THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 0185/2009

BETWEEN:

LESTER BRYANT BIRD

Claimant

AND

WINSTON BALDWIN SPENCER

CRUSADER PUBLICATIONS AND BROADCASTING LIMITED

Defendants

Appearances:
Ms. Leslie Ann Brisset with her Mr. Vere Bird III for the Claimant
Mr. Sanjeeve Datadin with him Ms. Sheri Ann Bradshaw for the Defendants

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2011: July 19
October 3
December 12
2012: February 21

JUDGMENT

INTRODUCTION

[1] **REMY J.**: This is an action for defamation.

[2] The Claimant is an Attorney at Law and the former Prime Minister of Antigua and Barbuda. He is also the Political Leader of the Opposition party the Antigua and Barbuda Labour Party (ALP). The 1st Defendant is the current Prime Minister of Antigua and Barbuda and is the leader of the ruling United Progressive Party (UPP). The Second Defendant is a

company which owns the Crusader Radio station over which the words complained of by the Claimant were carried live.

[3] By Claim Form filed on the 2nd April 2009 and Statement of Claim filed on the same date, the Claimant brought proceedings in respect of certain defamatory statements made by the First Defendant at a public rally on November 20th, 2008 and broadcasted live on the Second Defendant's radio station on the said date.

[4] The words complained of and alleged to have been spoken by the First Defendant are detailed in Paragraph 4 of the Statement of Claim and paragraph 2 of the Claimant's Witness Statement. The words are as follows:-

> **"...This is more than a Blue Wave this looks more like a Big Blue Tsunami of people, a Big Blue Tsunami of people who will keep this nation on track, a Big Blue Tsuname of people who will ensure that it is never again, never again for Lester Bird, Asot Michael, Gaston Browne and their gang."**
>
> **"...We have liberated a nation from the clutches of a greedy dynasty, we have replaced decades of thiefdom and thiefdom with transparency, accountability and integrity...."**
>
> **"...UPP troops are already battle ready so its only a matter of fine tuning the machinery and flushing out the large scale voter padding that is the ALP's election strategy..."**
>
> **"...Will you allow that in this country will you allow them to come back to save their skins after their would have stole millions of millions of the people's money we can't afford that we will not allow that to happen...."**
>
> **"...those Vagabonds are giving the impression that their hands are clean Lester Bird and Asot Michael and Gaston Browne, why then will you be challenging and putting this injunction and that injunction in the Courts, and trying to prevent us from getting into your bank accounts in Bermuda in the Isle of Man in Miami in New York in Switzerland. Why, why if you say that you haven't done anything wrong why are you preventing by placing all kinds of injunctions, trying to prevent the Courts from proceeding if you didn't do anything wrong. That is what is happening now a lot of injunctions, we have a lot of fights with them in the Courts all over the world when we try to get into their bank accounts when we try to unearth what was happening, and to find the money where it is? Because our aim is not only brothers**

and sisters for them to serve time but we want back the money and that is what we are seeking to do."

"...because I want to say to you we are not taking any chances with these vagabonds we are not taking any chances we go out there and fight fight in every corner in every nook and every cranny make sure that we look in the voters lists in the various constituencies and make sure we organize so that come election day we are properly mobilized because I know, I know brothers and sisters that we have the numbers the numbers are there."

[5] The Claimant claims the following relief against the Defendants:-

(i) Damages for defamation against the Claimant for words said on November 20, 2008, including aggravated and exemplary damages.

(ii) An injunction restraining the Defendants whether by themselves, their servants or agents or otherwise, from further publishing or causing to be published the said or similar defamatory words about the Claimant.

(iii) Costs on the indemnity basis and/or wasted costs against the Defendant.

(iv) Interest pursuant to section 27 Eastern Caribbean Supreme Court Act, Cap 143 of the Laws of Antigua and Barbuda.

(v) Such further and other relief as this Honourable Court deems fit.

[6] By their Defence filed on the 15th day of May 2009, the Defendants do not deny that the words were published, but deny that the words were published falsely and maliciously. They further deny that the words bore or were capable of bearing the meaning ascribed to them by the Claimant. The Defendants plead in the alternative, that the words were published on an occasion of extended qualified privilege in that "the statements were made by the First Defendant pursuant to a legal, social or moral duty to do so." The Defendants further contend that insofar as the words complained of have the meanings alleged by the Claimant, the words were "fair comment upon a matter of public interest, namely the conduct of the Claimant as when he was a Minister of Government between 1976 and 2004."

[7] In addition, the Second Defendant admits that the words complained of were contained in a broadcast referred to but denies that it was responsible for the publication of the words complained of in that:-

a) "it was not the author, editor or publisher of the statement complained of;
b) it took reasonable care in relation to its publication;
c) it did not know, and had no reason to believe what they did caused or contributed to the publication of a defamatory statement."

ISSUES

[8] The issues that arise for the Court's determination are:-

1) Whether the words complained of are capable of being defamatory;
2) Whether the words were defamatory in the circumstances;
3) Whether the words were defamatory of the Claimant?
4) Whether or not the Defences of Fair Comment, Qualified Privilege, Constitutional Privilege, Justification, Innocent Dissemination are available to the Defendants?
5) What damages, if any, should be awarded to the Claimant?

EVIDENCE

[9] The Claimant gave evidence on his own behalf and called no witnesses. The First Defendant gave no evidence but one witness was called on his behalf, namely the Attorney General of Antigua and Barbuda, Mr. Justin Simon (Mr. Simon). Mr. David George gave evidence on behalf of the Second Defendant. The evidence from the witnesses was by way of Witness Statements and cross-examination at the trial.

[10] In his Witness Statement, the Claimant stated that on the 20th November, 2008, he heard a radio broadcast on Crusader Radio which is owned and operated by the Second Defendant, in which the First Defendant at a public political rally "published and caused to be republished" statements about him stating that he had stolen millions of dollars from the people of Antigua and Barbuda, committed electoral fraud, and tried to cover up the theft of the money by filing several injunctions in the Courts. The Claimant stated that the

broadcast by the First Defendant "was quite lengthy" but that he recalled during the course of the broadcast, the First Defendant published the words complained of in Paragraph 4 of the Statement of Claim.

[11] The Claimant stated that he felt "horrified and aggrieved" when he heard these statements. He stated that all the allegations made by the First Defendant are untrue. He stated that, in relation to the publication by the Second Defendant, "he was not at all surprised that they participated and republished the offending words." He stated that the First Defendant and "several other high ranking members" of the United Peoples Party (UPP) are shareholders in the Second Defendant and "have a vested political and other interest" in destroying his good name and reputation. Further, that he has suffered injury to his good name and reputation and has endured odium and contempt from the Antiguan population regionally and internationally as a result of the reckless publication; and that, as a result, he claims compensation.

[12] Under a lengthy and rigourous cross-examination by Learned Counsel Mr. Sanjeev Datadin that spanned two days, the Claimant testified that he heard the words complained of "in person". He testified that the words were uttered at a UPP political rally called the Blue Wave. He testified that he was present at that rally and was at the back of the crowd but that he could hear because "the speakers were loud enough." He stated that he "pretty much" heard the entire First Defendant's speech, but that after he heard the words complained of, he "was so angry that he soon left." The Claimant stated that he heard the words uttered by the First Defendant sometime between 9.30 and 10.30 p.m, and that he left the rally before it was totally completed; he left after he heard the allegations of the First Defendant. He said that there was amplification via loudspeaker, so that the crowd could hear. He testified that as far as he could recall, the words stated in his Witness Statement were the exact words that he heard.

[13] The Claimant further testified that he was not paying any attention to any other speaker except the Prime Minister (the First Defendant). He re-iterated that he heard the words live and also heard them at the same time on the radio. He stated that what he meant by

saying that the statements were re-published is that "they were being broadcast live when the speech was being made by the First Defendant." He admitted that other than on the 20th November 2008, that he did not ever hear these statements again. The Claimant also testified that he understood the word "gang" to mean a criminal gang and understood "a greedy dynasty" to mean the ALP Government, since they had been in office for 28 years. He added that he understood "those vagabonds" to mean Lester Bird, Asot Michael and Gaston Browne.

[14] Mr. Simon's evidence in chief was by way of Witness Statement to which was attached a Press Statement dated the 1st March 2006. Mr. Simon's evidence as contained in the Witness Statement was that as Attorney General of Antigua and Barbuda, he has been the government's "chief legal adviser." Mr. Simon stated that, "in the latter part of 2004 one Bob Lindquist was appointed by the government to investigate certain questionable financial transactions conducted or executed by former ministers of government." As a result of the investigation, a civil suit claim was filed in the High Court by the Government against nine defendants including the Claimant, the former Prime Minister Lester Bird. The Press Release which was attached to the Witness Statement was dated 1st March 2006. The aim of the Press Release was to inform the general public that a civil suit had been filed in the High Court by the Government on the 20th February 2006 against nine defendants including the Claimant. The Press Release stated that "the claim is in the main asking for an account of monies alleged to have misappropriated from the Government's account... and general damages for misrepresentation and misfeasance in public office." The Court notes that this is the same civil suit referred to in the Witness Statement of Mr. Simon. The Press Release concluded by stating that "for the time being no further statements will be made by Government on this matter."

[15] Under cross-examination, Mr. Simon testified that he was not present at the U.P.P rally on November 20th 2008. He testified that he had not heard the broadcast on the Crusader radio and that he was not familiar with the Defence put forward in this matter. He testified that the "gist" of the words complained of was communicated to him by Defence Counsel and that he was asked to address a particular issue, namely the issue of the IHI loan. He

stated that what was conveyed to him was that the Defendant at a public meeting had stated that the Claimant, along with two (2) other named executive members of the Labour Party and former Government Ministers had diverted monies which had been paid by Government allegedly through IHI, which was a Japanese company, in respect of a loan or a debt that was owed to the Company.

[16] Mr. Simon testified that he was aware that there were civil claims filed against the Claimant for wrongdoing while in office. He further testified that as an Attorney at Law, he considered that once a matter went before the Court, the Defendants would be entitled to file their Defence and the matter should not be pre-judged by the public. He testified that he has known the Claimant from about 1977 and that he did not know the Claimant to be convicted of any crime in Antigua. He added that as far as he was aware, the Claimant has not been convicted on account of perverting the course of justice by placing injunctions to prevent persons getting into his bank accounts, and that the Claimant "has never been charged far less convicted" with regards to the Medical Benefits Scandal or the Airport Resurfacing Scandal or the Columbia Gun Running Scandal or with respect to the Southern Developers Scheme.

[17] Mr. David George gave evidence on behalf of the Second Defendant. In his Witness Statement, Mr. George stated that he is the Program Director of the Second Defendant's radio station, namely Crusader Radio. He stated that the words complained of were not defamatory of the Claimant. He stated that Crusader Radio was not responsible for the published statement complained of and "was not the author, editor or publisher of the statement." Mr. George stated that Crusader Radio "took reasonable care in relation to its broadcasting and it did not know and had no reason to believe that what they did caused or contributed to the publication of the statement complained of."

[18] Mr. George stated that Crusader Radio was only involved as the broadcaster of a live programme containing the statement, in circumstances in which they had no control over the speakers who spoke at the event. He stated further that prior to the broadcast of any program, all participants in the programme were specifically requested to refrain from

making obscene or defamatory comments. He stated that Crusader Radio did not know and could not have known that the statements complained of were defamatory as alleged.

[19] Under cross-examination, Mr. George testified that he did not request that the First Defendant provide him with his speech in permanent form prior to the broadcast on November 20th 2008. He testified that, based on his understanding, a defamatory comment means a lie. He testified that in his opinion, accusing an innocent person of committing a crime would not be defamatory; it would just be an accusation. He stated that he had no evidence of any convictions of the Claimant for a crime that he has committed. Mr. George testified that he reasonably believed the words complained of to be true.

SUBMISSIONS

[20] Counsel for the Claimant filed submissions within the time stipulated by the Court at the close of the trial. As of the date of writing this Judgment, which was at least a fortnight after the date specified by the Court, no submissions had been filed by Counsel for the Defendants. Accordingly, this judgment is based on the submissions of Counsel for the Claimant and on the Court's own inherent knowledge of the law.

THE LAW

[21] According to Gatley on Libel and Slander[1], "no civil action can be maintained for libel or slander unless the words complained of have been published..." As to what is meant by the word "published", Professor Kodilinye in his text Commonwealth Caribbean Tort Law[2], states that by 'published' is meant "communicated by the defendant to at least one person other than the plaintiff himself." Defamation protects a person's reputation and his reputation is not the good opinion he has of himself but the estimation in which others hold him." The learned writer goes on to say (at paragraph 7.1) that "to succeed in an action of defamation, the Claimant must not only prove that the Defendant published the words and

[1] 11th Edition, page 163, paragraph 6.1
[2] 3rd Edition, page 251

that they are defamatory; he must also identify himself as the person defamed... The words complained of must be published 'of' the Claimant."

[22] The uncontroverted evidence before the Court, is that the words complained of were uttered at a public rally; loudspeakers were used to ensure that the listeners heard the address of the speakers. In addition, the speech was aired live on the radio station owned by the Second Defendant. Further, the Defendants do not deny that the words complained of were uttered by the First Defendant. They also do not deny that the words were broadcast live via the Crusader Radio.

ARE THE WORDS DEFAMATORY?

[23] Where trial is by Judge alone – as in our jurisdiction - the Judge must perform the functions of judge and jury. He must decide (a) whether the words are capable of being defamatory and (b) if the answer is in the affirmative, whether the words are defamatory in the circumstances of the particular case.

[24] Halsbury's Laws of England[3] states as follows:-

> "In deciding whether or not a statement is defamatory, the Court must first consider what meaning the words would convey to the ordinary person. Having determined the meaning, the test is whether, under the circumstances in which the words were published, the reasonable person would be likely to understand them in a defamatory sense."

[25] It is settled law that in order to understand the meaning and significance of words complained of, one must look at the context in which they were used; further, that test is objective. In **Jones v Skelton**[4], Lord Morris explained the concept of the ordinary and natural meaning of words as follows:-

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

[3] 4th edition, page 22 paragraph 4.3
[4] [1963] 3 ALL ER 952

words (see Lewis v Daily Telegraph Ltd). The ordinary and natural meaning may therefore include any implication or reference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict rules of construction, would draw from the words."

[26] By Order dated July 30th 2009, Master Mathurin ruled, pursuant to an application made under Rule 69.4 of the Civil Procedure Rules (CPR) 2000, that the words contained in Paragraph 4 of the Statement of Claim are capable of the natural and ordinary meanings specified at paragraph 9 of the Statement of Claim. There was no appeal against the ruling of the learned Master.

[27] In paragraph 9 of the Statement of Claim the Claimant alleges that the words complained of in their natural and ordinary meaning meant and were understood to mean that :-

> "The Claimant, whilst Prime Minister, acted corruptly, immorally and against the interests of the population by stealing millions of dollars.
>
> That the Claimant stole considerable sums of money in his office as Prime Minister and, in so doing, is guilty of corruption and gross abuse of his office and public position and therefore is not fit to hold the office of Prime Minister of Antigua and Barbuda again.
>
> That the Claimant had something improper or corrupt to hide in relation to his tenure as Prime Minister and therefore have brought injunctions in an attempt to cover up his misdeeds and subvert the proper administration of justice.
>
> That the Claimant has whilst he was a Prime Minister and also whilst he was Leader of the Opposition has conspired and or deliberately committed electoral fraud by padding voters lists."

[28] Master Mathurin having held the words to be capable of bearing the defamatory meanings ascribed to them by the Claimant, the next question to be considered by the Court is whether the words did in fact bear the alleged or any meaning defamatory of the Claimant.

[29] As stated by Lord Reid in **Lewis v Daily Telegraph Ltd.**[5], "the ordinary man does not live in an ivory tower". The question for the Court is therefore, whether the words complained

[5] (1964) AC 234, page 258

of would convey to this ordinary, average citizen of Antigua and Barbuda, a meaning defamatory of the Claimant.

[30] In answering this question, the words complained of must be put in context. It is undisputed that the said words were uttered at a political rally prior to general elections in Antigua and Barbuda. It is a fact that politics in our region is a highly emotive issue. Friendships have been eroded and sometimes even family ties broken as a result of persons being of different political persuasions. In a great many cases the wrangling and disagreement continue long after Election Day. In the instant case, the words complained of impute criminality and corruption on the part of the Claimant. There is no doubt that the ordinary citizen of Antigua and Barbuda is well aware that theft is a criminal offence punishable by imprisonment. There is therefore, in my view, no question that, in the circumstances, the ordinary listener whether present at that political rally, or listening to the radio progamme, being an average, sensible citizen of Antigua and Barbuda, and a potential voter, would understand the words uttered as defamatory in the circumstances. There is no doubt that the ordinary, reasonable citizen of Antigua and Barbuda would have understood the words complained of to mean that the Claimant had acted corruptly, immorally and against the interests of the population of Antigua and Barbuda; that he had stolen monies properly belonging to the people of Antigua and Barbuda; that he was not fit to hold the office of Prime Minister of Antigua and Barbuda again; that he had attempted to subvert the proper administration of justice by bringing injunctions to cover up his misdeeds; and that he was guilty of conspiring and or deliberately committing electoral fraud by padding voters lists.

[31] In the circumstances, the defamatory statements would expose the Claimant to hatred, ridicule or contempt, would injure him in his public office and/or would tend to lower him in the estimation of right-thinking members of the Antiguan and Barbudan society generally.

[32] With respect to whether the words complained of were published "of the Claimant", it is unquestionable that the words are published of the Claimant. The Claimant is referred to by name and is clearly identified along with two other persons. These persons were

further described as "vagabonds". It is irrelevant that the Claimant is named along with two (2) other persons, and was not the only person named; it only means that each of the three persons named has a cause of action. As Learned Counsel for the Claimant stated in her Submissions, "it should be noted that the Claimant gave evidence at the trial that one of those other two persons mentioned also sued with respect to the publication."

[33] Professor Kodilinye[6] states that:-

> "Where a disparaging statement is made of a whole class or group of persons, ...no individual member of the class can sue, unless:-
>
> (a) The class is so small or so ascertainable that what is said about the class is necessarily said of each member of it; or
> (b) The individual member can show that he was particularly pointed out."

[34] In the case at bar, the Claimant is "particularly pointed out" not once but twice.

[35] In the circumstances, I find that it is beyond argument that the words complained of are defamatory, that they were capable of referring to the Claimant and did in fact clearly refer to the Claimant.

DEFENCES

FAIR COMMENT

[36] In paragraph 5 of their Defence, the Defendants plead as follows:-

> "Further and in addition if and insofar as the words complained of have the meanings set out in paragraph 9 of the Statement of Claim, they are fair comment upon a matter of public interest, namely the conduct of the Claimant as when he was a Minister of Government between 1976 and 2004."

[6] Commonwealth Caribbean Tort Law, page 246

[37] The basis of the defence of Fair Comment is stated in Gatley[7] (supra) as follows:-

> "It is a defence to an action of libel or slander that the words complained of are fair comment on a matter of public interest.
>
> 'The right of fair comment is one of the fundamental rights of free speech and writing.... and it is of vital importance to the rule of law on which we depend for our personal freedom' (per Scott L.J. in Lyon v Daily Telegraph (1943) 1 K.B. 746 Ca at 753)
>
> The right is a "bulwark of free speech" and is one of the means by which the common law attempts to comply with the guarantee of freedom of expression found in art. 10 of the European Convention on Human Rights. There are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able to comment freely, and even harshly, so long as they do so honestly and without malice."

[38] Matters of public interest include inter alia, (a) the affairs of government, both national and local; (b) the public conduct of those who hold or seek public office or positions of public trust – (see Kodilinye, at page 257). It therefore follows that the First Defendant, like other members of the public, was entirely free to comment on such matters of public interest, provided that the comments were without malice and were made upon facts that truly exist.

[39] According to Gatley[8], "to succeed in the defence (of fair comment) the defendant must show that the words are comment and not a statement of fact. However, an inference of fact from other facts referred to may amount to a comment. He must also show that there is a basis for the comment, contained or referred to in the matter complained of, at least to the extent of indicating that what is being stated is comment...4" The law is therefore settled that if the words complained of are fact and not comment, then the defence of fair comment will not be available. This requirement is fundamental to the defence.

[40] Further, at page 1013, the learned writer states:-

> "Where a Defendant alleges that the words complained of are fair comment on a matter of public interest, he must specify the defamatory meaning which he seeks to defend as fair comment .....The defendant should specify, usually at the start of his pleading of the

[7] At page 335
[8] At page 336

defence of fair comment, the comment in the words complained of, which he will contend falls within this defence."

[41] Part 69.3 of the Civil Procedure Rules (CPR) 2000 provides:

> "69.3 - A defendant (or in the case of a counterclaim, the claimant) who alleges that:-
> (a) in so far as the words complained of consist of statements of facts, they are true in substance and in fact; and
> (b) in so far as they consist of expressions of opinion , they are fair comment on a matter of public interest; or
> (c) pleads to like effect;
>
> must give particulars stating-
> (i) which of the words complained of are alleged to be statements of fact; and
> (ii) the facts and matters relied on in support of the allegation that the words are true."

[42] The Defendants have not complied with the above requirements.

[43] The Defendants plead "Particulars of Facts and Matters on Which the Comment Was Based". The "Particulars" pleaded are as follows:-

> 5.1 In 1989 the Claimant was involved in a scandal where Antigua and Barbuda passports and visas were sold by Bill Cheung, Antigua and Barbuda Consul to Hong Kong for up to $20,000.00. An inquiry was set up by the Claimant and retired Eastern Caribbean Supreme Court Justice Horace L. Mitchell who conducted the inquiry and concluded that the Claimant in fact authorized the issuance of the passports and visas. Three days after the scandal was made public by a local newspaper Bill Cheung was suspended as Consul and Envoy and barred from entering Antigua and Barbuda by the Claimant.
>
> 5.2 In 1995 after Hurricane Luis a substantial amount of money was withdrawn from the Social Security Fund for reconstruction. Approximately $1,000,000.00 was given to the confidant of the claimant and was unaccounted for and the claimant told the nation "I intend to make a full report to the people and account for everything." Fourteen years later the Claimant never did.
>
> 5.3 While being Prime Minister of Antigua and Barbuda from 1994 to 2004 the Claimant failed to ensure as required by the Constitution of Antigua and Barbuda that the public accounts were audited and presented before parliament ostensibly to avoid the theft in government.

5.4 That after the Claimant was defeated in the general elections of 2004 the Government of Antigua and Barbuda commissioned an investigation into the conduct of the Cabinet then headed by the Claimant in respect to the re-servicing of a loan, where it was discovered that millions of dollars rightly belonging to the government of Antigua and Barbuda was illegally diverted to the personal accounts of some leaders of the then government and the Claimant was implicated as been part of this scandalous affair.

5.5 That while the Claimant was a member of the Cabinet of Antigua and Barbuda, government's lands were sold to Southern Developers Limited, a company in which the Claimant has an interest at a price substantial below the market value.

5.6 The words complained of, taken as a whole are fair comment on the whole range of corruption scandals outlined aforesaid in paragraph 4.8 of this Defence."

[44] I have addressed the topic of the "corruption scandals" later in the judgment.

[45] It is the submission of Counsel for the Claimant that the Defendants' defence of Fair Comment should fail. Counsel submits, among other things, that:-

(a) A defence of fair comment is not a defence to false and defamatory statements of fact. Counsel cites the case of **Reynolds v Times Newspapers Ltd**[9] where it was held inter alia that "It is important to keep in mind that this defence is concerned with the protection of comment, not imputations of fact. If the imputation is one of fact, a ground of defence must be sought elsewhere."

(b) The words complained of do not fall into the realm of what can reasonably be considered a comment. The First Defendant made very clear factual conclusions that imputed that the Claimant and others had committed serious criminal offences.

[46] I agree with Counsel's submissions. I find that the defence of fair comment cannot avail the Defendants in this case. The statements complained of by the Claimant are in reality a series of statements of fact and not comment. As stated in Halsbury's Laws of England[10], "the defence applies only to words recognizable as 'comment' in the sense of an

[9] [1999] 3 WLR 1010 (HL)
[10] page 72 paragraph 138

expression of opinion and not mere assertions of fact." I am unable to extract any expression of opinion from the words complained of. This defence accordingly fails.

[47] In the event that I am incorrect in my finding that the words complained of could not be regarded as comment, the law is settled that if the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. "The comment must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated." – per Kennedy J. in **Joynt v Cycle Trade Co.**[11].

[48] I am of the view that there are no proven facts before the Court on which the purported comment or comments can be based. I am of the further view that what has been pleaded as facts are allegations and accusations devoid of proof and/or supporting documentary evidence.

[49] The law is also settled that malice will destroy the defence of fair comment. The onus of proving malice rests on the Claimant. The malice that is required to be proved is proof that the Defendant did not genuinely hold the view he expressed. The question to be asked is whether the comment is the "honest expression of the commentator's real view and not merely abuse or invective under the guise of criticism."

[50] Learned Counsel for the Claimant has submitted that the facts listed under paragraph 5 of the Defence (and referred to in paragraph 43 above) have not been proven as true, "since no evidence was led or documents produced to prove these allegations at the trial." I agree. I find that the Defendants have failed to establish the truthfulness of the alleged facts on which the defamatory statements were based. I find further that the First Defendant, in the absence of the necessary proof, could not and did not have a genuine belief in the truth of what he stated. In arriving at my conclusion, I have taken into account the fact that the defamatory statements were made by a person who is well versed in the law and one who is no stranger to the political arena. I have also taken into account the fact that the First Defendant failed to give evidence to defend or support the offending

[11] [1904] 2 K.B. 292 at 294

publication. With respect to the Second Defendant, I find it significant that Mr. David George testified under cross-examination that he believed the defamatory statements to be "reasonably true but not factually true." For the defence of fair comment to succeed, the Defendants must prove the factual basis of the comment to be true. The Defendants in this case have failed to do so. Further, I am not satisfied that the Defendants honestly believed that the defamatory statements were true. In my view, therefore, the defence of fair comment does not avail the Defendants. This defence therefore fails.

QUALIFIED PRIVILEGE

[51] The Defendants plead in paragraph 4 of their Defence that:-

> "4. In the alternative, the First Defendant states that the aforesaid words were published on an occasion of extended qualified privilege in that the statements were made by the First Defendant pursuant to a legal, social or moral duty to do so and the publication of the words to a wide audience was reasonable in the circumstances." The instances of "extended qualified privilege" particularized by the Defendants are as follows:-
>
> PARTICULARS OF EXTENDED QUALIFIED PRIVILEGE
>
> "4.1 The First Defendant is and was at the material time the Political Leader of the United Progressive Party (UPP), Prime Minister of Antigua and Barbuda and the sitting Parliamentary Representative for the St. John's Rural West Constituency.
>
> 4.2 The Claimant is and was at the material time the sitting Parliamentary Representative for the St. John's City West Constituency representing the Opposition Antigua Labour Party (ALP).
>
> 4.3 General elections were imminent in Antigua and Barbuda. Both Claimant and First Defendant were again contesting the elections in their respective constituencies for their respective parties.
>
> 4.4 Section 12 of the Constitution of Antigua and Barbuda provides, inter alia, for the freedom to hold opinions without interference, freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether the dissemination be to the public generally or to any class or class of persons) ....subject to certain safeguards including, inter alia, protecting the reputations, rights and freedoms of other persons.....

4.5 Communications concerning political or governmental matters between the electors and the elected representatives, between the electors and the candidates for election, are central to the system of representative government in Antigua and Barbuda. Section 12 of the Constitution of Antigua and Barbuda aforesaid protect that freedom of communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice as electors.

4.6 Each member of the Antiguan and Barbudian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Antigua and Barbuda. The duty to disseminate such information is simply the correlative of the interest in receiving it. The First Defendant had a legal, social and moral duty to communicate with the electorate and the electorate has a corresponding right or interest to receive the communication. The interest that each member of the Antiguan and Barbudan community has in such a discussion necessitates publication to a wide audience, that is, throughout the whole of Antigua and Barbuda, and all Antiguans and Barbudans in the diaspora. The vast majority of persons listening on the worldwide web were Antiguan and Barbudan nationals in the diaspora absorbing the political issues and happenings in their country.

4.7 The First Defendant, in his role as Political Leader of the United Progressive Party and Prime Minister of Antigua and Barbuda was entitled to address the electorate on matters concerning the United Progressive Party, the Claimant and the Antigua Labour Party so that the electorate could make an informed decision as to which way to vote.

4.8 The words set out in paragraph 4 of the Claimant's Statement of Claim referred to various corruption scandals which occurred over the decades under the Antigua Labour Party Administration from 1976 to 2004 of which the Claimant, Lester Bird and Asot Michael were leading members and whom the First Defendant merely used as representative of the Antigua Labour Party. In the Premises the Defendants published the words complained of in the reasonable and or necessary protection of their own interests and in the interest of the citizens of Antigua & Barbuda.

PARTICULARS OF CORRUPTION SCANDALS

(i) The Medical Benefits Inquiry
(ii) The Airport Resurfacing Scandal
(iii) The Columbia Gun-Running Scandal
(iv) The IHI Loan Scandal
(v) The Sale of Antigua and Barbuda Passports
(vi) The Scandal of lands being sold to ALP Cabinet Members at an undervalue e.g. to Southern Developers Limited a company in which the Claimant has an interest."

[52] The Defendants further plead in paragraph 4.9 of their Defence that "the publication of the aforesaid statements to a wide audience was reasonable in the circumstances and provides the First Defendant with the defence of extended qualified privilege."

[53] The law as it relates to qualified privilege has been stated in the much quoted passage of Lord Atkinson in **Adam v Ward**[12]:-

> "An occasion is privileged where the person who makes the communication has an interest, or a duty, legal, social or moral to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

[54] Whether a legal, moral or social duty to communicate the defamatory matter exists in the particular case is a question of law, to be decided by the judge. There is no litmus test for determining, with any degree of specificity, what is moral, ethical or social duty or interest. Lindley L.J. in **Stuart v Bell**[13], has opined that the test to be applied is as follows:-

> "Would the great mass of right minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication?"

[55] There is no doubt that "each member of the Antiguan and Barbudan community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Antigua and Barbuda." There is also no doubt that "the First Defendant, in his role as Political Leader of the United Progressive Party and Prime Minister of Antigua and Barbuda was entitled to address the electorate on matters concerning the United Progressive Party, the Claimant and the Antigua Labour Party so that the electorate could make an informed decision as to which way to vote." Indeed, this is the essence of democracy.

[56] It is settled law that where privilege is claimed on the ground that there was a duty on the defendant to make the communication and an interest in the party to whom it was made to

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[12] [1917] A.C. 309
[13] [1891] 2 QB 341, p. 350

receive it, such duty and such interest must have existed in fact. It is not sufficient that the defendant honestly believed that he was under a duty to make the communication and that the person to whom he made it had an interest in the subject matter. Simply stated, a duty will arise where it is in the interest of the public that the publication should be made, and will not arise simply because the information appears to be of legitimate public interest.

[57] The House of Lords has held that qualified privilege may apply to political discussion in all the circumstances of a particular publication, but that there is "no generic privilege for political discussion" (see Lange v Atkinson and another[14]).

[58] The headnote to the leading case of **Reynolds v Times Newspapers Ltd and Others**, (supra) states inter alia that:-

> (1) "The common law should not develop a new subject matter category of qualified privilege whereby the publication of all political information would attract qualified privilege whatever the circumstances, since that would fail to provide adequate protection for reputation, and it would be unsound in principle to distinguish political discussion from other matters of serious public concern; but that qualified privilege was available in respect of political information upon application of the established common law test of whether there had been a duty to publish the material to the intended recipients and whether they had had an interest in receiving it, taking into account all the circumstances of the publication including the nature, status and source of the material; and that, accordingly, a claim to privilege stood or fell according to whether it passed that test."

[59] In the Reynolds case, Lord Nicholls further suggested a non-exhaustive list of matters which a court ought to take into account when deciding whether a defamatory statement, which misstates facts, was published in the public interest and on an occasion of qualified privilege. These matters include:-

> 1) "The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
>
> 2) The nature of the information, and the extent to which the subject-matter is a matter of public concern.

[14] [1998] 3 NZLR 424

3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for the stories.

4) The steps taken to verify the information.

5) The status of the information. The allegations may have already been the subject of an investigation which commands respect.

6) The urgency of the matter. News is often a perishable commodity.

7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

8) Whether the article contained the gist of the plaintiff's side of the story.

9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10) The circumstances of the publication, including the timing."

[60] The Reynolds case has been followed by the English Court of Appeal case of **Loutchansky v Times Newspapers Ltd**[15]. In that case, the Court held that "when deciding whether there had been a duty to publish defamatory words to the general public, the standard to be applied was that of 'responsible journalism'. This standard should not be set too low, as that would encourage newspapers to publish untruths... on the other hand, the standard should not be set too high, as this would deter newspapers from discharging their proper function of keeping the public informed."

[61] Applying the Reynolds test to the instant case, I am of the view that the First Defendant has not satisfied the test. The defamatory statements made by the First Defendant allege that the Complainant committed serious criminal offences; they also allege corruption and dishonesty on the part of the Claimant. These are serious allegations which had the potential of destroying the Claimant's political future, as well as his professional life. The timing of the statements is also highly relevant and pertinent. The defamatory statements were made at a political rally held prior to general elections. This was not a case where there was any urgency in alerting the public of matters of vital concern. Further, the defamatory meaning of the statements was obvious and apparent to the ordinary, average

[15] [2001] 4 All ER 115, (No.2).

citizen of Antigua and Barbuda. I have stated earlier that the allegations of criminality have not been proven, and that the defamatory statements were made without proof or documentary evidence to support the said allegations and/or without a genuine belief in their truth. The First Defendant therefore had no duty, moral, legal, social or otherwise to publish or communicate unproven and unsubstantiated allegations of criminality and corruption against the Claimant to the public, and there was no public right or interest in receiving it. The law and the authorities are clear that there is no duty to publish misinformation and no corresponding duty to receive it.

[62] I am of the view that the Second Defendant failed in its duty to adhere to the principles of responsible journalism enunciated in the Reynolds case above. As stated earlier, the allegations made against the Claimant are serious in nature. Consequently, given the fact that the Claimant was aspiring to public office, the allegations are extremely damaging. Further, in light of the nature and the timing of the live broadcast, namely its proximity to general elections, the producers of Crusader Radio should have been even more keenly aware of the need to ensure that the broadcast did not contain defamatory words, and therefore should have taken the necessary steps to do so.

[63] Under cross-examination, Mr. George testified that he did not see the need to request the First Defendant's speech in writing prior to the live broadcast. He further testified that during the three (3) years that he has been programme director in the employ of the Second Defendant, he has pre-recorded live events for re-broadcast at a later date. However, when questioned as to whether he could not have done so on November 20th 2008, Mr. George did not even attempt to give a reason. His response was simply a bare denial in the form of an emphatic "No", stated with the nonchalance which he portrayed throughout the trial.

[64] In the Privy Council case of **Hugh Bonnick v Margaret Morris and the Gleaner Company Ltd.**[16], it was held, in paragraph 23 of the judgment, that :-

[16] [2003] 1 AC 300

"Stated shortly, the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals.

Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege journalists must exercise due professional skill and care."

[65] I am therefore of the view that the Second Defendant has not satisfied the Reynolds' test. Consequently, that the Second Defendant had no legal, moral or social duty to communicate over their radio station statements defamatory of the Claimant.

[66] I am of the view that, applying the test of Lindley L.J. in **Stuart v Bell** (supra), the great mass of right minded citizens of Antigua and Barbuda, placing themselves in the position of the Defendants, would not have considered it their duty, under the circumstances, to communicate the defamatory statements.

[67] It is the submission of Counsel for the Claimant that if the First Defendant is to successfully rely on the defence of qualified privilege, he must establish that he had a Duty to publish the words complained of.

[68] The further submissions of Counsel on the defence of Qualified Privilege in the instant case are as follows:-

a) To succeed on this defence of Qualified Privilege on the basis of a political statement the .....Defendants must prove that the words complained of BEING a political statement/discussion was published on the occasion which WAS privileged as required under the common law defence of qualified privilege.
b) The words complained of are conclusions of fact that the Claimant committed serious criminal offences and cannot be considered as a political statement or discussion.
c) The Defendants could not prove the criminal offences the Claimant was alleged to have committed, since it is undisputed that he has never been convicted of any crime in Antigua.
d) The various case law authorities have shown that there is no duty to publish allegations made about a person that accuses him of committing a crime where the allegations or charges have not been investigated or are still under investigation.

[69] Learned Counsel cited the case of **Purcell v Sowler** [17], where the Court held that there is no duty to publish allegations of criminal wrong-doing to the public and such an allegation to maintain the privilege ought to only be published to the persons whose duty it is to investigate the offence. Counsel also cited the case of **Blackshaw v Lord**[18], where Stephenson LJ stated that "...but where damaging allegations or charges have been made and are still under investigation or have been authoritatively reported... there can be no duty to report them to the public...."

[70] Counsel also cited the Barbados Court of Appeal case of **Mc Donald Farms Ltd v The Advocate Co. Ltd.**[19], in which the Blackshaw case was relied on. In the McDonald Farms case, the Court ruled that where damaging allegations had been made and were still under investigation, there could be no duty to report them to the public other than in exceptional circumstances. Counsel submits that in the present case, urgency could not be pleaded as an exceptional circumstance justifying a plea of qualified privilege.

[71] In any event, the law is settled that malice on the part of the Defendant will destroy the defence of qualified privilege (as well as that of fair comment). In **David Carol Bristol v Dr. Richardson St. Rose**[20], a decision of the Court of Appeal in our jurisdiction, Rawlins J.A., as he then was had this to say :-

> "Where words are published under circumstances which create qualified privilege, the claimant might still prevail on a claim for defamation if he proves that the person abused the privilege because of express or actual malice. The test of express malice requires the claimant to prove that the defendant did not honestly believe that the words were true because the defendant was either aware that they were not true or was indifferent to their truth or falsity. Express malice arises as a question of fact, which is to be drawn or inferred, inter alia, from the contents and source of the statements and the circumstances in which the statements were made. A defendant might be indifferent to their truth or falsity where he took no investigative steps to ensure their (sic) when he could have done so. Whether a defendant was indifferent to the truth of the defamatory statements is subjective to the defendant and depends, among other things, on his level of knowledge,

[17](1876-77) L.R. 2 CPD 215
[18] [1984] QB 1
[19] (1996) 52 WIR 64
[20] Civil Appeal No. 16 of 2005

education and intelligence. To a great extent, it is an inquiry as to the motive of the publication."

[72] The Claimant in paragraph 4 of his Statement of Claim pleads that the First Defendant "falsely and maliciously" published the words complained of. In paragraph 11 of the said Statement of Claim, he pleads that:-

> "Further or alternatively the said words complained of aforesaid were published and broadcasted maliciously, in the sense that the Defendants were actuated by political agendas irrespective of the truth."

[73] It is the submission of Learned Counsel for the Claimant that malice has been established. Counsel invites the Court to find "that there is evidence of malice on the part of the First Defendant so overwhelming that it extinguishes any plea of qualified privilege and/or fair comment". Counsel bases her submission among other things on the following:-

(a) "Intrinsic malice can be seen by virtue of the derisive, and scorching language and tone used throughout by the First Defendant. The Claimant was being referred to as a vagabond and the leader of a gang suggestive of criminality. The language throughout was violent and disproportionate to the facts relied on in the Defence, most of which are not true and not proven otherwise to be true by any documents or witness for the Defendants.

(b) At the time of the speech on November 20, 2008 the First Defendant knew that what he was saying was not factual. He knew that there was a high court claim filed in 2006 with respect to the issue and that it was not at the stage of case management and that it was also discontinued in Miami. As Prime Minister, the first defendant ought to be familiar with the constitutional provision relative to presumption of innocence in criminal matters and the standard of proof involved.

(c) That notwithstanding the Attorney General's public address on March 1, 2006 identifying the details with respect to the allegations and stating further that for the time being no further statements will be made by the Government on this matter, the First Defendant still persisted with the untrue statements.

(d) In the First Defendant's defence, he avers that "having regard to the subject matter of government and politics and particularly the impending elections the motive of causing 'political damage' to the Claimant or his party cannot be regarded as improper." Counsel submits that based on this the First Defendant has "somewhat conceded that he misused the occasion since the real motive was to cause political damage to the Claimant which was more foremost to the public's interest."

[74] The First Defendant has himself provided the Court with his motive for publishing the words complained of, namely that of causing "political damage." This is pleaded in paragraph 7 of the Defence.

[75] I find that the First Defendant was actuated by malice. I have taken into account firstly that the First Defendant made use of the occasion of the political rally for an improper purpose. He was not motivated by any sense of duty to publish the material complained of, but was propelled by political gain, namely that of damaging the Claimant politically, and thus scoring political mileage for himself. I find further that the First Defendant was indifferent to the truth or falsity of the defamatory statements. The defamatory meaning of the words complained of had to be obvious to the First Defendant. As an Attorney at Law and a politician of long standing, and one who is therefore obviously not unintelligent, the First Defendant had to be aware that he could not publish defamatory statements about the Claimant without first ensuring that the allegations made were true or had been proven. It is worth noting and repeating that Mr. Simon, in his evidence, testified that to his knowledge, the Claimant had not been charged, far less convicted of any criminal charges with respect to the "various scandals" levied at the Claimant by the Defendants. The First Defendant therefore, could not have been unaware of that fact, or if he was, was willfully unaware of the same.

[76] I am also of the view that the Second Defendant was actuated by malice. Based on his Witness Statement and his evidence at the trial, I am of the view that Mr. George was completely indifferent to the truth or falsity of the defamatory statements. His evidence under cross-examination was that as far as he was concerned, a defamatory statement

was "a lie." Mr. George also testified that accusing an innocent person of committing a crime was not defamatory; that it was "just an accusation." I have difficulty in coming to the conclusion that Mr. George, a Program Director and former Station Manager of a Radio Station, is that naïve.

[77] I have also taken into account the fact that the Second Defendant is a company in which the First Defendant and other members of the UPP party are major shareholders. That fact was undisputed. After an initial reluctance, Mr. George admitted under cross-examination that the First Defendant was a shareholder in the Second Defendant Company. In the view of the Court, this admission is important as it lends credence to the Claimant's contention that the Defendants' conduct was actuated by malice and that the Defendants had a vested interest in defaming the Claimant. The whole issue of the Second Defendant's malice is dealt with in more detail in paragraph 79 of the judgment under the heading of "Innocent Dissemination."

[78] In light of the above, I find that the Defendants are not protected by the cloak of qualified privilege. Accordingly that they cannot avail themselves of this defence.

INNOCENT DISSEMINATION

[79] Learned Counsel for the Claimant has, in her Submissions, addressed the Issue of Innocent Dissemination. Counsel states that the Second Defendant has sought to rely on the Defence of Innocent Dissemination, which is contained in paragraph 11 of the Defence.

[80] In paragraph 11 of the Defence, the Second Defendant "denies that it is responsible for the publication of these words complained of in that:-

11.1 it was not the author, editor or publisher of the statement complained of;

11.2 it took reasonable care in relation to its publication; and

11.3 it did not know, and had no reason to believe what they did caused or contributed to the publication of a defamatory statement."

[81] The Second Defendant goes on to plead "Particulars" as follows:-

(1) "The Second Defendant was only involved as the broadcaster of a live programme containing the statement, in circumstances in which they had no effective control over the First Defendant the maker of the statement.

(2) Prior to the broadcast, all participants in the programme were specifically requested to refrain from making obscene or defamatory comments."

[82] Learned Counsel cited the case of **Vizetelly v Mudie's Select Library Ltd**[21], where the elements of the defence of innocent dissemination were laid down, namely "that the Defendant had to show:

1. That he had no knowledge of the libel;
2. There was no reason for him to suppose that the work concerned contained a libel; and
3. That he had not been negligent in not knowing that there was a libel when he disseminated the work."

[83] Counsel submits that the Second Defendant "was in fact negligent and did not take reasonable precautions outside of the scant warning that was given to the First Defendant through the Public Relations Officer". She stated that "it was seen that Mr. David George who didn't give the warning himself couldn't say for sure if the warning was given since he wasn't there but merely anticipated that it would have been given." She stated that the evidence of Mr. George is that "neither he nor any other employee at Crusader Radio saw the speech of the First Defendant in writing prior to November 20, 2008 in order to satisfy himself that the speech did not contain defamatory or obscene comments." Additionally, that Mr. George further stated that "he did not see the need to request the speech in writing since it was a live broadcast."

[84] It is the further submission of Learned Counsel that the court can make the inference that the Second Defendant "was complicit in the publication of the offending comments

[21] 1990, 2 QB 170

since it was undisputedly the official radio station for the UPP and controlled by High Ranking members in the UPP." She also submits that it was this affiliation "that compromised the duty of care expected in these circumstances and led to the lackluster controls exhibited on that day, if any at all."

[85] Learned Counsel submits that the Second Defendant has not proved that it did all it could to discover the defamation and that it was not negligent in the circumstances. Accordingly, contends Counsel, the defence of innocent dissemination must fail based on that fact as well as on the "wanton and blasé attitude exhibited by the witness for the Second Defendant during the trial." Counsel also contends that "the failing of the Second Defendant to mitigate its damages is not consistent with a plea of innocent dissemination". She submits that "the inference can easily be made that the Second Defendant intended to play a part in the dissemination of the offending words since no actions were taken to rectify the situation or distance itself from the publication." Counsel was inviting the Court to draw this inference from the fact that "to date the Second Defendant has not published any retraction as it customary in these types of situation."

[86] According to Gatley[22]:-

> "The common law gives some degree of protection to the person who publishes but who is not the author, printer, or the 'first or main publisher of a work which contains a libel', but has only taken 'a subordinate part in disseminating it', e.g. by selling, distributing or handing to another a copy of the newspaper or book in which it appears. Such a person will not be liable if he succeeds in showing:
>
> 1) That he did not know that the book or paper contained the libel complained of ; and
> 2) That he did not know that the book or paper was of a character likely to contain a libel; and
> 3) That such want of knowledge was not due to any negligence on his part.
>
> On this basis news vendors and proprietors of libraries have escaped liability."

[22] page 183, paragraph 6.19

[87] Based on the above, the Second Defendant's pleadings to the effect that it did not fall within the category of "the author, editor or publisher" have merit. However, the Second Defendant does not deny that it was the "broadcaster of the live programme containing the statement", but seeks to escape liability by pleading, (a) that the live broadcast was "in circumstances in which they had no effective control over the First Defendant the maker of the statement", and (b) that "prior to the broadcast, all participants in the programme were specifically requested to refrain from making obscene or defamatory comments."

[88] I am of the view that broadcasters who take the risk of broadcasting live without any time delay must pay the price for taking that risk if it transpires that the broadcast is defamatory of anyone. In any event, the Second Defendant had the option of pre-recording the broadcast material.

[89] Based on the Second Defendant's neglect and/or failure as stated above, the Court is of the view that the Second Defendant's defence of Innocent Dissemination fails.

CONSTITUTIONAL PRIVILEGE

[90] In the "Particulars of Extended Qualified Privilege", (referred to in paragraph 68 above), the First Defendant, has pleaded, in paragraphs 4.4 and 4.5, a defence under Section 12 of the Constitution of Antigua and Barbuda. Section 12 of the Constitution of Antigua and Barbuda provides as follows:-

> (1) "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.
> (2) For the purposes of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether the dissemination be to the public generally or to any person or class of person) and freedom from interference with his correspondence or other means of communication.
> (3) .....
> (4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) That is reasonably requires –

(i) ……..

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons."

[91] Learned Counsel for the Claimant submits that "there is no absolute right of expression as intimated by the Defendants." Counsel contends that the Constitution has expressly recognized the reputations of others as having constitutional importance. Counsel further submits that "false and defamatory statements of fact by itself cannot be protected under section 12 of the Constitution and the Defendants will have to prove the criminal conduct of the Claimant and or sufficiently establish that they had a recognized duty to publish the defamatory statement."

[92] I agree with Counsel's submissions. It is beyond dispute that the Constitution guarantees the right to freedom of expression. However, like all other fundamental freedoms, freedom of expression is not an absolute and unfettered right. It is not a licence to violate the right of every individual to the protection of his reputation. The purpose of the law of defamation is to hold a balance between freedom of speech and the right to reputation.

[93] As stated by Lord Hobhouse in **Reynolds v Times Newspapers Ltd** (supra):-

> "… The liberty to communicate (and receive) information [is of fundamental importance] ….in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information which is the subject of this liberty. There is no human right to disseminate information which is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed."

[94] Based on my earlier findings that the Defendants have no duty to publish defamatory statements of the Claimant, that they have failed to provide proof of the facts to justify the charges which they have levied against the Claimant and that they were actuated by

malice, it is my view that this further defence of Constitutional Privilege cannot avail the Defendants. This defence accordingly fails.

JUSTIFICATION

[95] In paragraph 8 (iii) of their Defence, the Defendants plead that:-

> "The Claimant and the Antigua Labour Party have always denied any and all allegations of corruption even in the face of Commissions of Inquiry and published findings emanating therefrom. The Defendants had reasonable grounds for believing that the words complained of were true. The seeking of a response or rebuttal from the Claimant was not practicable in the circumstances or in the alternative was unnecessary."

[96] The Defendants further plead, in paragraph 8 (iv) that:-

> "The Defendants failure to apologise was consistent in a continuous belief that the statements were justifiable in the context of the impending elections and the privileged occasion on which they were issued."

[97] It would appear from the above that the Defendants are seeking to rely on the defence of justification. The law is settled that "it is a complete defence to an action for libel or slander that the words complained of were true in substance. Where a defamatory statement is uttered, the plaintiff does not have to prove that it is false, for the law presumes this in his favour, but if the defendant can prove its truth, he will defeat the plaintiff's claim." – (see Kodilinye - Commonwealth Caribbean Tort Law, page 255).

[98] In order to succeed in their defence of justification, the Defendants must establish that the defamatory imputations are substantially true. A defamatory imputation is presumed to be false and the burden lies upon the Defendants to show that it is substantially true. In the view of the Court, the Defendants in the instant case have failed to do so. They have provided not a shred of evidence, whether by way of documentary evidence or otherwise which support the statements made.

[99] The Defendants state in their Defence that the defamatory words referred to "various corruption scandals" which occurred over the decades under the ALP Administration from 1976 to 2004 of which the Claimant and the 2 others persons mentioned were "leading members." They have pleaded in the Particulars of Corruption Scandals the following:- The Medical Benefits Scandal; the Airport Resurfacing Scandal: the Columbia Gun Running Scandal; the IHI Loan Scandal; the Sale of Antigua and Barbuda Passports Scandal; the Scandal of lands sold to ALP Cabinet Members at an undervalue, e.g. to Southern Developers Limited.

[100] With respect to the IHI Loan Scandal, Mr. Simon had stated in his Witness Statement (page 12, at paragraph 2 of Bundle 2) that "in the latter part of 2004, one Bob Linquist was appointed by the government to investigate certain questionable financial transactions conducted or executed by former ministers of government." He stated that one such transaction was the repayment by government of a debt of US $28,050,000.00 owed to Ishikawajima-Harima Heavy Industries Company Limited of Tokyo, Japan (IHI-Japan) under a Letter of Guarantee dated April 7, 1986 in which government guaranteed payment by the Antigua Public Utilities Authority (APUA) of that debt. Mr. Simon stated that following initial investigations by Bob Linquist, he advised Cabinet sometime in February 2006 that "whereas there was an agreement between IHI-Japan and the government that the debt would be repaid by monthly installments of US $ 199,740.25 for twenty five years from September 1997, the government was in fact paying the sum of US $ 403,334.00 from December 1996 to IHI-Japan Debt Settlement Limited a Hong Kong Company owned and controlled by Bruce Rappaport for onward payment to IHI-Japan.

[101] Mr. Simon stated that "further, that the excess monthly amount was deposited into the Bermuda Bank account of a Panamanian Company Bellwood Services S.A. one of whose directors was one Asot Michael." Under cross-examination, Mr. Simon testified that he had proof of that statement; that he had bank statements to that effect which he obtained under the Mutual Legal Assistance Treaty (EMRAT) with Bermuda and also

Florida. Yet none of these were exhibited to his Witness Statement or presented to the Court. None of this "proof" was produced by the Defendants.

[102] At paragraph 7 of the said Witness Statement, Mr. Simon stated: "... I advised the Cabinet that the claimant was or ought to have been fully aware of the terms and conditions of the debt settlement with IHI-Japan dated September 14, 1997 which was very different from the terms of an agreement dated September 11, 1997 by which payment was made to IHI-Japan through Bruce Rappaport's Company." However, although Mr. Simon testified that he had seen and reviewed the Agreement of September 11th, 1997, and had seen the Cabinet minute in which the Claimant stated and advised Cabinet of the Agreement of September 14th 1997, neither of these agreements was produced to the Court in support of the truth of the facts relied upon.

[103] Mr. Simon testified that the decision not to exhibit the documents was not his; it was a decision of Counsel for the Defendants'; he added that if Counsel had requested the documents, he would have provided them. Mr. Simon also testified that as far as he was aware, the Claimant "has never been charged far less convicted" with respect to any of "scandals" referred to above, and that, as far as he was aware, the Claimant has not been convicted on account of perverting the course of justice.

[104] As stated in paragraph 95 above, the Defendants pleaded that "the Claimant and the Antigua Labour Party have always denied any and all allegations of corruption even in the face of Commissions of Inquiry and published findings emanating therefrom." Significantly, however, no evidence of the alleged findings of any Commission or Commissions of Inquiry were produced in evidence in support of the truth of the facts relied upon.

[105] Because a defamatory imputation is presumed to be false, the burden of proof is upon the defendants to show that it is substantially true. In the instant case, it is the view of the Court that the Defendants have failed to discharge their burden of proof. They have provided no cogent evidence that the defamatory imputation is true. In the view of the

Court, the defence of justification does not avail the Defendants in the instant case. The defence is ill founded and unsustainable.

DAMAGES

[106] The law is settled that in actions for defamation, damages are awarded to compensate the claimant for the injury to his reputation and the hurt to his feelings. Such damages are compensatory and are "at large..." According to Gatley[23] "damages are 'at large' in the sense that they cannot be assessed by reference to any mechanical, arithmetical or objective formula." That means that the judge is free to make his own estimate of the damage, taking all the circumstances into account. (Kodilinye page 292).

[107] In the case of libel or of slander actionable per se, that is, where there is an imputation of committing criminal offences, the Claimant need not prove actual damage, for: "the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation." (per Bowen L.J. in **Ratcliffe v Evans[24]**). Windleyer J stated in a passage approved in the House of Lords (**Broome v Cassell & Co. Ltd[25]**):-

> "It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed..."

[108] Even where the Claimant has suffered no injury to his reputation, the Claimant will be entitled to compensation for injury to his feeling – see the case of **Fielding v Variety Incorporated[26]**.

[109] The Claimant in his Witness Statement states as follows:-

> Paragraph 3- "When I heard these statements I felt horrified and aggrieved. I felt that people in their minds were questioning whether or not I was a thief, and that I had been

[23] page 269, paragraph 9.2
[24] [1892] 2 Q.B. 524 at 528
[25] [1972] A.C. 1027 at 1071
[26] [1967] 2 Q.B.841

corrupt as a public figure. I felt very upset, and to put [it] in context it was about this time when myself and others in the ALP had to face the same people seeking support. I didn't know how to face people after this broadcast by the Prime Minister....."

Paragraph 4- "To say the very least the statements were very humiliating and degrading..."

Paragraph 5- "...I had no acrimony towards the Prime Minister and was taken aback that he would have made this unwarranted attack on my reputation and character."

[110] According to Gatley[27], in assessing the quantum of damages, I am entitled to take into consideration the conduct of the claimant, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and the conduct of the defendant from the time when the libel was published down to the verdict.

[111] I must therefore take into account the fact that the defamatory statements were serious. They imputed to the Claimant criminal conduct and conduct unbecoming of someone aspiring to public office. I must take into account the standing of the Claimant. The Claimant is an Attorney at Law; he is and was at the time that the defamatory words were spoken, the Leader of the opposition party and a former Prime Minister of Antigua and Barbuda. Further, that the defamatory statements were made by the First Defendant, a person who is well versed in the law as well as one who is no stranger to the political arena.

[112] I must also take into account the mode and extent of the publication. The listening audience did not merely comprise those persons who were at the political rally on the 20th November 2008. In their Defence the Defendants have pleaded that the "discussion" "necessitates publication to a wide audience, that is, throughout the whole of Antigua and Barbuda, and all Antiguans and Barbudans in the diaspora." The Defendants further plead that "the vast majority of persons listening on the worldwide

[27] page 269, paragraph 9.2

web were Antiguan and Barbudan nationals in the diaspora..." The Defendants were therefore well aware that just as the listening audience was wide, so would the damaging effect of the defamatory statements be great.

AGGRAVATED DAMAGES

[113] The law is settled that general compensatory damages may be increased to take into account factors such as the motives and conduct of the defendant among others; such 'aggravated damages' are meant to compensate the plaintiffs for the additional injury, going beyond that which would have flowed from the words alone, caused by the presence of the aggravating factors.

[114] In the case at bar I am entitled to take into account the fact that, in making the defamatory statements, the Defendants were actuated by malice. One of the consequences of malice being established is that it becomes irrelevant that the publisher of the defamatory statements may not have intended to harm the Claimant's reputation. The existence of malice generally serves to inflate the damages that may be awarded.

[115] I am also entitled to find that the failure of the Defendants to apologise or retract their statements is also an aggravating factor. In paragraph 11.5 of his Statement of Claim, the Claimant pleaded that:-

> "The Claimant through his attorneys complained to the First Defendant in a letter before action dated March 5, 2009 about the publications, in that letter the Claimant set out his full case identifying the errors and falsities in the said publications, notwithstanding the First Defendant failed to apologize or retract the words complained of."

[116] In their Defence, the Defendants do not deny that they failed to apologise. They pleaded that they "had reasonable grounds for believing that the words complained of were true." They pleaded further that their failure to apologise "was consistent in a continuous belief that the statements were justifiable in the context of the impending elections and the privileged occasion which they were issued."

[117] Not only did the Defendants fail to apologise and/or retract the defamatory statements, but they persisted in their ill founded plea of justification. I am entitled to find that this is a further aggravating factor.

EXEMPLARY DAMAGES

[118] In paragraph 13 of his Statement of Claim, the Claimant pleads that "the Claimant will rely upon the Defendants' course of conduct throughout this affair to support its case that the Defendants outrageous conduct is deserving of an award of exemplary damages."

[119] Further, in her Submissions, Learned Counsel for the Claimant invites the Court to make a "suitable award" of exemplary damages "since the Defendants decided to publish the broadcast and or took no corrective measures afterwards, even though they knew the allegations were untrue and or in the case of the Second Defendant had reckless indifference as to its truth."

[120] The law is settled that exemplary or punitive damages are intended to punish the defendant for the willful commission of a tort or to teach him that tort does not pay.

[121] According to Clerk & Lindsell on Torts[28]:-

> "In a defamation action exemplary damages may be awarded in the following circumstances: (1) where the defendant has deliberately libeled or slandered the claimant for profit; or (2) where the defendant is a 'government servant' and has acted 'oppressively, arbitrarily or unconstitutionally."

[122] The above is based on Lord Devlin's classification in **Rookes v Barnard[29]**, namely that exemplary damages should be restricted to three situations:-

(1) "Where they are recognized by statute.
(2) Where the wrong involves oppressive, arbitrary or unconstitutional action by servants of the government.

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[28] page 1563, paragraph 22-231
[29] [1964] AC 1129

(3) Where the defendant's tortious act has been done "with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic, or perhaps physical penalty."

[123] In **John v MGN,**[30] Sir Thomas Bingham M.R. giving the judgment of the court, discussed if and when exemplary damages should be awarded. Such damages should be awarded only where:

(a) "At the time of publication, the defendant knew that he was committing a tort or was reckless as to whether it was tortuous or not and decided to publish because the prospects of material advantage outweighed the prospects of material loss."

(b) The publisher acted in the hope or expectation of material gain. Mere publication for profit does not satisfy this test; there has to be an element of calculation, e.g. that the gain from the publication will exceed the potential disadvantages, especially if the claimant may not sue."

[124] In recent times, it has been stated by the House of Lords, in the case of **Kuddus v Chief Constable of Leicestershire**[31]; and by the Privy Council in the case of **A v Bottrill**[32], that the underlying rationale of exemplary damages lies in the sense of outrage which a defendant's conduct sometimes evokes, "a sense not always assuaged fully by a compensatory award of damages, even when the damages are increased to reflect emotional distress."

[125] In the Bottrill case cited above, Lord Nicholls of Birkenhead, at paragraph 23 of his judgment had this to say:-

> "23 - The next point to note is that, in the nature of things, cases satisfying the test of outrageousness will usually involve intentional wrongdoing with, additionally, an element of flagrancy or cynicism or oppression or the like: something additional, rendering the wrongdoing or the manner or circumstances in which it was committed particularly appalling. It is these features that make the defendants' conduct outrageous."

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[30] (1997) Q.B. 586
[31] [2001] UKHL 29
[32] [2002] UKPC 44

[126] In the instant case, I am of the view that, although the conduct of the Defendants unquestionably justifies an award of aggravated damages, that it does not meet the threshold justifying an award of exemplary damages. I am of the further view that the instant case can be distinguished from the case of **Keith Mitchell and Steve Fassihi et al**[33], where the Claimant was awarded exemplary damages. In that case, Gordon J.A. who delivered the judgment of the Court stated thus:

> "I am of the view that this is one of those exceptional cases where it is appropriate to make an award for exemplary damages."

The learned Judge in that case found that the conduct of the Respondents came "dangerously close to outrageous." However, according to the Learned Judge, "the defendants went further. They printed the same libel in a second and subsequent issue of the newspaper." What follows is, in my view, very instructive in distinguishing the Keith Mitchell case from the case at bar.

[127] The learned Judge went on to say as follows:-

> "I believe that a clear and proper inference is that the Respondents were contemptuous of any sanction that the law might provide. I am of the view that compensatory damages, even augmented by an element of aggravation, is an inadequate remedy in this case."

The Court in that case awarded the sum of $ 50,000.00 as exemplary damages to express the its "disapproval of such (the respondents') conduct and to deter [the respondents] from repeating it." In the case at bar, there was no second or subsequent publication of the defamatory statements.

[128] In any event, I am of the respectful view that the award of aggravated damages in this case is sufficient to vindicate the Claimant and to assuage his feelings for the hurt, distress and injury caused to him by the Defendants' defamation.

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[33] (Grenada Unreported judgment) Civil Appeal No.22 of 2003

QUANTUM OF DAMAGES

[129] Counsel for the Claimant Ms. Brissett has referred the Court to the case of **Keith Mitchell v Steve Fassihi et al**, cited above, where the Court of Appeal confirmed the Master's award of $ 100,000.00 and awarded $ 50,000.00 exemplary damages to show the Court's disapproval at the conduct of the Defendants. Counsel also cited the case of **Edwardo G. Lynch v Ralph Gonsalves**[34], where the Court of Appeal awarded $140,000.00 for general damages including aggravated damages.

[130] Learned Counsel also referred the Court to the case of **Panday v Gordon**[35], in which the Privy Council approved of the rationale given by Hammel-Smith JA for "lifting the bar" although previous awards in that jurisdiction (Trinidad and Tobago) have tended to be on the conservative side over the years.

[131] It is the submission of Counsel for the Claimant that in the instant case, "an appropriate award of Compensatory damages is in the sum of EC $ 150,000.00, aggravated and exemplary damages in the sum of EC $ 100,000.00; hence the global amount of EC $ 250,000.00". Counsel's further submission is that "this is an appropriate case for 'lifting the bar' based on the malice involved, the severity of the allegations, the fact that publication was to the world at large."

[132] In the instant case, in considering the quantum of damages, I have taken into account comparable awards in the region, including in particular the awards made in the following cases:-

(i) **France and Bryant v Simmonds**[36], – where the Prime Minister of the Federation of Saint Kitts and Nevis was awarded $ 75,000.00 as compensatory damages including aggravated damages for the libel published in the newspaper by the defendant Mr. Bryant who was a former Attorney

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[34] CA 2009/002
[35] (2005) UKPC 36
[36] [1990)] 38 WIR 172

General and a practicing Attorney – at-Law. The Privy Council in that case affirmed the said award, which had been made by the trial judge and confirmed by the Court of Appeal.

(ii) **Vaughn Lewis v Kenny D. Anthony**[37] – this case involved two former Prime Ministers of Saint Lucia. At a political meeting, Dr. Lewis who was then leader of the opposition spoke slanderous words of Dr. Anthony the then Prime Minister at a political meeting with a small crowd of about 100 people. The Court of Appeal awarded Dr. Anthony a global award of $45,000.00.

(iii) **Keith Mitchell v Steve Fassihi and others** (supra) (cited by Counsel for the Claimant and referred to above) - this was a case in which the then Prime Minister of Grenada was libeled in the newspaper twice in an article written by Mr. Fassihi which accused the Prime Minister, among other things of using his office to harbor and assist criminals. The Court of Appeal dismissed the appeal against the award of $100,000.00 and made an award of $50,000.00 as exemplary damages. The Court found that compensatory damages were an inadequate remedy in this case.

[133] I have taken into account all the circumstances of the cases to which I have referred above. I have also taken into account the fact that the evidence before the Court does not disclose that the defamatory statements had an adverse effect on the Claimant's political reputation. Under cross-examination, the Claimant testified that when the defamatory statements were made on 20th November 2008, he was not a Member of Parliament, having lost his seat in the 2004 elections. He testified that he regained his seat at the last elections in March 2009. It would appear, therefore, that the Claimant's political reputation in Antigua and Barbuda was not harmed by the defamatory words. Further, no evidence was produced to show that the Claimant's political reputation was harmed regionally or internationally.

[37] (Saint Lucia Unreported judgment) Civil Appeal No. 2 of 2006

[134] Looking at the totality of all the above factors, I am of the view that an award of $75,000.00 inclusive of aggravated damages is appropriate, based on all the circumstances of the case.

INJUNCTIVE RELIEF

[135] In paragraph 15 of his Statement of Claim, the Claimant pleaded that: "unless restrained by this Honourable Court, the Defendants will further publish the said or similar words defamatory of the Claimant or cause to be published the said or similar words defamatory of the Claimant." The Claimant seeks "an injunction restraining the Defendants whether by themselves, their servants or agents or otherwise, from further publishing or causing to be published the said or similar defamatory words about the Claimant."

[136] As explained by Gatley[38], if the Claimant proposes to ask for an injunction to restrain further publication of the words complained of, he should plead as a fact that "the defendant 'threatens and intends' to continue to publish the words complained of." In the instant case, there is nothing in the Claimant's pleadings that states that the Defendants threaten or intend to continue to do so. Further, under cross-examination, the Claimant testified that after the words complained of were spoken on the 20th November, 2008, he never heard the words complained of again. I therefore find no reason to apprehend further publication by the Defendants. Accordingly, the claim for injunctive relief is refused.

POSTSCRIPT

[137] Prior to the delivery of this judgment, Counsel for the Defendants did file closing submissions in this matter. These submissions were 24 days late. There has been no application or request for extension of time. I have however read the submissions, and find no reason to change my decision.

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[38] page 989 paragraph 28.34

ORDER

[138] MY ORDER IS AS FOLLOWS:-

(1) Judgment is granted to the Claimant against the First Defendant and Second Defendant jointly and severally.

(2) The First and Second Defendants do pay the Claimant jointly and severally damages in the sum of $ 75,000.00.

(3) Prescribed costs are awarded in accordance with Part 65 of the Civil Procedure Rules (CPR) 2000.

(4) The First and Second Defendants to pay interest on the judgment debt at the statutory rate of 5% from the date of judgment until full and final payment.

Jennifer A. Remy

High Court Judge