

MONTSERRAT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1991

BETWEEN:

THE MONTSERRAT REPORTER LTD
THE MONTSERRAT PRINTER LTD
DAVID EDGECOMBE

Appellants

and

JOHN ALFRED OSBORNE

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. C.M. Dennis Byron - Justice of Appeal
The Honourable Dr. Nicholas J.O. Liverpool - Justice of Appeal

Appearances: Mr. L. Moore, Mr. T.W.R. Astaphan and Miss E. Henry
for the Appellants
Mr. L. Luckhoo Q.C. and Mr. J. Kelsick for Respondent

1992: October 13, 14
1993: April 26.

JUDGMENT

LIVERPOOL, J.A.

In June 1988, when the respondent was the Chief Minister and Minister of Finance of the Island of Montserrat, he was referred to in three contentious publications in three issues of a newspaper called "The Montserrat Reporter" which circulated in the Island and of which the first-named appellant (The Montserrat Reporter Ltd) was the proprietor and publisher, the second-named appellant (The Montserrat Printery Ltd) was the printer and the appellant David Edgecombe was the Editor. These publications all related to the payment by the Montserrat Port Authority to the respondent of the sum of \$11,506 purporting to represent the value of three boxes of telephone tapes which the respondent claimed to have been lost while they were in the possession or under the control of the Authority.

The Respondent, at the time of the action, also managed a

shipping business, Great Western Shipping, which owned two ships - the Western Sun and the Western Star. His brother Mr. Joseph Thomas Osborne was the captain of the Western Sun which journeyed from Puerto Rico sometime in November 1986, called at St. Kitts on 29th November, 1986 and arrived at its home port in Montserrat on 3rd December, 1986.

When the ship left St. Kitts one of the boxes of cargo which had been destined for that country and which contained plumbing tapes had not been landed. On arrival in Montserrat, three boxes which bore the marks "St. Kitts" and the numbers and quantity (three) indicated by three strokes (111) in the port's tally sheet were landed. It is not clear what commodities were contained in these three boxes; but above the words "St. Kitts" in the "Marks" column the figure "215.02" appears; and in the column headed "Nos. & Quantity" above the three strokes appears the following "← (2) (1) St. Kitts". It is the cargo relating to these entries in the tally sheet which has brought about this litigation. In particular, as learned counsel on both sides agreed, the important question seems to be whether one, or three boxes were over-landed in Montserrat on that voyage.

After the ship had discharged its cargo in Montserrat the respondent claims to have visited the port where he was shown by Alston Thomas the port's cargo checking clerk, three boxes marked "St. Kitts" only. Alston Thomas stated that he showed the respondent only one box, but the learned Judge for reasons stated by him preferred the evidence of the respondent on this matter. The respondent told Thomas to put the boxes aside to be later returned to the ship. Acting on information received from the captain of the ship, the respondent subsequently approached Alston Thomas about the boxes when he was told that only one box was over-landed and that it could not be found. On receiving the same information from Thomas two days later, the respondent reported the matter to the Manager of the Port and the Commissioner of Police. Both officials conducted enquiries and searches without success.

The respondent submitted a claim to the Manager of the Port, Mr. John Wilson, for the goods which were contained in the boxes. He claims that he asked Wilson not to process the claim unless it was followed up by the owner of the goods. Mr. Wilson denied this conversation, but the learned Judge gave reasons why he believed the respondent. On 23 January, 1988 the appellants' newspaper reported that on 23 December 1987, the Executive Council had met and issued a directive that for stated reasons, which were also reported in the January 1988 issue of the newspaper, the Board of the Montserrat Port Authority was to be dismissed, and that Mr. Wilson's contract as Manager was not to be renewed when it expired on 19 January, 1988.

On 18 April, 1988, the respondent submitted a copy of his original claim to the new Manager of the Port Authority requesting payment. He enclosed therewith a copy of an undated invoice from one Adolpho Fesser Luchessi of Puerto Rico for the sum of US\$4,235 representing the cost of the contents of the three boxes. By the time he received payment on 22 April, 1988 a new Board and Manager had been appointed. A few weeks later, publication of the allegedly offending articles began.

The first publication was an article written by the appellant Edgecombe. That article appeared on the front page of the issue of the 10th June and was headed "C.M. gets \$11,000 windfall". This was followed by a quadruple publication in the issue of the 17th June. That second or quadruple publication comprised an article written by the appellant Edgecombe on the front page and under the caption "Hanky Panky at the Port", two other articles on the front page under the captions "Reporter Probe," and "B. Osborne calls for investigation" respectively and an Editorial entitled "Play it clean!" The third publication was a dual publication in the issue of the 24th June. That third or dual publication comprised an article written by the appellant Edgecombe on the front page and under the caption "Bassie's Fishy Claim" and an article on page 12 under the caption "Osborne says Tally Sheet will prove goods landed."

As a result of these publications, the respondent sued the appellants for damages for libel. In paragraph 20 of his Amended Statement of Claim, the respondent specified the natural and ordinary meanings which he alleged should be ascribed to the words of the publications and on which he relied. In paragraph 21 of that document, he stated that:

"The said three publications when taken separately and or collectively are all to the effect that the Chief Minister is dishonest, has made a false and fraudulent claim on the Port Authority and is unfit to hold public office and has committed a criminal offence, or criminal offences."

In their Amended Defence, the appellants admitted the publications but denied that the words published were defamatory of the respondent. The appellants also pleaded justification and fair comment.

The action was tried by Redhead J. who gave judgment for the respondent on the 22nd March 1991. By that judgment, the learned judge awarded the respondent damages in the sum of \$60,000.00 which purported to include aggravated damages.

The learned Judge also made the following specific findings of fact:

1. The captain of the "Western Sun" was given three cartons of varying sizes the two largest being the size of a beer box and the other slightly smaller, by Luchessi. The captain Thomas Osborne wrote "St. Kitts" on the boxes. He was supposed to have sold the tapes which were in the boxes in St. Kitts by virtue of a special arrangement between the Captain and Luchessi.

2. The goods were not manifested and were not consigned to any particular person. Having sold them the captain would account to Luchessi who would then pay him a commission for his efforts.
3. The three boxes marked "St. Kitts" were landed in Montserrat and they were put into the warehouse by Alston Thomas who showed them to the respondent. The Judge did not accept Thomas' evidence, that only one box marked "St. Kitts" had been landed in Montserrat.
4. Captain Osborne called on Thomas requesting the return of the boxes, but was told that because of the congestion in the warehouse, the captain should return at a later date. The Captain returned and Thomas told him that he could not find the boxes. The captain then reported the matter to his brother (the respondent).
5. The respondent approached Thomas about the three boxes which had previously been seen by both parties. Thomas first told him that he could not find the boxes, but two days later Thomas claimed that only one box marked "St. Kitts" had been shown to him. The respondent reported the matter to Mr. John Wilson, Port Manager, and also to the Commissioner of Police.
6. He rejected the evidence of John Wilson whenever it conflicted with that of the respondent. He found that the respondent did tell John Wilson that three boxes marked "St. Kitts" were shown to the respondent by Alston Thomas; and he inferred that John Wilson subsequently became upset because his contract was not renewed.
7. He accepted the evidence of Mr. Thomas Richards, who was then the Commissioner of Police, that the respondent made a report to him and subsequently handed him a tape, and that the Commissioner caused enquiries to be made about the missing tapes including a search of the appellant's home, and that of his grandmother.
8. He accepted that Luchessi made a claim on the respondent

for the loss of the three boxes; that the claim was given to Wilson early in 1987; that the respondent told Wilson that he need not pay the claim until it was followed up; but that if the money had to be paid the port would have to pay it.

9. He stated that the facts as he found them, and with all the liberality at his disposal, did not allow him to draw a conclusion in favour of the appellants' assertions of corruption or dishonesty on the part of the respondent in relation to the claim.
10. He was of the view that the Editor of the newspaper had no more than a suspicion that the payment of the money was not above board; and as a result he saw this as an opportunity to injure the respondent and he spared no effort in doing so.
11. He felt satisfied that the appellants could not believe that the entire Board was sacked to facilitate payment of the claim; since about five months prior to writing the article of 10 June 1987; the appellants wrote and published in the same newspaper (on 23 January, 1988) that the Executive Council had met on 23 December, 1987 and had issued a directive that the Board should be dismissed.
12. He had no doubt in his mind that the appellants were actuated by malice towards the respondent when they wrote and published the articles complained of which he found highly defamatory of the respondent, and which were serious attacks upon his character.

The appellants appealed against the judgment on grounds which revive all the issues determined by the learned judge. This appeal requires the Court to examine the publications to determine whether they are defamatory or not.

The "windfall" article

This article which is headed in bold print "C.M. gets \$11,000 windfall" reads as follows:

"Mr. Franklin Greenaway, new manager of the Port Authority, has refused to discuss the basis on which over \$11,000 was paid last month to the Great Western Shipping Company of which Chief Minister John Osborne is owner and Managing Director.

The money was paid on a claim for U.S.\$4,235 (EC\$11,506) which was first submitted to the Port earlier last year but bluntly turned down by Mr. John Wilson, the manager at the time.

Wilson is not talking, but one of his confidants told the Reporter: 'John Wilson said that he begged the Chief Minister to withdraw the claim because it was the kind of thing people get sent to jail for'.

Shortly after the incident it was announced that John Wilson's contract as Port manager would be renewed.

The next shocking announcement was that the entire Port board had been fired and replaced by hand-picked PLM caucus men.

Greenaway said he was not prepared to comment on decisions taken by the new board because that is privileged information.

When it was pointed out that there ought to be no such thing as privileged information about how funds are spent by a public company, he said the claim was made on the basis of theft but in any case it was made before his time and the best person to speak to was the chairman, Miss Florence Daley.

Daley said she authorised the payment on the basis of a report submitted by Mrs. Jenny Richards, Port Superintendent which affirmed that the cargo, consigned to St. Kitts, had been mistakenly off-loaded at Montserrat and accepted by the Port.

This cargo, valued by Great Western at U.S.\$4,235, supposedly disappeared from the Port, but the police were not called in to investigate.

Nobody is saying why over \$11,000 was paid to John Osborne's Company before a full investigation was made regarding the circumstances of the claim."

The respondent's first objection is to the headline. Counsel for the respondent contends that the headline is a statement of fact. But in reality, the headline states no fact. According to the Concise Oxford Dictionary, the word "windfall" popularly or figuratively means "unexpected good fortune". This is a comment (inference or opinion) based on facts stated in the article. Those facts are (1) that the respondent (who was the Chief Minister of the Island of Montserrat) submitted a claim to the Port Authority

(2) that the basis of the claim was disputatious (3) that the claim was not honoured by the manager and Board to whom it was submitted and (4) that the claim was eventually honoured 16 months later and after a change in management. These basic facts (which were proved to be true) were sufficient to support the comment or opinion that "C.M. gets \$11,000 windfall". That headline comment or opinion was fair comment on a matter of public interest and it was fair comment by a commentator who was not alleged or proved to have been actuated by express malice.

The respondent's second objection is to the allegation that the respondent's claim was "bluntly turned down". But in the context in which the word "bluntly" was used, the reasonable reader would interpret it as a fair comment justifiable by the same basic facts which supported the headline.

The respondent's third objection is to the repetition of hearsay from Wilson that "it was the kind of thing people get sent to jail for" and hearsay from Greenaway that "the claim was made on the basis of theft". There can be no doubt that the words of the hearsay imputed dishonesty to the respondent. They were not proved to be true and were not mere comment. They were false allegations or statements of fact which could not support a plea of fair comment. They were therefore indefensibly libellous.

The "Hanky Panky" article

In this article under the headline "Hanky Panky at Port" the following words are complained of:

"Mr. John E. Wilson, port manager when the claim was first submitted by the Chief Minister early in 1987, took the position from the beginning that it was a bogus claim and refused to pay it.

.....

The shroud of secrecy thrown over the matter has fueled the suspicion that something is rotten and that a cover-up may be under way. As a result the Reporter sent a journalist to St. Kitts in search of some answers. (See first report next week).

One informant says that when the US\$4,235 claim was first presented to John Wilson, he was so ashamed that he

did not even show it to the Board and advised the Chief Minister to withdraw it.

And when Osborne got Mr. J.C. Kelsick, chairman of the ruling PLM to try and persuade Wilson to pay, the former port manager said: "If I worked for you and paid such a claim you would fire me immediately.

Wilson, who is credited with doing a good job at the Port, did not have his contract renewed when it expired this January. The other members of the board were all fired and a new board, packed with known PLM caucusmen, was soon set up."

It seems to us, as it did to the learned trial Judge that the use of words such as "rotten", "cover-up" and "bogus" and the allegation that payment of such a claim should result in being immediately fired all conjure up allegations of dishonesty and are plainly defamatory. Further, the clear imputation of the statement that Wilson and the Board had been fired and a new Board picked with PLM caucusmen had been set up is that this was done to facilitate the payment of the "bogus" claim. However the appellants knew this statement to be untrue because as we have stated, the same newspaper in an issue of 23rd January 1988 some five months earlier had published a report stating the reasons why the Board was to be dismissed and Wilson's contract was not to be renewed. The reasons were that the Board had granted loans and awarded scholarships without authority. This statement was also, therefore, clearly libellous.

Reporter Probe ("The Greedy Bassie" article)

Under the heading "Reporter Probe" the following question was posed "Did Greedy Bassie really put his hand in the till? And if so should we just sit back and applaud him?".

Those words speak for themselves. There is no doubt whatever that this question imputes, dishonesty to the respondent by implying that he stole money, and it is clearly defamatory.

The "investigation" article

The headline "B. Osborne calls for investigation" foreshadowed the following words:

"Mr. Bertrand B. Osborne, Leader of the Opposition and Chairman of the Public Accounts Committee, yesterday asked Governor Christopher J. Turner to order an investigation into the payment of a claim for over \$11,000 by the Port Authority.

The claim, first submitted in early 1987, was turned down by Mr. John E. Wilson who was manager of the Port then. He queried the arrival of the goods here and the subsequent charge that they had been stolen from the Port.

The goods were said to be shipped from Puerto Rico to St. Kitts but were over-landed here.

Even though the claim was pushed by Chief Minister John Osborne Wilson refused to pay it on the grounds that there was insufficient evidence that the goods were accepted by the Port Authority and cost US\$4,235.

Wilson and his entire board were replaced in March 1988. One month later on April 22 a cheque was written to the Chief Minister for the full amount of the claim.

Bertrand Osborne said that from the evidence he has, the matter is very serious and requires a thorough and immediate investigation.

'I brought the matter to the attention of the Governor as Head of State,' he said, so that he can use his good office in the interest of the public and good government to ensure that public funds, even though they are with a statutory body, are properly expended and that claims made on such funds are valid and justifiable.

Governor Turner has not yet responded formally to the request".

The statements that Wilson had queried the arrival of the goods in Montserrat, their subsequent theft from the port and the insufficiency of evidence that the goods had been accepted by the Port are all clearly untrue and conflict with the evidence which Wilson himself gave as to the manner in which he dealt with the report of the theft of the goods. For example after ordering an internal inquiry by the port's security he recommended the dismissal of Alston Thomas who was the person who received the goods on behalf of the port.

The "Play it clean" Editorial

The Editorial of the newspaper which at first glance seems to be a commentary on fair play in cricket stated as follows:

"Traditionally Montserratians have been an honest people. Generally, they don't cheat. The incidence of stealing has been relatively low and for the most part limited to modest sums of money. Dishonesty usually goes against the grain of most and the dishonest are despised and branded.

The recent experience in Antigua during the Leeward Islands tournament match between Antigua and Montserrat, has served to emphasize the general attitude and mentality of Montserratians. Play it clean! Don't cheat. The bitter complaints about the poor standard of umpiring and the significant number of decisions given against Montserrat by an all Antiguan umpiring team, has caused many Montserratians to react bitterly and even in an uncharacteristic way. There is an increasing body of support for retaliation. Let's play it like them. There has been open criticism and ridicule of some Montserrat umpires who have been accused, even by our opponents in the game, of giving Montserrat players a raw deal.

This new attitude is unfortunate and should be vigorously discouraged.

However, it seems that this new attitude cannot be totally rationalised as a mere reaction to being cheated by umpires. It seems that a growing tendency to be less than honest has crept into our society and at the highest levels.

Incidents of corruption in high places have surfaced in the Emerald Isle in recent weeks. The details are a sad commentary on the morals and integrity of our leadership, and an indication that an unfortunate state of decadence has taken over from what has traditionally been a healthy state of the body politic.

The stories of middle level public servants being switched about because they were unwilling to carry out irregular and dishonest acts on behalf of Ministers, is lamentable and disgraceful. That leaders in our society can pressure civil servants to act unfairly and dishonestly, is certainly a retrograde step which deserves the united condemnation of all Montserratians.

The compromising situation in which the Chief Minister has found himself at the Port seems to confirm the age-old rumours that he can do exactly as he likes even at the tax payers expense. All indications are that the procedure for the payment was unusual. That the C.M. was able to collect the sum out of public funds without proper documentation and without proper investigation is an indication of where we are heading.

If our island is to remain unspoilt and an attractive location for visitors and investors, we have to keep it clean. Our politicians and public servants must be honest. The offshore banks we bring in must be above board. We must display an image of uprightness and the highest integrity.

Fairplay must be our watchword. Like our umpires we want our politicians and civil servants to be above cheating. With one voice we should all reject corruption and dishonesty. With one united determination we should punish all those who fall out of line - be it umpire or politician."

Any person reading this article would clearly conclude that it was defamatory of the Chief Minister in that it accused him of being corrupt, dishonest, decadent and a cheat.

The "Bassie's Fishy Claim" article

The headline in the newspaper on that day proclaimed "Bassie's Fishy Claim". It was written by David Edgecombe and stated:

"The Reporter can reproduce today a copy of the document used by Chief Minister John 'Bassie' Osborne to claim \$11,506 from the Montserrat Port Authority.

Mr. Bertrand B. Osborne, Leader of the Opposition has called for an investigation into the payment and contends the document is questionable for the following reasons:

- The statement came from Adolpho Ferrer Luchessi who is the Agent in Puerto Rico for the Great Western Shipping Company which is owned by the Chief Minister.
- * Mr. Ferrer Luchessi is not an importer, nor an exporter of goods.
- No purchase bills were submitted to verify the quantities or value of goods listed on the statement.
- The statement is not dated.
- Although the statement indicates that the goods were shipped to St. Kitts, the name of a consignee was not given.
- The statement indicates that the cargo was "... shipped to St. Kitts, W.I. by M.V. WESTERN SUN on December, 1986". The vessel was, however, unloaded in St. Kitts on November 29, 1986, and its next call at that Port was late in January 1987.
- There are no shipping marks shown on the statement, therefore, it would have been virtually impossible, especially since there was no Bill of Lading, to connect the three cases mentioned in the statement with cases that were over-landed in Montserrat.
- The note at the bottom of the statement is absolutely worthless. Without a short-landed certificate from St. Kitts, no one in Puerto Rico could rightly say that the goods were short delivered there.
- The St. Kitts port authorities stated that only one case of merchandise was short-landed by the WESTERN SUN on November 29, 1986, and no cargo was short-landed on its next voyage in January 1987.
- The Agents for the WESTERN SUN in St. Kitts confirmed that only one case was short-landed there.
- * The importer, whose case was short-landed, stated that the missing case was one of a shipment of seven cases for which he made full payment to his suppliers in Puerto Rico. He further stated that he did not claim on the owners nor the agents of the WESTERN SUN, nor has he received any payment for the missing case.

The Chief Minister's claim was first made early last year but was turned down by Mr. John E. Wilson, manager of the Port then.

Wilson reportedly begged the Chief Minister to withdraw the claim and has since said: 'it was the kind of thing people get sent to jail for'.

Mr. John C. Kelsick, Chairman of the ruling PLM and 2nd nominated member to parliament, is said to have called Wilson urging him to pay, but was told by the former port manager: 'If I worked for you and paid such a claim, you would fire me immediately'.

Kelsick later became a member of the new Port board which began functioning in March 1988 and endorsed the payment of the \$11,506.12 which John Osborne received on April 22."

The allegations in this article if false are clearly defamatory. The question is whether David Edgecombe (by his allegations and arguments) has proved the truth of the facts stated or the fairness of the opinions expressed and the conclusion he arrived at.

As both learned counsel agreed the real live issue in this case is whether 1 box or 3 boxes were landed in Montserrat and found their way to the customs hall at the end of the relevant voyage of the Western Sun.

The respondent claims, and the evidence adduced on his behalf was believed by the learned Judge, that three unmanifested boxes bearing the mark "St. Kitts" only were landed, and that he collected the claim on behalf of his agent Mr. Luchessi after the latter had debited his account with the value of the goods contained in those boxes.

On the other hand the appellants, basing their information on the ship's manifest and the tally sheet genuinely believed (certainly at the outset) that only one box could have been landed in Montserrat since it was only one manifested box which had been short landed in St. Kitts. Armed with what they thought was irrefutable information they pursued this matter with the characteristic passion of the good investigative journalist. For

example when sources of information in Montserrat were dried up, they took the precaution of travelling to St. Kitts to continue the investigation in that island. Their motives could not be faulted, as those motives were, in my view to search for the truth. But alas the factual substratum of their inquiry has proved to be wrong; and no allowance was made for that possibility even as late as 23 June, 1988 when an apology was demanded. This was a classic case of following a false lead.

The appellant's failure therefore to prove the truth of the facts stated or the fairness of the opinions expressed leaves us in no doubt that the learned Judge was right in holding that this article was defamatory of the respondent.

The "Tally Sheet" article

This article, written under the headline "Osborne Says Tally Sheet will prove goods landed" began by stating that no investigation had been carried out into the questionable payment to the Chief Minister by the Port, and continued -

"John Osborne has claimed that three boxes consigned to St. Kitts on his boat The Western Sun were over-landed at Port Plymouth and stolen from the Port.

He submitted a claim early in 1986 which was bluntly turn down by John Wilson Port Manager at the time, on the basis that the claim was bogus."

It concluded by stating that -

"No explanation was offered for why the Port paid the Chief Minister \$11,506 for stolen goods which the C.M. knew were on sale in Plymouth but neglected to report to the police."

We have already stated our view with respect to the use of the adjective "bogus" to describe the claim made by the respondent. Further the evidence clearly discloses that the Chief Minister had in fact made a report to the Commissioner of Police, who ordered an inquiry into the matter and Sergeant Meade testified to the effect that he was part of a search party which went to the home of Alston Thomas to look for the tapes. The truth of these two statements of fact have not been made out. This article is therefore defamatory of the respondent.

Damages

The learned Judge found that all the articles complained of were highly defamatory of the respondent and were serious attacks upon his character. He took into account the fact that the respondents continued to publish articles which were defamatory of the respondent even after he had complained that the allegations were untrue, had written the appellants a letter of demand on 23 June, 1988, and had filed a writ for libel. He found that it was not until they were restrained by an interim injunction that they ceased publication of the articles. The Judge also considered the effect of the plea of justification which had been entered by the appellants thus necessitating their insistence at the trial that the three boxes were never over-landed at Montserrat and subsequently lost; and the suggestion at the trial that the respondent and his agent (Luchessi) had conjured up the existence of the three boxes.

He also took into consideration the fact that the appellants refused to apologise; and after considering the cases of *Rookes v. Barnard* (1964) 1 All E.R. 367 and *Cassell v. Broome et al* (1972) 1 All E.R. 801 he came to the conclusion that this was a case in which exemplary damages should be awarded, but he applied Lord Devlin's third consideration in *Rookes v. Barnard* at p.411 and refused to award such damages because of his doubts as to the ability of the appellants to pay. He however awarded aggravated damages, and arrived at a global figure of \$60,000 to be paid by the appellants jointly and severally.

Learned Counsel for the appellants submitted that the damages awarded were wholly excessive and out of all proportion to any damage which the plaintiff can have suffered and asked this court to reduce the sum awarded in damages. On the other hand learned counsel for the respondents urged the court to use comparable figures of similar awards made in this jurisdiction. The authorities reveal that a Court of Appeal should not disturb an

award of damages unless it is manifestly too large or manifestly too small; or as it is put in the alternative that no reasonable proportion existed between it and the circumstances of the case. (See *Cassell v. Broome* (1972) 1 All E.R. 801 at 819). This is not such a case. The appellants consistently and persistently published defamatory articles about the respondent and their cumulative effect would normally prima facie justify an award of the size made by the learned trial Judge.

However, in awarding aggravated damages the learned Judge took malice into account when he said:-

"There is no doubt in my mind that the defendants were actuated by malice towards the plaintiff when they wrote and published the articles complained of. I find all the articles complained of are highly defamatory of the plaintiff and were serious attacks upon the character of the plaintiff. He is therefore entitled to substantial damages."

In this connection our attention was drawn to the decision of the English Court of appeal in *Egger v Viscount Chelmsford and others* (1964) 3 A.E.R. 406, and in particular to the following words of Lord Denning at page 412:

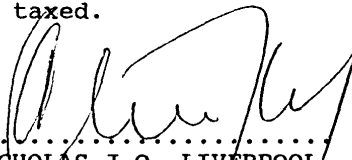
"If the plaintiff seeks to rely on malice to aggravate damages, or to rebut a defence of qualified privilege, or to cause a comment, otherwise fair, to become unfair, then he must prove malice against each person whom he charges with it. A defendant is only affected by express malice if he himself was actuated by it; or if his servant or agent concerned in the publication was actuated by malice in the course of his employment."

Although the learned Judge may have been justified in finding express malice on the part of the editor and the publisher, there was definitely no scintilla of evidence of malice express or otherwise adduced against the printer. In fact none was pleaded against him in the particulars of the claim of malice. For this reason and on the authority of *Egger's* case we have no alternative but to reduce the damages awarded. In so doing we are fortified

by the dictum of Lord Hailsham in *Cassell & Co. Ltd v Broome* at p 817, where he said:

"Counsel referred to us *Heydon's case*, *Clark v Newsam*, *Hill v Goodchild*, *Dawson v M'Clelland*, *Greenlands Ltd v Willmshurst*, *Smith v Streatfeild*, *Chapman v Lord Ellesmere* per Slesser LJ, *Dougherty v Chandler*, *Egger v Viscount Chelmsford* and to the current edition of *Gatley*. I think that the inescapable conclusion to be drawn from these authorities is that only one sum can be awarded by way of exemplary damages where the plaintiff elects to sue more than one defendant in the same action in respect of the same publication, and that this sum must represent the highest common factor, that is the lowest sum for which any of the defendants can be held liable on this score. Although we were concerned with exemplary damages, I would think that the same principle applies generally and in particular to aggravated damages, and that dicta or apparent dicta to the contrary can be disregarded."

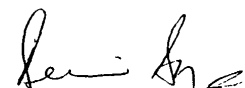
We are most grateful to learned Counsel Mr. Moore and Mr. Luckhoo for their stimulating submissions and for the assistance given to this Court under the difficulties and pressures which surround political activity in a small island. Taking into account the factors which influenced the learned judge's award, the dicta in *Egger's Case* and *Cassell Co. v Broome* and the limited extent of the circulation of that small newspaper, we are satisfied that the sum of \$40,000.00 would be the appropriate award to be made in this case. Accordingly, we would reduce the award made by the trial Judge to \$40,000.00 to be paid by the appellants jointly and severally. Otherwise, we would dismiss the appeal. There will be costs to the respondent to be taxed.


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NICHOLAS J.O. LIVERPOOL
Justice of Appeal

I concur.


.....
SIR VINCENT FLOISSAC
Chief Justice

I concur.


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C.M. DENNIS BYRON
Justice of Appeal