COURT OF APPEAL FOR ONTARIO

CITATION: James Bay Resources Limited v. Mak Mera Nigeria Limited, 2025 ONCA 448
DATE: 20250620
DOCKET: COA-24-CV-0045

Gillese, Roberts and Coroza JJ.A.

BETWEEN

James Bay Resources Limited

Plaintiff (Respondent)

and

Mak Mera Nigeria Limited a.k.a. Mak Mera Limited and Adewale Olorunsola a.k.a. Wale Sola

Defendants (Appellants)

Darryl A. Cruz and Audrey-Anne Delage, for the appellants

Hilary Book and William McLennan, for the respondent

Heard: January 20, 2025

On appeal from the judgment of Justice Eugenia Papageorgiou of the Superior Court of Justice, dated December 4, 2023, with reasons reported at 2023 ONSC 6844.

L.B. Roberts J.A.:

A. OVERVIEW

[1] This appeal involves the correct application of principles of contract interpretation to related agreements. It also turns on the proper assessment of damages for defamation owing to a corporate plaintiff.

[2] The respondent, James Bay Resources Limited ("James Bay"), is an Ontario corporation. It sought to acquire oil and gas contracts in Nigeria. Under Nigerian law, as a non-Nigerian entity, James Bay had to partner with at least one Indigenous Nigerian business to extract oil and gas in Nigeria. James Bay was introduced to the corporate appellant, Mak Mera Nigeria Limited a.k.a. Mak Mera Limited ("Mak Mera"), a Nigerian company that carries on business as a consultant and service provider in the oil and gas sector in Nigeria, and to the appellant, Wale Sola, Mak Mera's president and business development manager, who interfaced with foreign companies seeking to do business in Nigeria's oil and gas industry.

[3] James Bay entered into two agreements with Mak Mera dated, respectively, March 9, 2011 (the "2011 agreement"), and February 1, 2012 (the "2012 agreement") (together, the "Agreements"). Each of the Agreements provided that Mak Mera would receive monetary compensation and shares for providing services to James Bay in pursuing business opportunities in Nigeria's oil and gas industry. There is no dispute that, at least initially, the appellants provided valuable services to James Bay. James Bay paid Mak Mera the total amount of US$405,000. As the conditions in the Agreements for the issuance of the shares were not met, James Bay did not issue shares to Mak Mera.

[4] The parties' relationship deteriorated. In a July 2, 2014 letter written to the Department of Petroleum Resources of the Nigerian Government (the "DPR"), the

department responsible for approving oil and gas contracts, the appellants accused James Bay of breaching the intention of the 2012 agreement by excluding them from participating in James Bay's acquisition of the Oil Mining Lease ("OML")-25 (the "complaint letter"). They asserted that if they were to receive no benefit from James Bay's acquisition, they would consider themselves to have been "**defrauded by misrepresentations and deceptive conduct**" (bolded type in the original). They asked the DPR to suspend the award of the OML-25 to James Bay to allow them to resolve the matter.

[5] James Bay ultimately did not succeed in obtaining any oil and gas contracts in Nigeria and decided to abandon its efforts. It commenced an action against the appellants seeking repayment of the amounts paid under the Agreements and damages for defamation because of the complaint letter.

[6] By judgment dated December 4, 2023 (the "Judgment"), the trial judge ordered Mak Mera to pay James Bay the amount of US$405,000, which she characterized as "advances". She found that the appellants had defamed James Bay by the publication of the complaint letter and ordered the appellants to pay James Bay damages for defamation in the amount of $200,000. By order dated April 19, 2024 (the "Costs Order"), she awarded James Bay costs of the action of $304,401.91, plus interest.

[7] The appellants submit that the trial judge erred in her interpretation of the Agreements. Specifically, they argue she misconstrued the compensation terms of the Agreements. This led her to wrongly characterize the US$405,000 as advances, imply repayment terms, and order the funds' repayment. The appellants have not challenged the trial judge's finding of defamation but appeal her substantial damages award. They submit nominal damages of $1,000 would have been appropriate in the circumstances of this case.

[8] I accept that the trial judge erred in both respects. I would allow the appeal, set aside the damages award, and substitute an award of damages for defamation in the amount of $1,000.

B. BACKGROUND

(1) The Agreements

[9] The parties were introduced by an investment broker. They initially discussed a particular venture, the OML-11, that had significant proven and probable oil reserves but was at that time out of production for political reasons. Mak Mera had a relationship with the company, D & H Solutions AS ("D & H"), that had been given certain rights to operate in the OML-11's geographic area.

[10] Within days of meeting, on March 9, 2011, the parties entered into the 2011 agreement, which was drafted by James Bay's principal and approved by James Bay's Board of Directors. It was not limited to the OML-11 opportunity, but

covered more broadly “the acquisition of Nigerian oil & gas assets”. James Bay agreed to “fund [an] initial $2 million of risk capital to acquire oil & gas assets in Nigeria” and to “raise an additional $25 million in order to fund development of assets acquired in Nigeria”.

[11] The relevant compensation terms read as follows:

> 4. [James Bay] will pay [Mak Mera[1]] 12 million shares of [James Bay] and [US]$300,000
>
> a) 3 million shares to be issue[d] upon successful completion of due diligence and acquisition of oil & gas assets in Nigeria
>
> b) 3 million shares to be issue[d] upon [James Bay] reaching 1,500 [barrels of oil equivalent: “boe”] per day
>
> c) 3 million shares to be issue[d] upon [James Bay] reaching 4,000 boe per day
>
> d) 3 million shares to be issued upon [James Bay] reaching 5,500 boe per day.

[12] On March 21, 2011, James Bay and D & H entered into a Memorandum of Understanding (“MOU”) for the expressed purpose of working together “to review and evaluate projects in Nigeria (whether currently known or unknown to D & H) which could be mutually beneficial”. One such project identified in the MOU was the OML-11.

[1] The wording of the 2011 agreement is that payment would be to Mr. Sola; however, the parties agree that this provision should read as payment to Mak Mera.

[13] The appellants and James Bay worked towards the acquisition of the OML-11. By August 2011, James Bay determined that the acquisition of the OML-11 was proving difficult and decided to place less importance on it. As the trial judge explained: "Given that James Bay had spent hundreds of thousands of dollars in due diligence and had become comfortable in Nigeria, James Bay determined that it would look at other opportunities in Nigeria."

[14] Between March 2011 and February 2012, James Bay paid Mak Mera US$240,000 under the 2011 agreement.

[15] On February 1, 2012, the parties entered into the 2012 agreement. It provided for the following compensation to be paid to Mak Mera:

> 1.The parties agree that if an interest in a Potential Target (as defined in the MOU)[2] under the OML-11 License, for at least a 15% interest is obtained for the benefit of the Parties, then the terms of the Services Agreement[3] shall apply with regard to that transaction and [Mak Mera] shall receive in addition to the shares under Section 2, the balance of the 6 million (6,000,000) shares in the capital of James Bay as provided in the Services Agreement.
>
> 2. For Projects other than those in paragraph 1 above, James Bay shall issue to [Mak Mera] an aggregate of up to 6.5 million (6,500,000) shares. In such a case James Bay agrees that it will issue 3.5 million (3,500,000) common shares in the capital of James Bay (the "**Common Shares**") to [Mak Mera], as soon as **practicably** possible upon a definitive agreement being

[2] "MOU" is defined in the third preamble to the 2012 agreement as the memorandum of understanding that James Bay entered into with D & H.

[3] "Services Agreement" is defined in the first preamble to the 2012 agreement as the memorandum of understanding made on March 9, 2011. In these reasons, it is referred to as the 2011 agreement.

> entered into with regard to acquisition of an interest in an oil and gas project in Nigeria, and a further 3 million (3,000,000) Common Shares to [Mak Mera], as soon as practicably possible if such project(s): (i) achieve average production of at least 1,500 BOE/D over a period of 60 days or (ii) a minimum of P50 recoverable estimate of 50 million BOE (defined by an independent third party report).
>
> 3. …The conditions to the issuance of the 6.5 million Common Shares contained in items (i) and (ii) of paragraph 2 must be met on or prior to December 31, 2013, otherwise any obligations of James Bay pursuant to paragraph 2 of this Agreement shall cease to exist.
>
> 4. James Bay agrees that it will pay to [Mak Mera] the amount of US$165,000, as compensation for the services rendered. The parties acknowledge that the US$165,000 is to be paid at the same time the initial 3.5 million Common Shares are issued to [Mak Mera] under this Agreement. [Emphasis in original.]

[16] The appellants introduced James Bay to the OML-90 opportunity. Their efforts resulted in James Bay entering into an agreement to acquire an interest in the OML-90 in May 2012. In accordance with the terms of the 2012 agreement, between February and October 2012, James Bay paid Mak Mera monetary compensation of US$165,000. In or around May 2013, James Bay received approval from the DPR to acquire the OML-90 and passed a shareholders resolution for the issuance of shares to Mak Mera. James Bay did not ultimately issue those shares because it could not obtain TSX Venture Exchange approval before the December 31, 2013 deadline under the 2012 agreement. Nor did it proceed with the acquisition of OML-90 because it could not find lenders.

[17] The 2012 agreement between the parties terminated in accordance with its terms on December 31, 2013, because no oil and gas contracts had been obtained.

[18] In May 2014, Crestar Integrated Natural Resources ("Crestar") contracted with Shell Corporation ("Shell") with respect to the OML-25. James Bay's country manager, Adeniyi Olaniyan, had incorporated Crestar and James Bay subsequently acquired an interest in Crestar. Mr. Olaniyan had originally brought the OML-25 opportunity to James Bay in 2013.

(2) The complaint letter

[19] In July 2014, the appellants sent the complaint letter to the DPR and representatives of Shell. As previously noted, the DPR's approval was required for oil and gas contracts, such as the OML-25. In the complaint letter, the appellants alleged, among other things, that James Bay breached their agreement and treated them unfairly. The complaint letter stated in part that: "If we are to get NO BENEFIT from the OML-25 acquisition by JAMES BAY GROUP by virtue of the **opaque relationship** between CRESTAR and JAMES BAY, we do consider that [Mak Mera] would have been **defrauded by misrepresentations and deceptive conduct**" (underlining added; capitalization and bold in original).

[20] The appellants asked that the DPR "please suspend the award of OML-25 to JAMES BAY/CRESTAR to give us the required time to resolve the matters

raised with JAMES BAY. The two parties, [Mak Mera] and [D & H] want answers to the nagging questions" (capitalization in original).

[21] On July 15, 2014, James Bay sent a "cease and desist" letter through its lawyers to the appellants. The appellants' counsel replied by letter on August 9, 2014, advising that if James Bay did not comply with their demands, Mak Mera would "commence a number of blistering legal proceedings that will cause untold hardship and damages to your Clients' activities and reputation, not only in Nigeria, but worldwide."

[22] The appellants wrote a further letter to the DPR, repeating their allegations and request that James Bay and Crestar not be granted any interest in the OML-25.

[23] In or around the fall of 2014, the DPR decided to pre-empt the company with whom Shell could choose to partner in the OML-25. Neither James Bay nor Crestar ultimately obtained any interest in the OML-25. James Bay ceased to do business in Nigeria.

[24] On September 2, 2014, James Bay commenced the present proceedings against the appellants, alleging breach of contract and defamation.

C. THE TRIAL JUDGE'S DECISION

(1) The trial judge's interpretation of the Agreements

[25] The trial judge accepted James Bay's argument that the monetary payments to Mak Mera under both Agreements were contingent on the success of James Bay's acquisition of oil and gas assets in Nigeria and that the US$405,000 in payments made under the Agreements to Mak Mera therefore constituted advances and had to be returned. She also found that the 2011 agreement was entirely superseded by the 2012 agreement.

[26] As part of the surrounding circumstances that she used to interpret the Agreements, the trial judge found that:

> • The exploration for oil is risky, especially in Nigeria, because of required government approval and technical issues. Large amounts of capital are required with no guaranteed return.
>
> • The purpose of both Agreements was to facilitate James Bay's acquisition of an interest in oil and gas.
>
> • Prior to the [2011 agreement],[4] James Bay had no presence in Nigeria.
>
> • James Bay needed to partner with a Nigerian company to meet the Local Content requirement.
>
> • Mak Mera had the ability to assist James Bay in fulfilling the Local Content requirement.

[4] The trial judge defined the MOU as the 2011 agreement.

> • Mak Mera was also able to assist James Bay by providing valuable contacts in the Nigerian oil and gas industry as well as other services.

[27] Other than its general purpose, the trial judge did not consider the specific provisions of the 2011 agreement as part of the surrounding circumstances, nor whether any of those provisions had already been performed and therefore were spent. The core of her interpretation and findings as to the effect of the 2012 agreement on the compensation payable under the 2011 agreement is set out at paragraph 69 of the reasons:

> The [2012 agreement] specifically stated that it replaced the [2011 agreement] and that the terms of the [2011 agreement] would only apply if James Bay acquired at least a 15-percent interest in OML-11. Thus, all aspects of the [2011 agreement] were contingent on James Bay acquiring this interest in OML-11. James Bay never acquired any interest in OML-11. Thus, the [US]$300,000 payment referenced in the [2011 agreement] was never due.

[28] She therefore concluded that "[t]he only remaining financial remuneration to which Mak Mera could have been entitled under [the 2012 agreement] was the [US]$165,000 with respect to oil interests other than OML-11".

[29] The trial judge determined that Mak Mera was not entitled to this US$165,000 payment, nor the US$240,000 it had been paid under the 2011 agreement, and ordered Mak Mera to return the US$405,000 it received.

(2) The trial judge's award of substantial damages for defamation

[30] The trial judge concluded that the allegations of misconduct in the complaint letter were defamatory of James Bay and would tend to lower James Bay's reputation in the mind of a reasonable person, finding: "The overall tenor of the impugned statements is that James Bay violated an Indigenous Nigerian company by using its assistance and then cutting them out unilaterally after reaping benefits from [the appellants'] work."

[31] The trial judge held that the appellants' defences of fair comment and qualified privilege were defeated because the "dominant subjective motive" of their complaint letter was actual or express malice.

[32] The trial judge found that there were several factors that justified a significant damages award.

[33] First, she characterized the appellants' allegations as serious and concluded it was significant that they were made to the DPR "who held James Bay's fate in its hands, as well as its partner in a venture, Shell".

[34] Further, she determined that the appellants' complaint letter had "a significant enough impact" on James Bay's reputation in Nigeria and that "it affected the OML-25 bid" because "there was no other explanation for the DPR's decision to pre-empt the bid".

[35] Finally, she concluded that James Bay's abandonment of its more than $1.3 million dollar investment in Nigeria "supports the inference that it had to [exit the Nigerian market] because its reputation was so significantly undermined in the eyes of the DPR and others in the oil and gas field as a result of [the complaint letter]".

[36] The trial judge said there were no mitigating circumstances but there were the following aggravating circumstances: 1) the appellants refused to apologize or retract the complaint letter; and 2) the appellants advanced a defence of justification "which is essentially a republication of the defamatory statements right up until trial".

[37] Relying on *Second Cup Ltd. v. Eftoda* (2006), 41 C.C.L.T. (3d) 111 (Ont. S.C.), at para. 40, the trial judge concluded that absent an apology from the appellants, the amount required to vindicate James Bay's reputation was a substantial award of damages in the amount of $200,000.

D. ISSUES

[38] The appellants raise three issues:

1. Did the trial judge err by finding that monetary payments for services rendered under the 2011 agreement were contingent on James Bay acquiring an interest in the OML-11?

2. Did the trial judge err by implying that monetary payments for services rendered under the Agreements would have to be repaid?
3. Did the trial judge err in awarding a substantial award of compensatory damages for defamation?

E. ANALYSIS

(1) Issue 1: Did the trial judge err by finding that monetary payments for services rendered under the 2011 agreement were contingent on James Bay acquiring an interest in the OML-11?

(a) Standard of review and governing contractual interpretation principles

[39] The trial judge's contractual interpretation involves questions of mixed fact and law and is entitled to appellate deference absent errors on extricable questions of law, which are reviewable on the more exacting correctness standard, or a palpable and overriding error of fact: *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 491 D.L.R. (4th) 389, at paras. 27-28; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, 2 S.C.R. 633, at paras. 50-51; *Callidus Capital Corporation v. McFarlane*, 2017 ONCA 626, 51 C.B.R. (6th) 1, at para. 36.

[40] Extricable errors of law in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant fact": *Sattva*, at para. 53, citing

King v. Operating Engineers Training Institute of Manitoba Inc., 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21.

[41] The governing "practical, common-sense approach" that the Supreme Court instructed in *Sattva*, at para. 47, should be applied to the interpretation of contracts, is as follows:

> The overriding concern is to determine "the intent of the parties and the scope of their understanding". To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. [Citations omitted.]

[42] Ascertaining the surrounding circumstances in which a contract was made requires the court to know "the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating": *Sattva*, at para. 47, quoting *Reardon Smith Line v. Hansen-Tangen,* [1976] 3 All E.R. 570 (H.L.), at p. 574, *per* Lord Wilberforce.

(b) Analysis

[43] I accept that the trial judge erred by finding that monetary payments for services rendered under the 2011 agreement were contingent on James Bay acquiring an interest in the OML-11. More broadly, she erred by interpreting the

2012 agreement as tying compensation under both Agreements to James Bay's achieving success in its business ventures, including specifically the OML-11.

[44] The trial judge's overarching error was her failure to apply the interpretive principles that I have just reviewed. Although she referenced them, she failed to read the words of the Agreements in their ordinary and grammatical meaning in the context of the surrounding circumstances. Had she correctly applied the *Sattva* framework, the trial judge would have considered the Agreements together. The Agreements were part of the surrounding circumstances matrix that the trial judge was required to review to properly interpret them.

[45] The trial judge's analytical error primarily stems from her interpretation of the 2012 agreement without consideration of the 2011 agreement. In particular, she narrowly interpreted the statement in the preamble of the 2012 agreement that "[t]he parties propose to accordingly replace the [2011 agreement]" to mean that the 2011 agreement was no longer relevant to her analysis as part of the surrounding circumstances giving rise to the 2012 agreement. This interpretation ignores the plain language of the 2012 agreement: the reference to the 2011 agreement at paragraph 1 highlights the ongoing relevance of the 2011 agreement as part of not only the surrounding circumstances but also the plain language of the 2012 agreement.

[46] By considering it in isolation, the trial judge's interpretation of the 2012 agreement alone became the lens through which she viewed all aspects of the parties' relationship and, significantly, the monetary and share compensation structure to which they agreed and on which they operated. This led her to erroneously conclude that the monetary payments were contingent on James Bay's achieving success in its business ventures.

[47] Specifically, the trial judge erred by finding that monetary payments for services rendered under the 2011 agreement were contingent on James Bay acquiring an interest in the OML-11. In making this finding, she did not consider provisions in the 2011 agreement that were already spent or performed prior to the parties entering the 2012 agreement. These included the payment of the US$240,000 as monetary compensation to Mak Mera for services already rendered under the 2011 agreement. The 2012 agreement confirms the parties' intention to modify their contractual arrangement moving forward, not to retroactively change the terms for payments already received for services rendered.

[48] Further the trial judge's interpretation of the Agreements failed to distinguish between the purpose of share compensation versus monetary compensation. In both Agreements, the issuance of shares was clearly tied to the success of James Bay's business ventures in Nigeria. The monetary compensation was not tied to any condition.

[49] For ease of reference, I reproduce paragraph 4 of the 2011 agreement:

> 4. [James Bay] will pay [Mak Mera[5]] 12 million shares of [James Bay] and [US]$300,000
>
> a) 3 million shares to be issue[d] upon successful completion of due diligence and acquisition of oil & gas assets in Nigeria
>
> b) 3 million shares to be issue[d] upon [James Bay] reaching 1,500 boe per day
>
> c) 3 million shares to be issue[d] upon [James Bay] reaching 4,000 boe per day
>
> d) 3 million shares to be issued upon [James Bay] reaching 5,500 boe per day.

[50] On its face, the 2011 agreement ties payment of shares to achieving certain business milestones. The monetary payment, in contrast, is not contingent on achieving any particular milestone, including acquiring an interest in the OML-11.

[51] The 2012 agreement draws the same distinction. Paragraph 4 of the 2012 agreement provides: "[James Bay] agrees that it will pay to [Mak Mera] the amount of US$165,000 as compensation for the services rendered. The parties acknowledge that the US$165,000 is to be paid at the same time the initial 3.5 million Common Shares are issued to [Mak Mera] under this Agreement."

[52] The trial judge rejected the appellants' submission that paragraph 4 contains only a timing provision for the US$165,000 payment and concluded that it creates

[5] See Footnote 1.

a pre-condition for the payment itself. The trial judge determined that this interpretation was commercially reasonable as:

> There are many commercial arrangements where businesses provide services and are not ultimately remunerated unless a final arrangement is reached. The clearest example is real estate transactions where real estate agents are often, if not usually, only remunerated when a deal closes, even if they have provided valuable services.

[53] She reasoned further that: "One could argue that payment that is not contingent on success makes less commercial sense because [Mak Mera] would receive 30% of James Bay's shares upon a successful acquisition. If it was remunerated for its services all along, why would it receive 30% in James Bay's shares as well?"

[54] First, this interpretation is inconsistent with the plain language of the 2012 agreement. It fails to give effect to the provisions of paragraph 1 of the 2012 agreement that referenced the 2011 agreement and reads the second sentence of paragraph 4 in isolation from its first sentence. The first sentence clearly provides that there are no conditions attached to the US$165,000 payment and that it is consideration for the provision of the appellants' services. When the second sentence is read in connection with the first sentence of paragraph 4, the only reasonable interpretation is that the second sentence stipulates a deadline by which the US$165,000 amount had to be paid.

[55] The stipulation of an ultimate payment deadline did not foreclose earlier payment for services rendered, which is what happened in this case. This is consistent with the rest of the agreement which sets out conditions related to only the issuance of the shares and not to the payment of monetary compensation.

[56] Second, the trial judge's interpretation ignores the way in which the parties structured their relationship, as manifested in both Agreements, and, in particular, the compensation to be paid to Mak Mera for partnering with James Bay in its risky Nigerian business ventures.

[57] In both Agreements, the parties clearly distinguished between monetary compensation to be paid for services rendered, without any other condition, and the issuance of shares that were explicitly made conditional on the success of James Bay's business ventures. The 2011 agreement provided for payment of US$300,000 to Mak Mera without any conditions; the issuance of shares was subject to the acquisition of oil and gas contracts, as well as a certain level of oil and gas production. In the same way, the 2012 agreement stipulated that US$165,000 would be paid to Mak Mera for services rendered without any conditions; the share issuance was again dependent on the acquisition of oil and gas contracts and production.

[58] The trial judge erred by failing to look at the parties' actual relationship as reflected in the clear terms of both of their Agreements. The provision for two

different streams of compensation – monetary compensation for services rendered to get James Bay's foot in the door of the Nigerian market – and the more lucrative share issuance to reward the successful completion of the parties' efforts – made complete commercial sense.

[59] The trial judge accordingly erred by finding that monetary payments were contingent on James Bay's achieving success in its business ventures, including by specifically conditioning the monetary payment under the 2011 agreement on James Bay's acquisition of an interest in the OML-11.

(2) Issue 2: Did the trial judge err by implying repayment terms into the Agreements?

(a) Standard of review and governing contractual interpretation principles

[60] The standard of review and governing principles for issues of contractual interpretation are set out above. Additionally, the principles for implying a contractual term are relevant to this ground of appeal.

[61] There is a high threshold for implying terms into agreements. Contractual terms may be inferred "based on the presumed intention of the parties where the implied term must be necessary 'to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed'": *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 27, quoting

Canadian Pacific Hotels Ltd. v. Bank of Montreal, [1987] 1 S.C.R. 711, at p. 775. Implied terms must have a "certain degree of obviousness" and cannot be found "if there is evidence of a contrary intention", such as that expressed in the clear terms of the contract: *M.J.B. Enterprises Ltd.*, at para. 29. Implied terms cannot contradict express provisions of an agreement, be unreasonable or add terms that the parties could have provided for: *First National Financial GP Corporation v. Golden Dragon Ho 10 Inc. and Golden Dragon Ho 11 Inc.*, 2022 ONCA 621, 474 D.L.R. (4th) 650, at paras. 70-71, leave to appeal refused, [2022] S.C.C.A. No. 40456.

(b) Analysis

[62] The trial judge erred by implying repayment terms that were absent from and contrary to the plain language of the Agreements.

[63] Here, the terms of the Agreements that provide for monetary compensation to Mak Mera are clear. Again, unlike the terms relating the issuance of shares to the success of James Bay's business ventures, the monetary payments to Mak Mera are unconditional.

[64] It is common ground that James Bay needed the appellants' services to gain a foothold in the Nigerian oil and gas market regardless of whether oil and gas contracts were ultimately acquired and knowing that the business venture was

risky. There is no dispute that the appellants rendered valuable services to James Bay.

[65] As a result, the unconditional payment of monetary compensation in consideration for the appellants' services for obtaining entry into the Nigerian oil and gas market made commercial sense. The implied repayment terms based on the success of James Bay's business ventures in Nigeria were therefore unnecessary to give business efficacy to the parties' Agreements and contrary to the plain language of the Agreements. By implying the repayment terms and ordering repayment of the US$405,000 already paid to the appellants for services rendered, the trial judge effectively rewrote the unambiguous Agreements. This was an error.

[66] For ease of reference, I repeat the relevant provisions of the Agreements. First, paragraph 4 of the 2011 agreement provides that "James Bay will pay [Mak Mera[6]] 12 million shares of James Bay and [US]$300,000." However, while that paragraph goes on to set out the conditions under which the shares will be issued, as I have earlier noted, there is no language in that paragraph or elsewhere in the 2011 agreement that qualifies payment of the US$300,000. Second, the first sentence of paragraph 4 of the 2012 agreement provides that James Bay "will pay"

[6] See Footnote 1.

Mak Mera “the amount of US$165,000, as compensation for the services rendered.” Again, nothing qualifies the payment.

[67] On a plain reading of the provisions in both the Agreements, the monetary payments were to be made for services rendered. To interpret the Agreements as making the monetary payments conditional on the success of James Bay’s business ventures in Nigeria is contrary to the plain wording of the Agreements.

[68] Moreover, interpreting the Agreements to imply repayment terms in the absence of success ignores the surrounding circumstances. There is no dispute that the appellants rendered valuable services to James Bay in its pursuit of its business ventures in Nigeria in accordance with the terms of the Agreements. It is unchallenged that whether it acquired anything, James Bay needed the appellants’ services simply to get its foot in the door. It therefore made good commercial sense for the parties to provide for two different streams of compensation: monetary compensation for services rendered to assist James Bay in establishing a foothold in Nigeria; and shares of exceedingly greater value if James Bay’s business ventures in Nigeria were successful.

[69] As the trial judge found, James Bay’s proposed business venture was risky and required a substantial amount of investment without any guarantee of success. There was an acknowledged risk that despite its best efforts, James Bay might never acquire any oil and gas contracts. That is what occurred. James Bay did not

acquire any oil and gas contracts and abandoned its business in Nigeria. As a result – and in accordance with the terms of the Agreements – James Bay paid Mak Mera monetary compensation for the services it rendered but it issued no shares to Mak Mera.

[70] Further, by the time the 2012 agreement was negotiated, the surrounding circumstances included the 2011 agreement and the US$240,000 monetary payment already made under that agreement. It would have been a simple thing to include a repayment provision in the Agreements and, in particular, the 2012 agreement that followed the US$240,000 payment. The parties were sophisticated and represented by experienced counsel. However, the Agreements do not provide for any such repayment. Absent such explicit language, a plain reading of the 2012 agreement does not support an interpretation that there is an implied term in the Agreements for the repayment for services that had already been rendered.

[71] For the purposes of contractual interpretation, it is of no moment that James Bay did not pay the entire US$300,000 stipulated under the 2011 agreement. That is an accounting issue between the parties that does not affect the fact that payment had been made for services rendered by Mak Mera and that neither Agreement provided for its repayment.

[72] I also reject James Bay's submission that the timing of the payment of the US$165,000 in the 2012 agreement was conditional on the issuance of shares. This interpretation ignores the plain language of both Agreements that monetary compensation was separate from the share compensation. Again, it would have been a simple thing to make the payment of the monetary compensation conditional on terms, as was the case for the share issuance, or provide for its repayment. This was not done.

[73] Apart from the breach of the implied repayment terms – which, as I have explained were incorrectly implied – the trial judge found no other breach of the Agreements by the appellants. There is therefore no basis for ordering the repayment of the amounts paid to the appellants for services rendered to James Bay.

(3) Issue 3: Did the trial judge err in awarding a substantial award of compensatory damages for defamation?

[74] The appellants do not challenge the trial judge's finding that the complaint letter was defamatory of James Bay. Their appeal is limited to the trial judge's damages award. In sum, they submit that there was no basis for an award of substantial damages and that nominal damages of $1,000 should have been awarded.

(a) Standard of review

[75] The standard of review of an award of damages for defamation is highly deferential: appellate courts should not interfere with judge-alone defamation awards except where the judge has made an error in law, applied a wrong principle, seriously misapprehended the evidence, or made an award that is "so inordinately high or low" as to make the award an entirely erroneous estimate of the damages: *Barrick Gold Corporation v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at paras. 24-26.

[76] As this court instructed in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.), at p. 115, on appellate review: "The question to be addressed here is whether the amount awarded … falls within the range of damages reasonably required to compensate the company for the reputational harm suffered by it and publicly to clear its good name."

(b) Analysis

[77] I am persuaded that the appellants have met the high threshold justifying appellate interference with the trial judge's damages award. The award of $200,000 was inordinately high because it was unsupported by the evidence and the product of legal error.

(i) The absence of evidence to support the substantial damages award

[78] It was an error to award James Bay substantial damages for defamation absent admissible evidence of harm or impact.

[79] It is well-established that damages are presumed if defamation is established. However, there is no presumption as to the impact or amount of those damages: *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, 53 C.C.L.T. (4th) 1, at para. 22, leave to appeal refused, [2019] S.C.C.A. No. 38592. Moreover, while a corporation may be entitled to general damages beyond nominal damages without proof of specific loss, it is unlikely to obtain a substantial award without proof of special damages or at least of a general loss of business or impact on reputation or goodwill: *Walker*, at pp. 113-14.

[80] As this court further noted in *Walker*, at p. 113: “[U]nlike an individual, a company is not entitled to compensation for injury to hurt feelings or, it follows, to compensation by way of aggravated damages for a loss of this nature.” In the often-cited words of Lord Reid in *Lewis v. Daily Telegraph Ltd.*, [1963] 2 All E.R. 151 (H.L.), at p. 156: “A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.”

[81] As noted earlier, the trial judge founded her substantial damages award principally on her findings of reputational harm and economic loss (the latter

stemming from James Bay's abandonment of its investment in Nigeria).[7] Specifically, the trial judge based her findings on, first, the DPR's decision to pre-empt James Bay's OML-25 bid and, second, the "credibility issue" confrontations that James Bay argued it experienced. The trial judge concluded that the damage to James Bay's reputation caused by the appellants' complaint letter induced James Bay to withdraw from its business ventures in Nigeria. However, James Bay did not plead or prove special damages or provide admissible evidence of reputational harm or economic loss or of any other impact. The trial judge's finding of reputational and economic harm to James Bay thus lacked any admissible evidentiary support and instead depended on evidence of opinions from third parties who did not testify at trial.

[82] For example, in support of her finding that the DPR pre-empted the bid because of the appellants' complaint letter, the trial judge relied on an alleged conversation between James Bay's principal and the Minister at the DPR, who did not testify at trial. James Bay's evidence was that the Minister "asked about [the complaint letter]." From this, the trial judge drew the speculative inference that the DPR was motivated by the complaint letter to pre-empt James Bay's bid. She explained her reasoning at para. 291 of her reasons that:

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[7] The trial judge also held that the lack of an apology or retraction and the continuation of the defence of justification at trial were aggravating factors. I will return to the significance of these findings later in my reasons.

> James Bay had been taken seriously in the oil and gas industry in Nigeria up until [the complaint letter]. It had negotiated an agreement with [Bicta Energy & Management Systems Limited[8]] regarding OML-90 and obtained DPR approval. There is no other explanation for the DPR's decision to pre-empt the bid. Thus, I conclude that [the complaint letter] did have a significant enough impact on James Bay's reputation, that it affected the OML-25 bid even though there is no request for special damages with respect to it. [Emphasis added.]

[83] This unsubstantiated explanation for the pre-emption of James Bay's bid and its departure from Nigeria is not only speculative but depends on an alleged conversation with a Minister of the DPR who did not testify at trial and is contrary to the trial judge's findings about the riskiness of James Bay's business ventures in Nigeria.

[84] As earlier noted, the trial judge found that James Bay's exploration for oil and gas in Nigeria was risky and large amounts of capital were required with no guaranteed return. Moreover, the evidence was uncontroverted that prior to the delivery of the complaint letter, only one of James Bay's other bids for different licences was approved and none of James Bay's other bids came to fruition for reasons unrelated to the complaint letter. It is therefore not surprising that James Bay made the business decision to cut its losses and leave Nigeria.

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[8] Bicta Energy & Management Systems Limited was an Indigenous company that had acquired the OML-90 and was seeking financing.

[85] Accordingly, it was an error for the trial judge to conclude that there was "no other explanation" for the pre-emption of James Bay's bid and its departure from Nigeria other than because of the reputational impact caused by the complaint letter.

[86] Similarly, the trial judge's finding that James Bay's "credibility" and business prospects were greatly harmed by the appellants' complaint letter was not founded on admissible evidence presented at trial. At para. 293 of her reasons, the trial judge supported her finding that James Bay lost credibility and was forced to abandon its Nigerian business ventures by reference to "confrontations" that James Bay's country manager apparently had with third parties:

> James Bay and its related companies ultimately left Nigeria and did not successfully obtain any other interests. Although Mr. Olaniyan did not provide any particulars on any conversations, he said that after [the complaint letter], when he tried to do business in Nigeria he was repeatedly confronted with James Bay's "credibility issue" and eventually had to call it quits. James Bay's subsidiary, JBENL, is being wound up. James Bay expended more than $1.3 million in Nigeria. The fact that it would walk away from this investment supports the inference that it had to because its reputation was so significantly undermined in the eyes of the DPR and others in the oil and gas field as a result of [the complaint letter]. [Emphasis added.]

[87] However, no one from the DPR, Shell or any "others in the oil and gas field" in Nigeria were called as witnesses at trial. Moreover, the trial judge found that: "[T]here is no evidence of any media publications of [the complaint letter]". Other

than the publication of the letter to the DPR and Shell, there was no admissible evidence, nor did James Bay plead, that the appellants' complaint letter was sent to or known by any parties apart from the DPR and Shell.

[88] Further, the trial judge found that, "there was very little evidence" as to why James Bay's relationship with Shell fell apart, other than evidence about an international arbitration between the parties which James Bay lost. As a result, the trial judge could not find that the appellants' complaint letter caused the end of the relationship between James Bay and Shell.

[89] Accordingly, the trial judge's finding that James Bay's reputation was "so significantly undermined in the eyes of DPR and others" (emphasis added) was not supported by any admissible evidence, was inconsistent with her other findings regarding the cause of the end of James Bay's relationship with Shell and the limited publication of the complaint letter, and represented a misapprehension of the evidence.

[90] The trial judge thus erred in awarding James Bay substantial damages in the absence of admissible evidence of harm or impact.

(ii) The absence of an apology to support the substantial damages award

[91] The trial judge relied heavily on the absence of an apology by the appellants to justify her substantial award of damages, finding that the absence of an apology aggravated James Bay's damages and that a substantial award of damages was

the only way to vindicate James Bay's reputation. This represented a misapplication of the governing analytical framework governing the significance of an apology, or its absence, in the determination of damages for defamation for a corporate plaintiff.

The significance of an apology or its absence in the determination of damages

[92] In the case of a corporate plaintiff, the absence of an apology, by itself, cannot serve to aggravate damages or justify an award of substantial damages. This is because of the different function that the presence or absence of an apology plays in the analysis of damages for an individual versus a corporate plaintiff. While the lack of an apology is a relevant factor for both corporate and individual plaintiffs, its significance and treatment in the analysis are not equivalent.

[93] The primary function of an apology in the assessment of damages for corporate plaintiffs is its mitigating effect. A "prompt correction, retraction or apology may be far more valuable than an award in damages" because it recognizes the wrongfulness of the defamation and stops its pernicious, ongoing impact: *Grossman v. CFTO-TV Ltd.* (1982), 39 O.R. (2d) 498 (C.A.), at p. 504.

[94] Accordingly, the significance of the absence of an apology for corporate plaintiffs is that the seriousness of the defamation and its impact are not attenuated. As this court explained in *United Soils Management Ltd.*, at para. 25,

"the timely and unqualified apology and retraction" of the offensive libel can be "a crucial factor in assessing harm caused or likely to be caused" to the plaintiff because an apology may go "a long way to eliminating any possible future harm to the [plaintiff's] reputation" and serves to achieve the vindication of the plaintiff's "good name".

[95] With respect to an individual plaintiff, however, the absence of an apology, *per se*, may give rise to an entitlement on the part of an individual claimant to aggravated damages, which are not for injury to reputation but for the additional separate element of injury to feelings: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 192-94; *Ratzen v. Mirror Group Newspapers (1986) Ltd.*, [1994] Q.B. 670 (Eng. C.A.), at p. 683; and *Rai v. Bholowasia*, [2015] EWHC 382 (Eng. Q.B.), at para. 175, citing *John v. MGN Ltd.*, [1997] Q.B. 586 (Eng. C.A.), at p. 607. Similarly, this court explained in *Walker*, at p. 111, that: "Aggravated damages are damages which take into account the additional harm caused to the plaintiff's feelings by such reprehensible or outrageous conduct on the part of the defendant" (emphasis added).

[96] As I have already noted, a corporate claimant is not entitled to recover damages for injury to its feelings. It is therefore critical that in its determination of damages, a court not conflate the two and award to a corporation under the guise of a substantial award of damages what really are aggravated damages for injured feelings or humiliation.

[97] The presence of an apology is significant because, as this court instructed in *United Soils Management Ltd.*, at para. 25, by itself, an unqualified and timely apology can vindicate a corporate plaintiff's good name. However, the reverse is not true. The significance of a failure to apologize is that the ongoing damage of the defamation, particularly if the defamation is widespread, continuing and destructive, remains unattenuated. It is the unchecked extent of the latter factors, and not the mere absence of an apology, that may support a substantial award of damages for corporate plaintiffs: *Valley Traffic Systems Inc. v. Malak*, 2024 BCCA 370, 96 B.C.L.R. (6th) 199, at paras. 49-51, aff'g *Malak v. Hanna*, 2023 BCSC 1337, 96 B.C.L.R. (6th) 199.

[98] Aggravated damages must be distinguished from aggravating factors. A corporate plaintiff cannot be awarded aggravated damages. Aggravating factors, however, may support a substantial award of damages. That said, absent evidence of damage or impact, a substantial award of damages cannot be supported by the mere absence of an apology, unless there are other aggravating factors such as widespread publication and continued, longstanding and repetitive libel.

[99] For example, in *Barrick Gold Corporation*, this court held, at para. 51, that the individual defendant's "refusal to retract his statements, or to apologize for them" served as an aggravating factor in the circumstances of that case, including the defendant's "dogged pursuit of the libelous campaign", the virtually unlimited publication of the defamation on the internet, and the demonstrated impact on the

corporate plaintiff's reputation. A careful reading of the reasons in *Barrick Gold Corporation* demonstrates that the absence of an apology was characterized as aggravating the "vicious and widespread" defamation in that case and, as a result, failed to attenuate the huge and ongoing impact of the vicious and widespread defamation in that case. It was the unchecked nature and extent of the defamation and ensuing impact that supported the substantial award of damages substituted by this court.

[100] Similarly, in *Valley Traffic Systems Inc.*, the absence of an apology or a retraction by itself did not serve to increase the damages assessed in favour of the corporate plaintiff. The British Columbia Court of Appeal rejected the submission that the trial judge had erred in his treatment of the absence of an apology or a retraction, noting, at para. 65 of the reasons, that: "in assessing general damages [for the individual and corporate plaintiffs] the judge expressly rejected absence of an apology or retraction as factors justifying a higher award" and considered the failure to apologize only in the assessment of aggravated damages for the individual plaintiff.

[101] The circumstances in *Valley Traffic Systems Inc.* that the trial judge found supported a substantial award of damages included widespread publication of seriously defamatory statements accusing the plaintiffs of illegal kickbacks and other corrupt activities, which were the product of a common design by competitors to defame both the corporate and individual plaintiffs and resulted in reputational

and inferred business losses to the corporate plaintiffs. The trial judge found that these defamatory statements were particularly harmful having regard to the corporate plaintiffs' customers who were quasi-public/public bodies that "generally wish to avoid public controversy": *Malak*, at para. 198. He explained that it was those factors and not the defendants' failure to apologize or issue a retraction that justified a higher award of damages because: "It is not surprising that given the ongoing litigation, and the legal position taken by [the defendants] that they were not part of a common design to defame the plaintiffs, that they did not issue a retraction or apology": *Malak*, at para. 221.

The *Walker* analytical framework

[102] In the present case, the trial judge's award of substantial damages in the absence of the appellants' apology relied on the highlighted portion of para. 40 of the reasons in *Second Cup Ltd.*:

> It has been observed that a company cannot be injured in its feelings and therefore "damages may be small in commercial terms, unless the defendants' refusal to retract or apologize makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a 'really substantial award of damages'." (see: *Walker v. CFTO* (1987), 59 O.R. (2d) 104 at para. 26 (*per* Robins J.A. for the Court) quoting with approval from Carter-Ruck, *Libel and Slander* (3rd Edn.) 1985 at pp. 156-157). [Emphasis added.]

[103] The trial judge erred in her application of these principles because she interpreted and applied the highlighted portion as a dispositive factor without looking at all the relevant circumstances.

[104] The highlighted portion appears in the context of a larger, more general discussion in *Walker*, at pp. 113-14, about a company's limited entitlement to damages in defamation absent proof of loss or harm to reputation. The text comes from the following long passage from Peter F. Carter-Ruck & Richard Walker, *Carter-Ruck on Libel and Slander,* 3rd ed. (London: Butterworths, 1985), at pp. 156-57:

> Limited companies, and other corporations, may also be awarded general damages for libel or slander, without adducing evidence of specific loss. However, it is submitted that in practice, in the absence of proof of special damages, or at least of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages. As was made clear by Lord Reid in *Lewis v Daily Telegraph Ltd,* 'A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.' Whilst Lord Reid went on to say 'The injury need not necessarily be confined to loss of income; its goodwill may be injured', a company, which is unable at trial, some two or three years after the original defamatory publication, to point to the slightest hiccup in its trading figures, may be hard pressed to persuade a court that even an unpleasant libel has seriously injured its reputation. Unlike a personal plaintiff, it cannot tug the jury's heart strings by describing its distress and humiliation on reading the defamatory words. This presents a problem for a limited company which has been defamed, since it is often difficult to *prove* that the publication caused either a specific or a general

> loss of business. That there is an entitlement to general damages which are more than nominal damages is certain, but the amount likely to be awarded to a corporation may be small in commercial terms, unless the defendant's refusal to retract or apologise makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a really substantial award of damages. [Citations omitted.] [Underlining added; italics in original.]

[105] The last sentence of the above quote must be interpreted in the context of the entire passage. A defendant's refusal to retract or apologize by itself does not allow for "a really substantial award of damages". Rather, the absence of the apology must be looked at in the context of all relevant circumstances, including the nature, gravity and extent of the defamation, the wrongdoer's conduct, and the impact of the defamation. This is the way in which this court in *Walker* applied the above-cited passage.

[106] In *Walker*, during a television program broadcast across Canada, the defendants suggested that the plaintiff company and its principals had abused the public trust through their allegedly dangerous and unlawful disposition of toxic waste. As in the present case, the plaintiffs in *Walker* did not claim specific damages or sustain any financial loss. The defendants did not apologize or retract the libellous statements. The jury awarded damages to the plaintiffs in the amount of $883,000.

[107] This court, at p. 115 of its reasons in *Walker*, reviewed whether the jury award of $883,000 fell "within the range of damages reasonably required to compensate the company for the reputational harm suffered by it and publicly to clear its good name", and, in so doing, considered whether it was the only way in which the reputation of the company could be vindicated:

> In considering this question, it is to be recognized that Walker Brothers sustained no financial loss as a consequence of the libel. It is undisputed that in the four years from the date of the broadcast to the date of trial it suffered no diminution of profits or loss of business, and there is nothing to indicate any likelihood that it will do so in the future. While this may raise doubts about the effect of the libel on the company's reputation, it does not dictate that the compensatory damages be merely nominal; the action is maintainable per se without proof of damage, general or special. However, if there is no evidence of damage, the view has been expressed that "the damages given (to a corporation) will probably be small" (*South Helton Coal Co. v. North-Eastern News Ass'n, Ltd.*) and, in the same vein, "the amount likely to be awarded to a corporation may be small in commercial terms" (Carter-Ruck). Although the award may be small or nominal, it is manifest that the judgment enables the plaintiff publicly to brand the defamatory publication as false or groundless, and, when there is no actual damage, can perform the vindicatory function of this cause of action. In the final analysis, however, the amount necessary to uphold the corporate reputation can only be determined by a consideration of all the circumstances of the case viewed in the light of the applicable law. There may be some cases where even absent proof of loss the impact of the libel is such that, as Carter-Ruck points out at p. 157, "the only way in which the reputation of the company can be vindicated in the eyes of the world is by a really substantial award of damages". [Citations omitted.] [Emphasis added.]

[108] I have reproduced this long passage to show how this court in *Walker* interpreted and applied the statement from *Carter-Ruck on Libel and Slander* that "the only way in which the reputation of the company can be vindicated in the eyes of the world is by a really substantial award of damages". The passage demonstrates that in determining whether a substantial award of damages is the only way to vindicate a company's reputation, all relevant circumstances must be considered, and these circumstances are not limited to an absence of an apology. Importantly, absent proof of loss, the court must consider the "impact" of the libel and whether that impact is such that only a substantial award of damages will vindicate the reputation of the defamed company. If there is no such impact, then absent proof of loss, a substantial award of damages will not be justified, and the judgment, with small or nominal damages and costs, will suffice to perform "the vindicatory function".

[109] Having accepted "the gravity of the libel and viewed the circumstances in a manner most favourable to the company's position", this court in *Walker* set aside the jury award of $883,000 as "so inordinately large as to bear no reasonable relationship to the defamatory publication or the consequences flowing from it": at pp. 115-16. The court concluded, at p. 116, that:

> Furthermore, in this case, there is no question of any pecuniary loss. All that has to be compensated for here is the injury to Walker Brothers' corporate reputation. <u>The figure set by this jury as being the amount necessary to vindicate that reputation</u> in the eyes of right thinking

> people in the community goes far beyond the maximum limit of any range that can conceivably be regarded as fair or reasonable compensation for this company in these circumstances. It is so exorbitant and irrational a sum that it should not be allowed to stand. [Emphasis added.]

[110] The trial judge in *Second Cup Ltd.* followed the same analytical approach as instructed in *Walker*. The defamation consisted of a long campaign by the defendants against Second Cup Ltd. ("Second Cup"), as franchisor, whom the defendants described as being "one of the most unprincipled franchisors operating in Canada", accusing it of "misrepresentation, lack of support, exploitation, harassment, deception, and fraud": *Second Cup Ltd.*, at para. 8. The defendants encouraged Second Cup franchisees to sue Second Cup. The trial judge found that Second Cup had suffered damage to its reputation and in its relationship with its franchisees, and substantial economic loss in defending itself against the defamation. The defendants refused to apologize or retract their statements.

[111] In *Second Cup Ltd.*, the trial judge did not consider the lack of an apology alone as justifying the substantial damages he awarded. Rather, the defendants' failure to apologize or retract their libellous statements was considered as part of all the circumstances. These circumstances included the defendant's overall conduct that the court found caused considerable damage and justified an award of substantial damages to vindicate Second Cup's reputation. Specifically, the court held, at para. 38, that the individual defendant's "actions have severely

harmed Second Cup and many Second Cup franchisees and have dramatically aggravated the damages at a time when he could have mitigated the impact of his actions" (emphasis added) by apologizing or retracting the vitriolic statements that he had made.

[112] Although the trial judge did not reference *Barrick Gold Corporation* for this point, in that decision, this court referenced, at para. 49, the analytical approach in *Walker* and the above-noted cite to *Carter-Ruck on Libel and Slander*. Specifically, the court in *Barrick Gold Corporation* did not consider the lack of an apology or retraction of the defamation in isolation but in the particular context of the case. These circumstances included that the individual defendant had engaged in a "dogged pursuit of the libelous campaign even after commencement of the proceedings" against the integrity and *bona fides* of Barrick Gold Corporation ("Barrick") and its officers and directors in the world-wide forum of the internet. The defendant's actions were described, at para. 3, as:

> '[A] systematic, extensive and vicious campaign of libel … over an extraordinarily lengthy period' with the express purpose and intent of embarrassing Barrick and injuring its reputation. This campaign was conducted over the Internet, and involved the posting of hundreds of false and defamatory statements concerning Barrick on various websites.

[113] This court concluded, at para. 51, that the motions judge had erred in not granting a substantial award of damages because she failed to consider all relevant factors:

> The motions judge found that [the individual defendant] would likely continue his defamatory statements. Had she considered the lack of retraction and apology, along with repetition, in the context of determining whether "a really substantial award of damages" was required to vindicate Barrick's reputation. In the circumstances, she might well have come to a different conclusion than she did.

[114] The court acknowledged, at para. 52, that "[i]t is readily apparent that a successful judgment in a defamation case will be of assistance to the plaintiff in vindicating the plaintiff's reputation" but cautioned against relying on the judgment itself as sole vindication and reducing "an otherwise appropriate damage award" necessary to vindicate the plaintiff's reputation where the circumstances support such a damage award. While there were no proven economic losses, there was evidence of damage to Barrick's reputation that supported a substantial damages award. Unlike the present case, there was specific evidence of inquiries and complaints as a result of the defamatory postings, including from Barrick shareholders and professional and regulatory bodies. The court concluded that in the circumstances of the case, $75,000 for general damages and $50,000 for punitive damages were appropriate.

[115] In this case, the trial judge should have considered whether, in the absence of circumstances supporting a substantial award of damages, there were other ways to vindicate James Bay's reputation, such as the fact of the judgment itself, including nominal damages, and costs. This was not like the circumstances in

Barrick Gold Corporation where an award of substantial damages was otherwise appropriate and could therefore not be reduced by the fact of the judgment itself serving as vindication. The trial judge therefore erred in her analysis.

[116] In the circumstances of this case, where there was no admissible evidence of any harm or impact on James Bay's reputation by the appellants' defamation, the lack of apology alone and the absence of its attenuating effect did not support a substantial award of damages.

[117] As a result of these legal errors, the trial judge's award of damages cannot stand.

(iii) The appropriate damages award

[118] In my view, there was no basis for an award of substantial damages in the circumstances of this case.

[119] The present case is different from the circumstances in *Barrick Gold Corporation*, where the libel was published widely over the internet, or in *Second Cup Ltd.*, where the libel against the franchisor was published to all its franchisees. In both cases, the widely published defamation had a considerable impact on the reputation of the corporate plaintiff and caused tangible losses.

[120] Here, the defamation was not published to a potentially unlimited world-wide audience but only to the DPR and Shell in Nigeria. As the trial judge found, there was no evidence that the DPR or Shell republished the libel and no admissible

evidence that they acted on it. James Bay has not proven financial loss nor other impact on its reputation arising from the appellants' defamation, either at the time of the appellant's complaint letter or in the ensuing decade.

[121] While not raised as a ground of appeal, as earlier noted, the trial judge found as an additional aggravating factor in relation to damages that the appellants had advanced an unsuccessful defence of justification, which, in her view, amounted to further publication of the defamation against James Bay. Absent proven loss or impact on reputation, I am not persuaded that this factor alone justifies a substantial award of damages.

[122] The repetition of defamation by way of an unsuccessful plea of justification as part of a defence may aggravate the damages of an individual because it perpetuates hurt feelings and humiliation: *Hill*, at para. 191. However, in the case of a corporate plaintiff, the mere repetition of a libel by way of a plea of justification is insufficient, by itself, to establish reputational or economic loss or impact. As this court noted in *Barrick Gold Corporation*, at para. 51, "[r]epetition [of the libel] … is only one factor to be considered in determining what award of damages is required to vindicate a plaintiff's reputation". Accordingly, it should be considered in the context of other relevant factors such as the conduct of the defendant and the mode and extent of the publication: *Second Cup Ltd.*, at paras. 32-35. It is not automatically applicable: in *Walker* and *Malak*, for example, the failed defences of

justification did not serve to ground a substantial award of damages to the corporate plaintiff.

[123] In the case of a corporate plaintiff, absent proof of loss or impact, it is unlikely that substantial damages will be awarded. Rather, the judgment itself will often serve as a vindication of the plaintiff's rights. As this court in *Walker* explained, "the judgment enables the plaintiff publicly to brand the defamatory publication as false or groundless, and, when there is no actual damage, can perform the vindicatory function of this cause of action": at p. 113. The real value of such an action thus lies in the corporate plaintiff securing a court pronouncement of the falseness of the defamation and thus rehabilitating the plaintiff's reputation in the public's eye. It may therefore be that the judgment, along with nominal damages plus costs, will serve this vindicatory purpose. For these reasons, a substantial award of damages is unwarranted.

[124] The appellants submit that, applying the proper principles, nominal damages should be awarded in the circumstances of this case.

[125] I agree. Despite the absence of an apology or a retraction, nominal damages are appropriate where, as here, the corporate plaintiff can establish a cause of action but there is extremely limited publication and there is no substantial loss or the loss is unproven: see *Langille v. McGrath* (2001), 243 N.B.R. (2d) 360 (C.A.), at para. 18, citing Jamie Cassels, *Remedies: The Law of Damages* (Toronto,

Irwin Law, 2000), at pp. 281, 285; *Skafco Ltd. v. Abdalla,* 2020 ONSC 136, 62 C.C.L.T. (4th) 14, at para. 66; and *Singh v. Doad*, [1990] A.J. No. 240 (Alta. Q.B.), at para. 9.

[126] I conclude that damages in the nominal amount of $1,000 should have been awarded.

F. DISPOSITION

[127] I would allow the appeal.

[128] I would set aside the Judgment, except for the paragraphs numbered 2, 3[9] and 4.

[129] I would not set aside paragraph 2 of the Judgment, in which the court dismissed James Bay's claim for breach of the Agreements by Wale Sola. However, I would amend the paragraph to dismiss the claim for breach of the Agreement by Mak Mera as well.

[130] I would not set aside paragraph 3 of the Judgment, in which the court dismissed James Bay's claim for unjust enrichment against the appellants.

[131] With respect to paragraph 4, I would substitute an award of damages of $1,000 in place of $200,000.

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[9] Two paragraphs in the Judgment are numbered 3. For greater clarity, I have specified the terms of the orders contained in the paragraphs that I would not set aside.

[132] I would order pre-judgment interest on the $1,000 damage award. If the parties cannot agree on the calculation of pre-judgment interest, I would permit them to make brief submissions of no more than one page about the appropriate amount within 7 days of the release of these reasons.

[133] I would also set aside the Costs Order.

[134] The appellants ask that they be awarded costs of the action. After factoring in the results on appeal, it is my view that the appellants have been largely successful. However, James Bay remains successful on its claim for defamation, albeit with a reduction in damages to a nominal amount.

[135] If the parties cannot agree on the disposition of the trial costs, I would permit them to deliver brief written submissions of no more than two pages within 7 days of the release of these reasons. In those submissions, the parties should address the issue of whether James Bay should be entitled to any trial costs because it was successful in its defamation claim brought "to establish a legal right, wholly irrespective of whether any substantial remedy is obtained": *101100002 Saskatchewan Ltd. v. Saskatoon Co-operative Association Limited*, 2022 SKCA 12, 467 D.L.R. (4th) 632, at para. 26, quoting *Anglo-Cyprian Trade Agencies Ltd. v. Paphos Wine Industries Ltd.*, [1951] 1 All E.R. 873 (K.B.), at p. 874.

[136] I would award the appellants costs of the appeal in the agreed upon all-inclusive amount of $50,000.

Released: June 20, 2025 “E.E.G.”

“L.B. Roberts J.A.”
“I agree. E.E. Gillese J.A.”
“I agree. S. Coroza J.A.”