

RE- ISSUED

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2019/0683

BETWEEN

VERE BIRD III

Claimant

and

GASTON BROWNE

Defendant

Appearances:

Mr. Ruggles Ferguson and Ms. Luann DaCosta for the Claimant
Mr. Jared Hewlett for the Defendant

2023: March 1;
April 27.
May 4th (re-issued)

JUDGMENT

- [1] **Byer, J.:** In the world with no rules or structure, people in a society may speak as they wish, do as they wish and have no repercussions. However, this world that we do live in has rules, has structures and has consequences for our actions. One such consequence is when we speak or write of another with abandon, which if not careful may raise the ugly possibility of our actions being considered defamatory.
- [2] Although defamation has eluded a precise definition, the authors of the classic text Winfield and Jolowicz on Tort¹ had this to say, “it has been said that a statement is defamatory if it tends to bring a person into “hatred, contempt or ridicule” or that such a statement must “...tend to lower the claimant in the estimation of right thinking members of society generally.” It is both of these actions, that the claimant has alleged that the defendant, the Prime Minister of Antigua and Barbuda did in his Facebook posts in 2019.

¹ 19th Edition at para 13-002

Background

- [3] The Claimant, on the 12th day of December, 2019, filed a Claim form and Statement of Claim seeking:
- (1) Damages for Defamation against the Defendant for words published and broadcasted on Facebook on the 5th, 6th and 8th November, 2019.
 - (2) Aggravated and Exemplary Damages.
 - (3) An injunction restraining the Defendant and each of them by themselves their agents, servants, or howsoever otherwise from broadcasting the said or any similar defamatory words about the Claimant.
 - (4) Interest pursuant to section 27 of Eastern Caribbean Supreme Court Act Cap 143 or the Laws of Antigua and Barbuda 1992 (R.E.).
 - (5) Costs on the indemnity basis and/or wasted costs against the Defendant.
 - (6) Such further and other relief as this Honorable Court deems fit.
- [4] This claim was amended on the 20th October 2020² but it was unclear from the filed document as to the precise nature of the amendment as the purported Amended Claim was filed in contravention to the provisions of Practice Direction 5 of 2011.
- [5] The Defendant filed his amended defence on the 30th October 2020³ and relied on the defences of truth (justification) and fair comment. The Defendant further pleaded that the words which he admitted publishing, were not actuated by malice and that in any event the Claimant could not show any damage to his reputation and character as the Defendant was already a man of bad character and was held in low esteem by the public at large.⁴
- [6] The Claimant filed no reply to this defence, and the matter proceeded to trial on the 1st March 2023 with the sole witnesses being the claimant and the Defendant.
- [7] At the conclusion of the trial it was clear to the court that there were clear issues to be determined on this matter. They were as follows:
- i) Whether the words are defamatory in the circumstances that they were spoken
 - ii) Whether the words were defamatory of the Claimant
 - iii) Whether the Defendant could avail himself of the defences of fair comment and truth
 - iv) Whether the Claimant is entitled to damages including aggravated and exemplary damages
- [10] In considering these issues this court intends to deal with each utterance as complained of by the Claimant and address its mind to each utterance as to issues

² Pages 3-16 of TB 1

³ Pages 17-42 of TB 1

⁴ Paragraphs 12 and 19 of the amended defence

(i) to (iii) as stated above and then deal globally with the issue of damages if that becomes necessary.

- [11] However before this court embarks on this undertaking it is necessary in this court's mind to note certain matters. Firstly, by ruling of the Learned Master on the 30th March 2021, it was determined that the words complained of were capable of bearing the meanings as set out in the statement of claim of the claimant at Paragraph 10 (a) to (f-2)⁵ thus this court will not be required to make that finding. Secondly it is clear to the court that the utterances complained of by the Claimant far from following on one after another as set out in paragraph 5 and 6 of the statement of claim⁶, the statements in fact were made in the process of statements and comments by others on the social platform to the complained of statements. Thus, given the genesis of these statements, it is the responsibility of the court in making the determination as to whether they in fact defamed the Claimant, to assess the same in their context and to "...characterize and summarize the thrust of the [information] as a whole"⁷.
- [12] Further for the sake of clarification, in the reproduction of the complained of passages in this assessment this court wishes to make it clear that, the portions that are in bold are the parts of the exchange that were in fact pleaded by the claimant. This court has merely put the same in the context that they were spoken for ease of reference.

FACEBOOK POST #1

"Gaston Browne

Nov 5 at 6:19PM

Killer: When you live in a glass house don't throw stones.

(screen shot of a document)

Sale of Crown Land

Vere C Bird III

Cabinet agreed to the sale of one (1) acre of Crown Land to Mr. Vere C. Bird III at concessionary rate of \$25,000.00 per acre. Cabinet further agreed that the Ministry

⁵ (a) The Claimant is a crook.

(b) The Claimant is a thief.

(c) The Claimant is a corrupt politician.

(d) That the Claimant derived a benefit from a crooked cabinet deal.

(e) The Claimant and his father fraudulently concocted a deal to sell him land at a concessionary Parliamentary rate.

(f) The Claimant has defrauded the State of Antigua and Barbuda of its Crown Lands by getting and acre of land at a concessionary rate of \$25,000.00.

⁶ Pages 4 and 5 of the TB1

⁷ **Dr Frank Skuse v Granada Television Limited** [1993] EWCA Civ 34 at para 8

of Agriculture should determine the site, effect the demarcation of the land and verify its registration particulars.⁸

Alex Nicholas

Wonder what year was that? Hmmm

Gaston Browne

Alex Nicholas – Sept 2003, when his late father, Vere Bird Jr was Minister responsible for Crown Lands.

Killer, was not a parliamentarian yet, he and his father concocted a deal to sell him land at a Parliamentary rate.

Alex Nicholas

@Gaston Browne – waaaaaat... well Mr PM hope that is no more.

Gaston Browne – Our Parliamentary rate is \$4.00 per square foot and developmental rate at \$3.00 per square foot.

FACEBOOK POST #2

"Vere C. Bird III

Does anyone know a red nigger named Craig Christian, after I told him I was going to sue him for posting this bullshit he deactivated his fb account. Trying to find his home or workplace for my lawyer. Thanks in advance.⁹

Gaston Browne

**Here goes the Bird Poop 🐔
Again, trying to intimidate
People for factual, and
Responsible free speech**

**You claimed that you didn't
get the land, but you cannot
refute the decision, to sell
you the land at the
concessional rate for which
you were not eligible.**

⁸ Cabinet Decision

⁹ As provided by the Defendant in submissions filed 15/7/2021 at paragraph 3

Thanks to the vigilance of
our public servants the
crooked land deal was not
effected.

I was even told by my
colleagues who served in the
cabinet, that the decision
was a Cabinet Creeper.

Crooked Vere, kindly explain
to the people, what made
you eligible for land at a
Parliamentary rate.

- [13] Although there has been a finding that the words are capable of being defamatory there is still a need before the court can consider if the Defendant has viable defences to determine whether the words complained of are in fact defamatory and defamatory of the Claimant.

Issue #1 Whether the words are defamatory in the circumstances that they were spoken.

- [14] The court must consider whether the words are defamatory in these circumstances.
- [15] Indeed, “[i]t is established law that for a statement to be defamatory, it must contain either expressly or by implication statements of fact which would tend to lower the Claimant in the estimation of right-thinking members of society generally or it exposes [him] to contempt, public hatred, and ridicule. It is trite law that a statement is defamatory if it imputes dishonesty to a person in the context of his trade, business, or profession. Again, in determining whether the statement so imputes any such lack of quality, the test is that, of how the **ordinary, reasonable man who is fair minded** to whom the words are published is likely to understand them.”¹⁰
- [16] When this court considers this pronouncement of my learned sister Williams J, to the case at bar this court will consider each post individually. Post #1 clearly imputes to the Claimant that not having been entitled to rates for land sale attributable to a parliamentarian, that he clandestinely and by means of corrupt practices was able to attain a parcel of land. In Post #2, it is again imputed to the Claimant that he was able to manipulate the Cabinet confirmation process and obtain by corrupt means land to which he was not entitled.

¹⁰Beulah Mills v Michael Perkins and anr NEVHCV2009/0098 per Williams J at para 85

- [17] Accordingly, this court finds that the utterances of the Defendant would be likely to be understood by the reasonable and right-thinking member of society as libelous in all the circumstances.

Issue #2: Whether the words were defamatory of the Claimant.

- [18] Beyond the necessity to establish that the words must be defamatory there is a second and more pressing requirement to be successful on a claim for defamation that the words must refer to the Claimant. As the Learned Author in the text Commonwealth Caribbean Tort Law¹¹ stated:

“The second requirement for a successful action in defamation is that the defamatory words must be shown to have referred to the claimant. In most cases the claimant will be mentioned by name, but this is not a necessary requirement. It is sufficient for liability if he is mentioned by, for example, his initials or his nickname, or if he is depicted in a cartoon, photograph or verbal description, or if he is identified by his office or post. It may also be sufficient if a particular group of which he is a member is mentioned. In all cases, the test is whether a reasonable person might understand the defamatory statement as referring to the claimant. In Attorney General v Milne, for instance, it was held that there was sufficient reference to the claimant where a radio broadcaster referred to ‘one irresponsible businessman ... who ... pledges half a million dollars on placards, posters and other subversive material’ and in Gairy v Bullen (No 1), a newspaper article which alleged sexual impropriety towards young girls seeking employment was held to contain sufficient reference to the claimant, the Prime Minister of Grenada, although it did not mention him by name, because ‘a substantial number of ordinary sensible persons who knew the [claimant], reading the article, would believe that it referred to him’.

- [19] Thus the question must be in this instance not whether anyone did identify the claimant but whether persons who were acquainted with the claimant could identify him or her from the words used¹². This proposition was no more clearly identified than in the Barbadian case of **Jordan v The Advocate Co. Ltd.**¹³ In that case, “[T]he defendant newspaper published an article under the heading, ‘Little Help for Junior Doctors’, in which it was alleged that junior doctors at the Queen Elizabeth Hospital were often forced to make decisions regarding the treatment of patients without the benefit of consultation with senior medical practitioners. The latter were accused of spending more time playing golf than attending to their duties at the hospital. The claimant, a senior consultant physician and prominent amateur golfer, brought an action for libel against the newspaper, claiming that, although the writer

¹¹5th Edition – Gilbert Kodilinye at pages 260-261; further distilled in the case **Knupffer v London Express Newspaper Ltd** [1944] 1 All ER 495 at 496 per Viscount Simon LC

¹²**Beulah Mills case** Supra n10 at para-90.

¹³(1998) High Court Barbados No 727 of 1996 (unreported)

of the article purported to criticise senior practitioners as a group, and the claimant's name was not mentioned, reasonable readers would understand the article to refer to him.

*Payne J, in the Barbados High Court, considered that the question was 'whether reasonable readers generally or reasonable readers with the knowledge of certain special facts proved would understand the article to refer to the [claimant]'. He went on to hold that, in the circumstances, reasonable readers generally would not understand the article to refer to the claimant, as distinct from the group of which he was a member, but that persons knowing the special facts, namely, that there was only one other consultant at the hospital who played golf, and that this consultant was in the Department of Radiology and would not, therefore, be involved in the medical care of patients, would reasonably understand the article to refer to the claimant.'*¹⁴

- [20] In this instance, although there was no evidence led as to whom the name "Killer" in Post #1 referred, when this is read in the context of the Cabinet Decision that was disclosed immediately after the mention of the name Killer, and that the Cabinet Decision itself referred to Vere C Bird III, it is without question that Post #1 referred to the Claimant. In relation to Post #2, similarly there can be no question to whom the Defendant was addressing as the Claimant's name is clearly stated at the commencement of Post #2.

Issue #3: Whether the Defendant can avail himself of the defences of justification (truth) and fair comment.

- [21] Having made the previous determinations, in this matter the most important matters are whether the Defendant can in fact rely on the defences raised of justification or truth and fair comment both of which are complete defences to a claim for defamation.

Justification (Truth)

- [22] In the State of Antigua and Barbuda, the common law defence of truth has been codified in The Defamation Act, 2015 ¹⁵ (DA) and, in particular, section 20 thereof.

- [23] Section 20 in its entirety states as follows:

(1) Defense of truth

- (a) In proceedings for defamation, the defence known before the commencement of this Act as the defense of justification shall, in

¹⁴ Supra n11

¹⁵ No 7 of 2015

relation to an action for defamation brought after the commencement of this Act, be known as the defence truth.

- (b) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.
- (c) In proceedings for defamation, a defence of truth shall succeed if-
 - (i) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
 - (ii) Where the proceedings are based on all or any of the matter contained in a publication taken as a whole was in substance true or was in substance not materially different from the truth, if the words not proven to be true do not materially injure the claimant's reputation having regard to the truth of the remaining imputations.

- [24] Section 20 therefore provides for two criteria for the defence to succeed, they are 1) that the defendant is able to prove that the imputations are true or not materially different from the truth or 2) that all or any of the matter in the publication is true or at least not substantially different from the truth once the words that are not true do not "materially injure the claimant's reputation" bearing in mind the remainder of the words that are true.
- [25] In the case at bar, in order for this court to determine whether this defence applies to Post #1 and Post #2, the court will take each one separately and assess the words used in each and the facts upon which they were based.
- [26] The genesis of these posts by the Defendant was the Cabinet Decision, which by Order dated the 7th October 2020 my sister Drysdale J declared that "it was recorded in the Official Minutes of Cabinet that the Claimant was the subject of a Cabinet Decision for the sale of one acre of Crown Lands to him at a concessionary rate."
- [27] Having had sight of this Cabinet Decision the Defendant then posted it on his Facebook page. It was in response to a question as to when the decision was made that Post #1 was made.
- [28] I will take each portion of Post #1 in turn for ease of determining if what was said was true or was not materially different from the truth. Indeed, in the case of **Abraham Mansoor and ors v Grenville Radio Limited and ors**¹⁶ Blenman J (as she then was) even though deciding the matter before the advent of the DA had this to say which in this court's mind is still good law. It is "...the law that a substantial justification is sufficient. If the defendant[s] prove that "the main charge or gist of the libel" is true they need not justify statements or comments which do not add to the sting of the charge or introduce any matter which is by itself actionable. It is sufficient if the substance of the libelous statement is justified, it is unnecessary to repeat every word which might have been the subject of the original comment...as

¹⁶ ANUHCv2004/0408 at paragraph 121

much must be justified as meets the sting of the charge and if anything, be contained in a charge which does not add to the sting of it that need not be justified.”

[29] As stated by the authors of *Gatley on Libel and Slander*¹⁷ when considering substantial truth, it is important to “isolate the essential core of the libel and not to be distracted by inaccuracies around the edge – however substantial.” Therefore, it is imperative to take the context of the publication as a whole. Thus “words cannot be taken out of context. The claimant is not entitled to take a blue pencil to the article, so as to change its meaning and then prevent the defendant from seeking to prove the truth if the words in their unexpurgated form.”¹⁸

[30] Bearing all this in mind, Post #1 must be considered in context. This court will therefore look at the Post in two parts and consider the context of the same.

Part 1 – Post #1

Sept 2003 when his late father Vere Bird Jr was Minister responsible for Crown Lands

[31] This statement was clearly in response to the question by an individual as to the timing of the Cabinet decision which had no date ascribed to it.

[32] Further in cross examination when the question was posed to the Claimant if his father was the Minister of Lands in 2003, he agreed. He also agreed that in 2003 a Cabinet Decision was made granting him permission to buy Crown lands at a concessionary rate.

[33] The basis of this statement is therefore truthful.

Part 2 – Post #1

(a) Killer was not a parliamentarian.

[34] The Claimant was referred to by a nickname that was obviously recognized and states that he was not a parliamentarian in 2003. This statement is admitted by the Claimant who in cross examination made it clear that he had never sat in Cabinet or had won his seat in the elections as contested in 2014 and 2018. This statement is also true.

(b) yet, he and his father concocted a deal to sell him land at a parliamentary rate.

¹⁷ 12th ed para 11.7; *Edwards v Bell* (1824) 1 Bing 403 at 409 per Burrough J

¹⁸ *Ibid*

- [35] In the evidence of the Claimant¹⁹ on examination in chief, the Claimant admitted that a friend of the family one Rupert Sterling told him he could get him a piece of government land to buy and that 6 months later the same Mr. Sterling told him to collect a Cabinet Decision where he was given the permission to buy land at a concessionary rate.
- [36] On cross examination the claimant admitted that Rupert Sterling was not a member of Cabinet, but his father was, as Minister of Lands. He further admitted that he had not made any application himself to buy a parcel of land and did not know of the procedure to do so. The Claimant also was unable to deny that his father had approached the Defendant to seek his support of obtaining a Cabinet Decision to allow the Claimant to buy land at a concessionary rate.
- [37] When this court therefore considers the evidence in this regard the following on a balance of probabilities is found to be true: i) the Claimant's father was a member of Cabinet at the time of the decision; ii) the Defendant and the Claimant's father were Cabinet colleagues at the time of the Cabinet Decision; iii) that Rupert Sterling was not a member of Cabinet; iv) that the Cabinet Decision permitted the Claimant to purchase land at a concessionary rate to which he was not entitled.
- [38] Taken in the round, this court therefore finds that the use of the word "concocted" in this context cannot be considered as materially injuring the Claimant's reputation on the basis that the facts that are true can lead a reasonable person to use that word. Thus this court accepting that the sting in this statement would have been attached to the word "concocted" (and to which the Claimant admitted on cross examination was really why he was upset) this court considers and finds that the Defendant has not just proven the literal truth of the basis of the statement but that additionally he has also proven the truth of the fact which could be inferred, that is that the Claimant and his father who was a member of Cabinet had been able to create a scenario where the Claimant received land at concessionary rates in circumstances where he was not so entitled. This court finds that that the inference was reasonable especially since the person who is stated to have enabled the transaction was in fact not a member of Cabinet and could have had no such ability without the assistance of a member of Cabinet, and the reasonable inference would have been that that person was the Claimant's father. In particular this, is even more evident when the decision also states that the Ministry of Agriculture (the Ministry of Vere Bird Jr the father of the Claimant) had the responsibility of determining the site, the demarcation and to verify the particulars of registration.
- [39] In all the circumstances this court therefore finds in relation to Post #1 that the defence of truth is available to the Defendant and the claim of the Claimant in relation to that post fails.
- [40] In relation to Post #2, this court will also examine that post in five parts to consider whether this defence is also available in relation to this post some two days later.

¹⁹ WS filed 27/5/2021 paragraphs 13 and 14.

- [41] The context of this Post is supposedly a direct response to a comment made by the Claimant on Facebook himself intimating that he was prepared to sue someone who he was asking the Facebook community to assist him in finding. Since the Claimant did not include this initial statement in his pleadings by way of context, this court must assume that it was a genuine query of the Claimant at the time.

Part 1 -Post #2

Here goes the Bird Poop again, trying to intimidate people for factual and responsible free speech.

- [42] In this court's mind this statement is better dealt with under the concept of fair comment and whether the Defendant was entitled in all the circumstances to utter this opinion.

Part 2 – Post #2

You claimed that you didn't get the land, but you cannot refute the decision to sell you the land at the concessional rate for which you were not eligible.

- [43] This statement continues to speak to the evidence that was uncontroverted by the Defendant and the Claimant himself. There was a decision to sell land at concessionary rates to the Claimant. There has been no evidence led by the Claimant that he was in fact entitled to these concessionary rates based on any particular factor but rather his case is that he did not accept the land as offered.
- [44] This court therefore must reach the inescapable conclusion that this statement is true.

Part 3- Post #2

Thanks to the vigilance of our public servants the crooked land deal was not affected.

- [45] At trial of the matter, the contention of the Defendant was that the reason the Claimant did not receive the land under the Cabinet Decision was due solely to the loss of the 2004 election by the Antigua and Barbuda Labour Party to the United Progressive Party which then halted any acts taken by the previous government.
- [46] The Claimant on cross examination made heavy weather that this was not the case but rather that he had personally decided not to take up the entitlement under the Cabinet Decision because as he put it, "the discomfort came that I would see other members of the Cabinet who would flip these lands and I did not want to be

associated with that ; I was uncomfortable because I did not want to be associated with other members of Cabinet who bought land at peppercorn rates and then sold them for millions of dollars.”²⁰

- [47] However the same Claimant also stated in his examination in chief ²¹ that it had been over sixteen years since the Cabinet Decision (to the date of the Witness Statement) but yet still, in those sixteen years the claimant did not produce a scintilla of evidence that his decision to not accept the option to purchase had been in any form conveyed to Cabinet. In fact, this court is of the strong opinion that if any such correspondence did exist the Claimant would have proudly and clearly produced it to the court or even posted it on his social media.
- [48] Rather this court finds on a balance of probabilities that the failure of the Claimant to obtain this parcel of land was the change in government that took place after the 2004 elections.
- [49] Indeed this court takes notice of the court action that was commenced against the Defendant after the 2004 elections in seeking to set aside a land transfer that had been approved by the Cabinet prior to the elections.²² On appeal the Defendant herein (the Appellant therein) was successful and the land transfer so sanctioned was upheld.
- [50] In this regard this court therefore accepts that the land transaction of the Claimant was affected due to the actions of public servants working for the government at the time. As stated, regarding Post #1, this court is satisfied that the use of the word “crooked” was a reasonable inference to be drawn considering all the circumstances that this Cabinet Decision had not been made within the parameters of proper procedure.
- [51] It was indeed quite telling to the is court that on cross examination the Claimant admitted that he was not aware that there was a specific procedure in order to have a matter laid before Cabinet for consideration and further that he had no idea how the decision had been obtained and that he knew that the Cabinet Decision had given him a benefit “...over hard working and tax paying citizens ...”²³
- [52] This court therefore accepts that this statement did not depart materially from the truth of the situation and the defence is also available to the Defendant on this statement as being the truth.

²⁰ Evidence elicited on cross examination at trial of matter

²¹ Para 14 of the WS of the Claimant filed 27/5/2021.

²² HCVAP2009/024 **Gaston Browne v The Attorney General of Antigua and Barbuda and anr**

²³ Para 14 of the WS of the Claimant filed 27/5/2021.

Part 3- Post #2

I was even told by my colleagues who served in the Cabinet that the decision was a Cabinet creeper

- [53] It was at the trial of the matter that the Claimant made it clear that until the Defendant had raised it in his case, he had no idea what was a “Cabinet creeper.”
- [54] Indeed in the examination in chief of the Defendant²⁴ this concept was thoroughly explained. “Although uncommon it was not unheard of for certain “decisions” being placed into the Official Cabinet minutes by the secretary without having actually been made in Cabinet. Such “decisions” are referred to as Cabinet creepers ...”
- [55] In addition at the start of the examination in chief of the Defendant he clearly set out the procedure to have a matter brought before Cabinet. This process includes a written application from the applicant, then there is a circulation note created from that application which comes from the Ministry responsible. The note is then sent to the secretary to be included on the agenda and the Minister with responsibility is tasked with making the presentation to Cabinet on the application by way of circulation note and then Cabinet votes on the matter at meeting.
- [56] The Claimant admitted on cross examination that he made no application, that he had no idea how the Cabinet Decision came about and that in fact that he did not know whether any application had been made on his behalf. It therefore lies at the feet of the Claimant to prove that despite this decision forming part of the Official minutes of the Cabinet as found by Drysdale J, its genesis was indeed genuine.
- [57] This court on a balance of probability finds that the evidence of the Defendant as to not having participated in the process to approve this sale or seeing it in any minutes which he reviewed stands uncontroverted. The truth is that this Cabinet Decision cannot be grounded in any sanctioned procedure. The Claimant simply states that its mere existence is sufficient evidence of its validity. Indeed, perhaps that may have availed him in circumstances where there was no evidence by someone who would have been legitimately part of the process. But there is, and the Defendant’s contentions cannot be discounted without more especially when the Claimant makes it clear that he did not seek to get land at a concessionary rate, that Mr. Sterling obtained the land without his consent and that it was not his father who was the Minister who orchestrated the permission.
- [58] In this court’s mind it was therefore entirely appropriate for the Defendant to question the origins of this Cabinet Decision knowing full well that there was no supporting information as to its appearance and when the evidence of the approach to the Defendant by the father of the Claimant remains untested there is only one conclusion that the Cabinet Decision was a creeper and that the Defendant is entitled to rely on the defence of truth .

²⁴ Para 7 of the WS of the defendant filed on the 18/6/2021.

Part 5- Post #2

Crooked Vere, kindly explain to the people what made you eligible for land at a parliamentary rate.

[59] This court is of the opinion that this statement is better dealt with under the defence of fair comment.

Fair Comment

[60] In the 12th edition of the text Gatley on Libel and Slander, the authors recognized that the defence of fair comment, like truth, is a complete defence to an action of libel or slander where the words complained about are honest or fair comment on a matter of public interest²⁵. Indeed, the terminology fair comment has given way to the term honest comment as was recognized by the United Kingdom Supreme court in the case of **Spiller and another v Joseph and others**²⁶ which terms has now also been codified in the Defamation Act 2013 of the United Kingdom. However, in the DA of this State, the terminology fair comment remains and in sections 21 and 22 the defence is preserved.

[61] Sections 21 and 22 in their entirety states as follows:

21. Defence of fair comment; truth of assertions

- (1) In an action for defamation in respect of words, including or consisting of expression of opinion, a defence of fair comment shall not fail only because the defendant has failed to prove the truth of every relevant assertion of fact relied on by him as a foundation for the opinion, provided that such as the assertions as are proved to be true are relevant and afford a foundation for the opinion.
- (2) Nothing in this section affects the liability of the defendant in an action for the defamation for the acts of his employee.

22. Publication on a matter of interest

- (1) It is a defence to an action for defamation for the defendant to show that:
 - (a) The statement complained of was, or formed part of, a statement on a matter of public interest; and
 - (b) The defendant reasonably believed that publishing the statement complained of was in the public interest.

[62] That being said, the right to comment has been considered “one of the fundamental rights of free speech and writing...and ...of vital importance to the rule of law in

²⁵ Paragraph 12.1

²⁶ [2010] UKSC 53

which we depend for our personal freedom.”²⁷ Even further in the Hong Kong Court of Final Appeal in the case of **Tse Wai Chun Paul v Albert Cheng**²⁸ the court put it thusly, “the defence of honest comment is intended to promote vigorous free speech, so that “a critic need not be mealy mouthed in denouncing what he disagrees with ... [but rather is] entitled to dip his pen in gall for the purposes of legitimate criticism.”

- [63] For the Defendant to avail himself of this defence he must however show that the words are comments and not statements of facts. They must also show that there is a basis, which is some allusion, to the facts underpinning the comment, that it is based on facts that are true or protected by privilege and the comment is one that is objectively fair in that an honest and fair-minded person could hold that view. “The defence is not in- applicable because the comment was prejudiced or exaggerated or “unfair” in the ordinary sense of the word”²⁹ and finally the comment must be on something that is of public interest. That is, “one which has been expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern.”³⁰

- [64] Indeed in **Silkin v Beaverbrook Newspapers**³¹ Diplock J put it thusly:

“People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided – and this is the important thing – that there are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test; was this an opinion, however exaggerated obstinate or prejudiced, which was honestly held by the writer?”

On what the true test is I think what I can best do is to repeat to you, adapting it to the facts of this case, a statement made by a judge some years ago when he said this; “When you come to a question of fair comment you ought to be extremely liberal, and in a matter of this kind... you ought to be extremely liberal, because it is a matter on which men’s minds are moved, in which people who do know, entertain very, very strong opinions, and if they use strong language every allowance should be made in their favour. They must believe what they say, but the question whether they honestly believe it is a question for you,” the jury, “to say. If they do believe it, and they are within anything like reasonable bounds, they come within the meaning of fair comment. If comments were made which would appear to you to have been exaggerated, it does not follow that they are not perfectly honest comments.”

²⁷Gatley on Libel and Slander Ibid at para 12.1

²⁸[2000] HKCFA 86; [2001] EMLR 31

²⁹**Abraham Mansoor and ors v Grenville Radio Ltd** ANUHCv 2004/0408 per Blenman J (as she then was) at paragraph 102.

³⁰**Abraham Mansoor** Ibid paragraph 102

³¹[1958] 1 WLR 743

[65] However as the learned authors of Gatley on Libel and Slander³² recognized this concept is not a static one and as such the parameters of the defence have also morphed. Therefore, “[Honest] comment is a defence that is open, in principle, to every defendant. While it has been used constantly by media defendants, the right of comment which the press and broadcasters have is one which they share with every member of the public. ... However, the advent of social media platforms has opened a new field of public discussion in which the defence might become more important to the average person. Indeed, one explicit motivation that underpinned the court’s restatement of the elements of the defence in *Joseph v Spiller* was to allow greater flexibility over how commentators express their views while yet being able to resort to the legal safe harbor. The need to accommodate the advent of social media platforms – and the way in which people relate to one another thereon – in the construction of opinions and to express them to others; they have a right to respond to the world as they find it (even if this involves them in reaching wrong conclusions).”

[66] As was stated in **Joseph v Spiller** by Lord Phillips³³:

“...Today the internet has made it possible for the man in the street to make public comment about others in a manner that did not exist when the principles of the law of fair comment were developed, and millions take advantage of that opportunity. Where the comments that they make are derogatory it will often be impossible for other readers to evaluate them without detailed information about the facts that have given rise to the comments. Frequently these will not be set out.

100. The cases have none the less emphasized repeatedly the requirement that the comment should identify the subject matter on which it is based, ... If the requirement that the comment should identify the subject matter on which it is based is not imposed in order to enable the reader of the comment to form his own view of its validity, what is the object of the requirement? Bingham LJ in *Brent Walker* [1991] 2 QB 33, 44 said that the true facts must be “stated or sufficiently indicated” – sufficiently for what?

101. There are a number of reasons why the subject matter of the comment must be identified by the comment, at least in general terms. The underlying justification for the creation of the fair comment exception was the desirability that a person should be entitled to express his view freely about a matter of public interest. That remains a justification for the defence, albeit that the concept of public interest has been greatly widened. If the subject matter of the comment is not apparent from the comment this justification for the defence will be lacking. The defamatory comment will be wholly unfocussed.

102. It is a requirement of the defence that it should be based on facts that are true. This requirement is better enforced if the comment has to identify, at least in general

³² Supra at para 12.2

³³ Supra at para 99, et seq

terms, the matters on which it is based. The same is true of the requirement that the defendant's comment should be honestly founded on facts that are true.

103. More fundamentally, even if it is not practicable to require that those reading the criticism should be able to evaluate the criticism, it may be thought desirable that the commentator should be required to identify at least the general nature of the facts that have led him to make the criticism. If he states that a barrister is "a disgrace to his profession" he should make it clear whether this is because he does not deal honestly with the court, or does not read his papers thoroughly, or refuses to accept legally aided work, or is constantly late for court, or wears dirty collars and bands."

- [67] Therefore as this court turns its attention to the case at bar, it is clear that the basis of the statements made in Parts 1 and 5 of Post #2 must be considered.

Part 1- Post #2

Here goes the Bird Poop again, trying to intimidate people for factual and responsible free speech.

- [68] As has been stated throughout this judgment, context of a statement is imperative in the analysis of any such statement. Indeed, although there was no specific complaint made of this statement it is included in the statements the Claimant has considered defamatory.
- [69] Therefore as was stated above this statement was made in direct response to the query by the Claimant looking for an individual for "his lawyer" so that he could sue him for making certain statements against him on Facebook.
- [70] It is clear to this court that the Claimant having made his initial statement on Facebook opened himself up to persons expressing their opinions on his purported actions. Therefore, having stated that he was prepared to sue the person for what was said, the Defendant was entitled to comment on what he considered the actions of the Claimant to silence persons who said anything contrary to him on the social media platform. Having used the term Bird Poop as well in this court's mind was also an attempt by the Defendant to register his disgust at the actions of the Claimant to silence opposition.
- [71] In this court's mind this was clearly a comment on the action of the Claimant himself and an action with which the Defendant disagreed. It was clear that there was a factual basis for the comment, the action of the Claimant himself and it was clear that having seen what the Claimant had said that the statement was one that a person could have honestly held based on the actions of the Claimant. This court therefore determines that the defendant is entitled to rely on the defence of fair comment in relation to this statement.

Part 5- Post #2

Crooked Vere, kindly explain to the people what made you eligible for land at a parliamentary rate.

- [72] This statement was posted by the Defendant at the end of a lengthy diatribe as to the existence of a Cabinet Decision in favour of the Claimant. A matter which this court has previously discussed in this judgment.
- [73] This statement therefore came as a conclusive paragraph by the Defendant after setting out particulars of fact. In this court's mind, once again context is key and it was clear to this court that having set out his factual determinations (and which this court has found were truthful in substance) the Defendant, in this court's mind, issued his opinion as to the nature of the behavior of the Claimant by calling him crooked and in all the circumstances could be "understood as an inference from supporting facts."³⁴
- [74] Thus as was discussed in the case of **Branson v Bower**³⁵ where a newspaper article had been written about Sir Richard Branson and what may have been his motives in making a bid to run the National Lottery in the United Kingdom, it was stated that the Claimant was being motivated not by charity but by revenge and financial gain and self-interest. The Court of Appeal by Latham LJ held that the traditional test that must be applied is as set out in the case of **Clarke v Norton**³⁶. The test strictly was that the "...sense of comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation etc."
- [75] Thus, when this court considers these pronouncements and applies them to the case at bar, that "whilst an assertion as to motive [or character] may be capable of amounting to an assertion of fact, that depends on its context"³⁷ and as such the context of what was said by Defendant in using the adjective "crooked" to the name of this Claimant satisfies this court that as "pungent and offensive"³⁸ as the term maybe or as "prejudiced or exaggerated"³⁹ as the term was, that this was the opinion of the Defendant on the actions of the Claimant of which he had already complained. Indeed "there is no requirement that the opinion be reasonable. It is not [even] necessary that the court should accept the opinion as correct"⁴⁰. Once the court is satisfied that his comment and opinion was on the sole truthful fact that the Claimant had been the beneficiary of a Cabinet Decision to be sold land at a rate

³⁴Gatley on Libel and Slander Supra at para 12.8

³⁵ [2001] EWCA Civ 791

³⁶ [1910] VLR 494 at 499

³⁷ **Branson v Bower** Ibid at paragraph 13

³⁸ **Keays v Guardian Newspapers Ltd** [2003] EWHC 1565 (QB) at paragraph 21

³⁹ **Eastern Express Publisher Ltd and Another v Mo Man Ching and Another** [1999] 3 HKLRD 530; [1999] 4 HKC 425

⁴⁰ Winfield & Jolowicz Tort at paragraph 13-100

that was traditionally extended to parliamentarians, then the Defendant could avail himself of the defence of fair comment.

- [76] Thus in a “modern democracy all those who venture into public life in whatever capacity must expect to have their motives subjected to scrutiny and discussed. Nor is it realistic today to demand that such debate should be hobbled by the constraints of conventional good manners - still less deference. The law of fair comment must allow for healthy skepticism”⁴¹. I therefore find that in all the circumstances the Defendant can avail himself of the defence of fair comment in both these circumstances as outlined.
- [77] For the purposes of completeness I also wish to indicate the court’s determination on the issue of malice as was raised by the Claimant.
- [78] The Claimant has pleaded and given evidence that the Defendant was actuated by malice in the sense that he was motivated by “political gain and mischief” ⁴². Indeed, in the submissions of counsel for the Claimant the mere fact that an otherwise confidential document, the Cabinet Decision, was published by Defendant in the manner that he did, was clear proof that the Defendant was acting towards the Claimant with malice.
- [79] Indeed at the trial of the matter and during cross examination the Claimant insisted that he is a political threat to the Defendant despite never having won an election in comparison to the Defendant having not lost his seat since 1998 and as such the Claimant was adamant that this was what had driven the Defendant’s actions.
- [80] It is not doubted that the defence of fair comment can be defeated by malice. As was stated in the case of **Tse Wai Chun v Cheng** ⁴³ Lord Nicholls put it this way: “a comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation whatever it may be even if it is the dominant or sole motive does not of itself defeat the defence. However, proof of such motivation may be evidence sometimes compelling evidence from which lack of genuine belief in the view expressed may be inferred.”
- [81] The onus of proving the existence of malice is on the Claimant⁴⁴ and he is at liberty to do so by considering intrinsic or extrinsic evidence. When this court considers the words themselves used, namely “Bird Poop” and “Crooked Vere”, this court does not find that those words in and of themselves were “violent,or utterly disproportionate to the facts”⁴⁵ In terms of extrinsic evidence , the evidence of the Claimant is that he is a threat to the Defendant (a statement not backed up by any factual evidence before the court), that the Defendant was seeking political mileage

⁴¹ **Branson v Bower** [2002] QB 737 at 747 per Eady J

⁴² Para 17 (d) WS of the Claimant filed 27/5/2021 and para 11(d) of the statement of claim filed 20/10/2020.

⁴³ [2000] HKCFA 86; [2001] EMLR 31

⁴⁴ **Gransaul v De Gransaul** [1922] Trin LR 176 (High Court of Trinidad and Tobago)

⁴⁵ Commonwealth Caribbean Tort Law (5th edn) at page 309

(a statement not backed up with any factual evidence before the court as there was no evidence as to the popularity of the Antigua and Barbuda True Labour Party as run by the Claimant) and that he was never a friend of the Defendant. The Defendant on the other had called the Claimant comrade, said that he had supported the Claimant taking over the seat of his father in the constituency that his father commanded, that knowing that the Claimant was not entitled to receive any concessionary rate it was dishonesty that resulted in the advent of the Cabinet Decision.

- [82] The Claimant has not in this court's mind on a balance of probabilities proven that the Defendant knew at the time that he made the posts that the statement was false, indeed all that the Defendant said (and so found by this court) was based on a truthful interpretation of what transpired. Neither has the Claimant shown the court that there was any hostile conduct as between himself or the Defendant or that the Defendant had ever shown any bad intent towards the Claimant, rather all the evidence before the court including the myriad of Facebook posts by the Claimant clearly shows contempt, mal-intent, disgust, and impertinence towards the Defendant. This court therefore finds that the Claimant has not proven on a balance of probability that the Defendant was actuated by malice that would defeat the plea of fair comment.

Conclusion

- [83] Having therefore found that the Defendant is entitled to rely on the defences of fair comment and truth which provides complete defences to the words spoken the court makes the following order:
- (1) The claim of the Claimant is dismissed in its entirety.
 - (2) Prescribed Costs to the Defendant on an unvalued claim pursuant to Part 65.5 CPR 2000.

Nicola Byer

HIGH COURT JUDGE

By the Court

Registrar