumstances may justify the inference that she or he was aware of it and accepted the risk that it could well happen…."** [Emphasis added]

[177] At paras 21 and 22, Lord Nicholls starts off with the principle. He stated:

> **"21. The starting point for any discussion of the limits of the court's jurisdiction to award exemplary damages is to identify the rationale of the jurisdiction. This is not in doubt, although different forms of words have been used, each with its own shades of meaning. For present purposes the essence of the rationale can be sufficiently encapsulated as follows. In the ordinary course the appropriate response of a court to the commission of a tort is to require the wrongdoer to make good the wronged person's loss, so far as a payment of money can achieve this. In appropriate circumstances**

> **this may include aggravated damages. Exceptionally, a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response. Something more is needed from the court, to demonstrate that such conduct is altogether unacceptable to society. Then the wrongdoer may be ordered to make a further payment, by way of condemnation and punishment.**
>
> **22.Thus, in distinguishing the essentially different roles of compensatory damages and exemplary damages Lord Devlin said a jury should be directed that if, but only if, the amount they have in mind to award as compensation is 'inadequate to punish [the defendant] for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it', then they might award exemplary damages: see *Rookes v Barnard* [1964] AC 1129, 1228. In *Broome v Cassell & Co Ltd* [1972] AC 1027, 1060, Lord Hailsham of St Marylebone LC approved this passage as a most valuable and important contribution to the law of exemplary damages".**

[178] The Court has a wide discretion to determine whether the facts of this case warrants an award for exemplary damages.

[179] The reason given by Ms. Bain for an award of exemplary damages is that the conduct by the Company has been calculated by them to make a profit which may well exceed the compensation payable to her.

[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.

Conclusion

[181] The Company breached Ms. Bain's contract since it incorrectly relied on the termination clause. She is therefore entitled to damages for breach of contract. Since her Agreement contained no express provision for its determination, a term will readily be implied for its determination by reasonable notice. In my judgment, a period of 12 months represents reasonable notice, she ought to be paid salary

for 12 months after deducting commissions and salaries from other employments in her “duty” to mitigate loss.

[182] In addition, on a preponderance of evidence, I find that the Company conspired with its intermediary, Mrs. Major to injure Ms. Bain by lawful means and defamed her by writing a letter which attributed to her dishonesty in her profession. For conspiracy, damages of $20,000 are fair and reasonable. For defamation, damages in the sum of $25,000 meet the justice of this case. No award of exemplary damages is made.

Costs

[183] In terms of costs, Ms. Cleare submitted a Bill of Taxation in the amount of $230,733.94 as professional charges and disbursements in the amount to $10,675.25 which I will allow. With respect to professional charges, I find such sum to be excessive.

[184] In civil proceedings, costs are entirely discretionary. The discretionary power to award costs to a successful party, like Ms. Bain, must always be exercised in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties’ conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd** [1986] 2 All ER 529 at pages 536-537.

Reasonable costs

[185] In deciding what would be reasonable the court must take into account all the circumstances, including but not limited to:

a) any order that has already been made;
b) the care, speed and economy with which the case was prepared;
c) the conduct of the parties before as well as during the proceedings;
d) the degree of responsibility accepted by the legal practitioner;
e) the importance of the matter to the parties;

f) the novelty, weight and complexity of the case; and

g) the time reasonably spent on the case.

[186] Having considered all of these factors, a reasonable figure representing professional charges is $60,000 with disbursements of $10,675.25 which are payable to Ms. Bain by the Company.

Dated the 8th day of March 2022

Indra H. Charles
Justice