

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2020/0028

BETWEEN:

GASTON BROWNE

Appellant

and

ISAAC NEWTON

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Gerard St. C. Farara
The Hon. Mr. Trevor M. Ward

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Anthony W. Astaphan S.C, with him Ms. Rika Bird for the Appellant.
Mr. Lawrence Daniels for the Respondent.

2021: October 20;
2022: January 13.

Civil appeal – Defamation – Libel – Defence of truth – Section 20 of the Defamation Act of Antigua and Barbuda – Qualified privilege – Whether judge erred in finding words defamatory – Whether judge erred in finding the defence of truth did not avail the appellant

In 2017, the United States published its International Narcotics Control Standard Report (“the report”) in relation to the state of Antigua and Barbuda. The appellant, Mr. Gaston Browne, the Prime Minister of Antigua and Barbuda responded to the report publicly and condemned it. In his view, the report painted Antigua and Barbuda in a negative light. The respondent, Dr. Isaac Newton, a political strategist and businessman, publicly expressed his opinion of the appellant’s response to the findings of the report, citing it as crass and lacking of any public decorum. The appellant then replied to the respondent’s comments on Antigua’s “Observer Radio Big Issues” programme on 19th March 2017 which was subsequently published in the Times Newspaper on 21st March 2017 (“the first publication”)

stating that 'what was crass was his misconduct, during his short-lived career as a public servant, in which he was fired by former Prime Minister Spencer for certain wrongdoing.'

The respondent engaged counsel who wrote to the appellant, by letter dated 3rd April 2017, requesting that the appellant retract the statements of the first publication, apologise, give an undertaking not to repeat the publication or similar statements and to pay damages for defaming the respondent's reputation. No apology was forthcoming from the appellant; rather, the appellant published a response on his Facebook account on 11th April 2017 ("the second publication"). In that publication, the appellant stated 'this is the second time he has sought to extort money from me. The first was leading up to the 2014 elections, when he demanded US\$500k for a few weeks of political consultancy work. Just as I declined your extortionate request then, so shall I treat your current demand with contempt'.

The respondent brought a claim for damages, including aggravated damages, for libel in respect of both publications. He contended that the natural and ordinary meaning of the words of the first publication was that he was involved in gross misconduct as a public servant, lacked integrity and was corrupt. In respect of the second publication, he contended that the words meant and were understood to mean that the respondent was involved in extortion of monies for political consultancy work and was demanding money from the appellant for telling the truth.

In her judgment delivered 30th June 2020, the learned judge found that the words of the first publication were defamatory of the respondent holding that the natural and ordinary meaning to reasonable persons in the society informed accordingly, was that the respondent engaged in misconduct while holding public office, and that he was fired from public office as a result of wrongdoing or misconduct.

The learned judge also found that the defence of truth was not established because there was no evidence before the court that there was a finding, either through an administrative investigation or through a criminal investigation that the respondent was guilty of any form of misconduct while in public office.

In respect of the second publication, the learned judge found that in their natural and ordinary meaning, the words meant and were understood to mean that the respondent attempted to extort money from the appellant as it related to political consultancy work and was again attempting to do so through the correspondence written by his lawyer on 3rd April 2017. The learned judge found that the publication would be understood by a reasonable member of society to mean that the respondent demanded US\$500,000.00 for his services which suggests an unjustified demand and not a reference to exorbitant services.

The learned judge also found that the defence of qualified privilege failed in respect of both publications as they extended beyond the permitted latitude of the defence.

Dissatisfied with the decision of the learned judge, the appellant appealed. The following issues arose for determination by this Court: (i) whether the judge erred in holding that the words used by the appellant imputed the commission of the offence of misconduct in public office; (ii) whether the judge erred in holding that the defence of truth did not avail the appellant because he had not proved that there was a finding of guilt by a criminal or administrative investigatory body and; (iii) whether the judge erred in holding that the words

of the second publication were defamatory of the respondent and the defence of qualified privilege did not apply.

Held: allowing the appeal in its entirety; setting aside the decision of the learned judge; remitting the claim in relation to the first publication to be retried by a different judge of the High Court; and awarding the appellant prescribed costs in the court below and two thirds of those costs on appeal, in accordance with rules 65.5 and 65.13 of the **Civil Procedure Rules 2000**, that:

1. To succeed in an action for defamation, a claimant must prove the making of a statement by a defendant tending to lower the claimant in the estimation of right-thinking members of the society and the publication of that statement to a third party or parties. The words must be construed in their natural and ordinary meaning which may include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words.

Jones v Skelton [1963] 1 WLR 1362 applied; **Lewis v Daily Telegraph** [1964] A.C. 234 applied.

2. A defendant to an action for defamation may successfully invoke the defence of truth if he can show that the imputations of the words used were true or not materially different from the truth. Alternatively, he may succeed if he can prove that the publication taken as a whole was substantially true, if the words not proven to be true do not materially injure the reputation of the respondent having regard to the truth of the remaining imputations. However, the judge is required to assess all the evidence in making the determination of whether the defence of truth avails the defendant. In this case, the learned judge, albeit rehearsing some of the factors relied on by the appellant, which the appellant alleged were true and therefore could've assisted the judge in her determination, failed to analyse them in the context of the defence of truth. The learned judge instead attributed a criminal meaning to the word "misconduct" and determined that in its ordinary and natural meaning, the word "misconduct" imputed a criminal offence which meant that the respondent was found by an administrative or criminal investigatory body to have misconducted himself in public office and found that since there was no such finding, the words were not true nor true in substance. The learned judge therefore restricted herself to a technical and legalistic meaning of the word "misconduct" and fell into error by not making a proper assessment of whether the defence of truth was established.

Section 20 of the **Defamation Act**, Act No. 7 of 2015 of the Laws of Antigua and Barbuda applied; **Bonnick v Morris & others** [2002] UKPC 31 applied.

3. The assessment of the ordinary and natural meaning of a publication is a matter for the trial judge and an appellate court should only disturb such finding if satisfied that the learned judge was wrong. Where the words complained of are capable of bearing a number of good interpretations, it is unreasonable to seize upon the only

bad one to give the words a defamatory sense as the ordinary reader is not presumed to be avid for scandal and would not select one bad meaning where other non-defamatory meanings are available. Accordingly, the court must read the publication as a whole and eschew overelaborate analysis, and also, too literal an approach. In this case, the learned judge gave a preference to the imputation derived from one meaning of “extort” in the context of to obtain by means of threats or other unfair means, while discounting the non-defamatory meaning of “extortionate” and failing to consider the whole context in which the words were used. A complete reading of the publication showed that the appellant meant that the fee of US\$500,000.00 was exorbitant and unjustified. They were accordingly not capable of being defamatory of the respondent in the sense that he engaged in extortion by force, threats or other unfair means. In light of the foregoing conclusion, the need to address the defence of qualified privilege is rendered otiose.

Bonnick v Morris & others [2002] UKPC 31 applied; **Halsbury’s Laws of England** 4th edn., Vol. 28 applied.

JUDGMENT

- [1] **WARD JA. [AG.]:** The appellant, Mr. Gaston Browne, is the Prime Minister of Antigua and Barbuda. The respondent, Dr. Isaac Newton, describes himself as a businessman, political analyst, strategist and consultant. Sometime after the general elections in March 2004, he was appointed as Economic Advisor and Ambassador Plenipotentiary, attached to the United Nations.
- [2] This appeal concerns two publications by the appellant, which the respondent alleges libeled him. The catalyst of these exchanges was a publication by the United States International Narcotics Control Strategy Report 2017 (hereinafter referred to as “the INCSR 2017 report” or “the report”) in relation to Antigua and Barbuda. The report drew the ire of the appellant, who felt that it contained several inaccuracies which painted Antigua and Barbuda in a bad light. The appellant responded to the report publicly and condemned it.
- [3] The respondent in turn publicly expressed his views on the appellant’s response to the report and its findings. He expressed himself in the following terms, saying of the appellant:

“It is clear that his approach was extremely crass and crude, lacking in public finesse and public decorum, lacking in a sense of diplomacy and a sense of sophistication, and lacking an understanding of the international mood and that it is complex and requires nuances and grace”.

- [4] The appellant did not take kindly to these comments and replied to them during a radio broadcast on the “Observer Radio Big Issues” programme on 19th March 2017, which was printed in The Caribbean Times Newspaper on 21st March 2017, (“the first publication”). The first publication is replicated as follows:

“I stand by my statement that the report is replete with inaccuracies and that it repeated a lot of Observer Media Group propaganda,’ so said the Honourable Gaston Browne, Prime Minister of Antigua and Barbuda, following a Sunday afternoon broadcast on the Observer Radio.

The Prime Minister explained that the INCSR 2017 report is utilized extensively by ‘international banks for purposes of determining de-risking.’ The report is also utilized by our peers in reviewing Antigua and Barbuda’s compliance with international standards, the Prime Minister explained; it therefore has potential negative implications for our visa-free relationship with other countries and for the much-needed CIP revenues.

‘To allow these patent inaccuracies to stand uncontroverted would have been a form of silent self-condemnation. The consequences of silence would be far greater than any strident defense which the Prime Minister has made’, the Honourable Gaston Browne remarked.

‘The inaccuracies were numerous and grossly exaggerated. For example, the report stated that Antigua and Barbuda’s offshore sector is ‘tax-free’ when it is not. The INCSR 2017 report also claimed that Antigua and Barbuda has a ‘large offshore banking and remote gaming jurisdiction.’ The facts are, Antigua and Barbuda has less than a handful of internet gaming operators after the US decimated the industry and put thousands of youth out of work. We are now down to 11 offshore banks with less than \$1.5 Billion dollars in assets,’ the Prime Minister reported.

‘The offshore banking sector is by no means medium-sized, much less large,’ the Head of Government remarked. ‘The authors of the INCSR report are clueless about the small size and small volume of transactions,’ the Prime Minister asserted. Antigua and Barbuda has strengthened its AML/CFT framework and the country has been found to be compliant by all international standards-setting body.

Legislation passed by the Gaston Browne administration include a new offshore banking act, FATCA, Common Reporting Standards and numerous amendments to existing AML/CFT and tax transparency laws to make them fully compliant with international standards. Antigua and

Barbuda has cooperated with various US agencies, including the Department of Justice, the Drug Enforcement Agency, the US State Department. Antigua and Barbuda has also cooperated with the Interpol and many other international agencies.

'The country's level of cooperation with the US is deemed to be even better than that of the USVI and many other countries in the hemisphere,' the Prime Minister revealed.

'We operate the most transparent and accountable CIP program in the region and one of the best-governed in the world, with several tiers of due diligence. In the past, under the United Progressive Party administration, only private due diligence providers were used by the Citizenship by Investment Unit, and it reported to a Minister and not the Cabinet. Today, the CIP Unit utilizes private due diligence providers, JRCC, and regularly seeks (sic) the assistance of friendly governments- including US agencies, to assist with our due diligence,' Prime Minister confirmed.

'We publish, twice yearly, all of the CIP information to include all payments and receipts. We even introduced a list of restricted countries whose citizens are ineligible for CIP. We are the first country to introduce three tiers of due diligence, and we have been the standard-setter for due diligence, transparency and accountability,' Prime Minister Browne made clear.

The Prime Minister asks: 'how come, with all of the safeguards, transparency and accountability could anyone characterize our program as the most lax in the world?'

'We reject that characterization by anyone, no matter how mighty,' the Prime Minister asserted.

'In the human trafficking report, the Observer Media Group published propaganda that US\$500K was stolen from our CIP. It is an unfounded, fabricated allegation by a known fabricator of alternative facts. An individual whom the OMG lauded for his mischief and assassination of people's character, and for denigrating the image of our country. OMG is routinely propagating opposition propaganda/nastiness that hurts our country's image. Several of OMG programs are rabid political programs. Accordingly, they will be treated as rabid political opponents and UPP [United Progressive Party] propagandists. The unfortunate result is that many of the regional and international reports on Antigua & Barbuda emanate from the OMG publications; those reports are repeated by the international community as factual' the Prime Minister asserted.

Finally, we all have a duty to defend our Country against all unjust attacks. As your prime minister, it is a duty that I take exceedingly seriously. I could not have allowed our country to be unfairly condemned by its silence on the patently false statements appearing in the INCSR report. **Too bad that the**

short sighted and disgraced former UPP Ambassador Isaac Newton, saw my defence as crass. What was crass was his misconduct, during his short- lived career as a public servant, in which he was fired by former Prime Minister Spencer for certain wrongdoing". (emphasis added)

The words in bold are the words complained of.

[5] As a result of the said statements, the respondent engaged counsel who wrote to the appellant by letter dated 3rd April 2017 requesting that, within seven (7) days, the appellant retract the statement, apologise and give an undertaking not to repeat the publication or similar statements and to pay damages for defaming the respondent's reputation.

[6] No apology was forthcoming from the appellant. Instead, on 11th April 2017, he published a post on his Facebook account ("the second publication") which stated:

"This intellectual baboon, Isaac Newton, 'Doctor of incoherent thoughts and superfluous words,' has gotten his lawyer to demand money from me for defamation (speaking the truth about him.) The truth is still a perfect legal defense.

This is the second time he has sought to extort money from me. The first was leading up to the 2014 elections, when he demanded US\$500k for a few weeks of political consultancy work. Just as I declined your extortionate request then, so shall I treat your current demand with contempt.

Not one red cent for you, Isaac Newton. Let your self-proclaimed 'superior' intellect work for you and stop extorting money from people. See you in Court, in the box, so that you and your UPP witnesses could be cross examined. I doubt they would commit perjury for your benefit".

[7] The respondent claimed damages, including aggravated damages, for libel in respect of both publications. He pleaded and relied on the natural and ordinary meaning of the words. As it relates to the first publication, the respondent contended that the words complained of meant and were understood to mean that the respondent was involved in gross misconduct as a public servant; was incompetent as a public servant; was not an honorable man with any intellectual capacity, lacked

integrity and was corrupt; and was so dishonest and incompetent that even the person holding the highest office had to terminate his employment and or association with him.

[8] As it relates to the second publication, the respondent contended that the words complained of meant, and were understood to mean, that the respondent was involved in extortion of monies for political consultancy work; was guilty of blatant corruption in habitually attempting to extort money from the appellant; was corrupt; and was habitually involved in wrongdoing by making requests and/or extorting money from politicians for consultancy work.

[9] The appellant's pleaded case¹ is that the words complained of do not bear the meanings pleaded by the respondent. Regarding the first publication, the appellant contends that the words meant or were understood to mean that while holding the post of ambassador under the UPP Government the respondent committed, and was accused of committing, an act or acts of misconduct which caused him to be removed from the performance of his duties, fired (at least constructively) and/or which forced him to resign as ambassador.

[10] As it relates to the second publication, the respondent pleaded the words complained of meant, and were understood to mean, that the respondent was demanding money from the appellant for telling the truth; and that asking the sum of US\$500,000.00 "for a few weeks political consultancy work" was an attempt to get an exorbitant amount of money from the appellant. The appellant says that the words meant that the fee was unjustified and exorbitant, which meaning is said to be supported by the appellant's use of the word "extortionate".

¹ Defence at paragraph 8.

Judgment in the court below

- [11] The learned judge delivered her judgment on 30th June 2020. She held that the words of the first publication were defamatory of the respondent. Her reasoning is set out at paragraph 36:

“At the time when the statement was made, members of the society were aware that there were allegations against the [respondent] and that he was, at the very least, suspended for a period as a consequence of those allegations. The natural and ordinary meaning to reasonable persons in the society informed accordingly was that (i) the [respondent] engaged in misconduct while holding public office; (ii) the [respondent’s] appointment in public office was short-lived; (iii) that the [respondent] was fired as a result of wrongdoing or misconduct (iv) the [respondent] was short-sighted and (v) the [respondent] is sullied by matters that go to his integrity. The sting of words was that the [respondent] engaged in misconduct while in public office and that there was a termination of the [respondent’s] employment while in public office as a result of misconduct. In its natural and ordinary meaning the ‘wrong-doing’ is tied to the misconduct which resulted in a ‘short-lived’ appointment in the post. The matter of misconduct in public office is a question of fact which is determined upon the examination of the evidence.”

- [12] The learned judge further held that the defence of truth was not established because there was no evidence before the court that there was a finding, either through an administrative investigation or through a criminal investigation, that the respondent was guilty of any form of misconduct while in public office. She held that an allegation of misconduct is materially different from a finding of misconduct, which is the natural and ordinary meaning of the statement made by the [appellant].²

- [13] As it relates to the second publication, the learned judge held that in their natural and ordinary meaning the words meant and were understood to mean that the respondent was unwise; that he attempted to extort money from the appellant as it related to certain political consultancy work prior to the 2014 general elections; and that the respondent has again attempted to extort money from the appellant through correspondence written to the appellant by the respondent’s lawyer. The judge held that the sting of this second publication relates to the contention that the respondent

² Judgment at paras. 41 & 42.

engages in extortion.³ She further held that the publication would be understood by a reasonable member of society to mean that the respondent demanded US\$500,000.00 for his services which suggest an unjustified demand and not a reference to exorbitant services.⁴

- [14] The learned judge also held that the defence of qualified privilege did not avail the appellant in respect of the first publication because the appellant's statement moved beyond defence to matters unrelated and different from the statement made by the respondent and thus extended beyond the permitted latitude of the defence of qualified privilege. As it relates to the second publication, the learned judge held that the defence failed because the appellant's statement extended beyond the permitted latitude of the defence when he raised the unrelated topic of 'extortion' which was extraneous in nature to the initial statement made by the respondent.⁵ She awarded the respondent aggravated damages on the basis that, having been cautioned about the first publication, the appellant made another defamatory statement alleging that the respondent had committed the criminal offence of extortion which was a serious allegation.

Grounds of appeal

- [15] The appellant, being aggrieved by the decision of the learned judge, filed a notice of appeal which lists twelve grounds of appeal:
- (i) The learned judge erred in law by failing to consider whether the words complained of by the claimant in the first publication did in fact bear the meanings attributed to them by the claimant in his Statement of Claim;
 - (ii) The learned judge erred in law when she failed to improperly (sic) consider and/or misconstrued the pleadings and evidence before her;

³ Ibid at para. 51.

⁴ Ibid at para. 54.

⁵ Ibid at paras. 66 & 67.

- (iii) The learned judge erred in law when she failed to improperly (sic) consider and/or misconstrued the defence of justification under the Common Law was not repealed by the defence of truth under section 20 (3) (a) of the **Defamation Act 2015**.⁶ Alternatively, she failed to properly consider and (sic) the defence of justification or Truth to the facts before her;
- (iv) The learned judge having found that (a) sometime in and about August or September 2004, the [respondent] became embroiled in a situation where allegations were levied against him and one other person in relation to the use of his position to influence members of the Tenders Board and possibility (sic) the provisions of the Civil Public Service Regulations; (b) that through correspondence dated 23rd September 2004, the Permanent Secretary within the Ministry of Foreign Affairs wrote to the [respondent] suspending him from all ambassadorial functions with immediate effect; (c) the then Attorney General through correspondence dated 12th October 2004 appointed a sole commissioner to conduct an investigation to enquire whether the [respondent] and other persons had used their position to influence members of the Tenders Board and (d) the [respondent] in his email correspondence admitted that "*charges were brought and the matter placed before the Magistrates' Court*" erred in law by failing to appreciate that the [appellant] had established on a balance of probabilities that the imputation which he made against the [respondent] were true or substantially true and/or not materially different from the truth and therefore his defence of justification under the Common Law, or truth should have succeeded pursuant to section 20 (3) (a) of the Defamation Act 2015.
- (v) The learned judge having ruled on the natural and ordinary meanings of the words complained of in the first publication at paragraph 36 of

⁶ Act No. 7 of 2015, Laws of Antigua and Barbuda.

her judgment erred in law by requiring the [appellant] to prove that the [respondent] was found guilty of misconduct before an administrative or criminal body to establish his defence of justification.

- (vi) The learned judge erred by failing to properly assess the oral evidence of the former Prime Minister, Mr. Baldwin Spencer during trial which was in conflict with his clear and unambiguous response to a question posed to him in parliament by the [appellant] on the appointment and status of the claimant.
- (vii) The learned judge erred in law by failing to consider whether the words complained of by the [respondent] in the second publication did or did not in fact bear the meanings attributed to them by the [respondent] in his Statement of Claim.
- (viii) The learned judge in determining the words used in the second publication failed to take into account the obvious context in which those words were used.
- (ix) The learned judge erred in law by holding that the second publication was defamatory of the [respondent].
- (x) The learned judge erred in law when she held that the defence of justification or truth was not available to the [appellant] in relation to second publication.
- (xi) The learned judge erred in law when she held that the [appellant] could not rely on the defence of qualified privilege in relation to the first and second publications.
- (xii) The learned judge erred in law in awarding the [respondent] aggravated damages on the second publication.

Condensed Issues on Appeal

[16] Grounds (i) to (vi) overlap and relate to whether the learned judge erred in holding that the words used by the appellant imputed the commission of the offence of misconduct in public office and whether the learned judge erred in holding that the defence of truth did not avail the appellant because he had not proved that there was a finding of guilt by a criminal or administrative investigatory body. Grounds (vii) to (x) are concerned with whether the judge erred in law by holding that the words of the second publication were defamatory of the appellant and that the defence of qualified privilege did not apply.

[17] The grounds of appeal may thus be condensed into the following three:

- A. The learned judge erred in holding that the words used by the appellant imputed the commission of the offence of misconduct in public office ("the meaning of the first publication")
- B. The learned judge erred in holding that the defence of truth did not avail the appellant because he had not proved that there was a finding of guilt by a criminal or administrative investigatory body ("the defence of truth"); and
- C. The learned judge erred in law by holding that the words of the second publication were defamatory of the appellant and that the defence of qualified privilege did not apply ("the meaning of the second publication").

The appellant's submissions

[18] The essential thrust of the written and oral submissions made by learned Senior Counsel, Mr. Anthony Astaphan, on behalf of the appellant may be summarised as follows.

Ground A – The meaning of the first publication

[19] Mr. Anthony Astaphan submitted that the meaning pleaded by the appellant, at paragraph 8 of his defence, in relation to the first publication is the proper meaning

of the words published by him. The learned judge therefore erred when she failed to uphold the meaning advanced by the appellant; erred or misdirected herself when she ruled that the words meant that the respondent was guilty of misconduct in some administrative or criminal sense when it was clear that the words meant that the respondent's services were terminated or no longer required by the Prime Minister and Cabinet because of his conduct.

[20] Mr. Astaphan further submitted that the learned judge failed to consider the unchallenged evidence before her which would have established that the words were substantially true or not materially different from the truth. This included the evidence that as a result of the allegations in the public domain, on 21st September 2004, Cabinet took a decision to suspend the respondent. That decision was acted upon when the Permanent Secretary in the Ministry of Foreign Affairs informed the respondent of his suspension as ambassador by letter dated 23rd September 2004, in which it was made clear to the respondent that Mr. Baldwin Spencer, as Prime Minister, was directly involved in the discussions which led to his suspension. It was submitted that these two documents were directly relevant to the status of the respondent, which were in the public domain, and which the appellant raised as a question to the former Prime Minister Spencer in Parliament.

[21] Mr. Astaphan further submitted that the learned judge failed to properly consider the question posed by the appellant to Mr. Spencer in Parliament regarding the current status of the respondent and his response to the question as recorded in the Hansard of the Parliament. The question was predicated on the appellant's statement that the respondent was in fact suspended for one month for allegedly interfering with the Tender process covering the sale of APUA-PCS. This was the factual premise of the question which was not repudiated by Mr. Spencer.

[22] Mr. Astaphan contended that the former Prime Minister's response pointed unequivocally to the fact that he and Cabinet had terminated the respondent's services as ambassador. Accordingly, at that date, the "current status" was that the

respondent's services had in fact been terminated by him and the Cabinet, whether expressly or implicitly, because he (the respondent) had crossed "the ethical ocean" and failed to meet the "unprecedented high standards..." set by his Government which separated it from the Antigua Labour Party.

[23] Mr. Astaphan submitted that the learned judge failed to properly consider that question and answer exchange in Parliament and instead took into account wholly irrelevant considerations when she relied on the absence of evidence of an administrative investigation or criminal investigation which showed the respondent was guilty of misconduct in public office to hold that the defence of truth failed, notwithstanding that the allegation or charge made by the appellant, or issue before the learned judge, was that the respondent's services were terminated; the appellant did not in the words complained of, allege that the respondent was charged or prosecuted for any criminal offence.

[24] Mr. Astaphan further submitted that the attempt by the respondent and Mr. Spencer to suggest in evidence that the questions or issues between the respondent and the Government were all contractual, not only conflicted with the indisputable documentary evidence before the learned judge, but was also baseless and false because, *inter alia*, a person does not get suspended over a contractual dispute; suspension carries a connotation that it was against the will of the person suspended; the respondent's suspension was never revoked; there was no evidence of any public or legal response or challenge by the respondent repudiating the numerous publications, which alleged that he acted improperly and was suspended; and there was no evidence or documents to substantiate the alleged "contractual" issues.

Ground B – The defence of truth

[25] In relation to this ground, Mr. Astaphan submitted that the learned judge erred when she held the appellant failed to establish his defence of justification because the evidence, especially the contemporary evidence and documents, showed that the

respondent was in fact suspended, and had his services terminated because of his conduct or misconduct.

Ground C – The meaning of the second publication

- [26] As it relates to the second publication, Mr. Astaphan submitted that in their ordinary meaning, and context, the words meant and were understood to mean that, the respondent: (i) was seeking money from the appellant for telling the truth (first paragraph), and (ii) wanted to charge the appellant an "extortionate" fee i.e., an exorbitant and excessive fee for a few weeks' consultancy. The third paragraph is connected to the first two paragraphs. It was further submitted that there is no other reasonable interpretation because there is nothing in the words used by the appellant which expressly or implicitly accused the respondent of any demand for money with menaces including threats, violence or blackmail. In other words, there was no allegation of any demand for money with menaces by the respondent contrary to section 34 of **the Larceny Act**⁷ or the criminal offence of extortion.

The respondent's submissions

Ground A – The meaning of the first publication

- [27] Learned counsel, Mr. Lawrence Daniels on behalf of the respondent, submitted that the first issue for the court is to determine the ordinary and natural meaning of the words. He advanced the learning contained in **Halsbury's Laws of England**⁸ as stating the correct approach and test in determining this meaning. Mr. Daniels submitted that the learned judge was right to construe the ordinary and natural meaning of the words contained in the first publication as imputing the commission of the crime of misconduct in public office by the respondent. Counsel submitted that where a defendant imputes the commission of a criminal offence by the plaintiff, his plea of justification will not succeed unless he can prove the commission of the offence as strictly as if the plaintiff were being prosecuted for the offence.

⁷ Cap. 241, Revised Laws of Antigua and Barbuda.

⁸ Halsbury's Laws of England 4th edn., vol. 28.

Ground B – The defence of truth

[28] On this issue, Mr. Daniels submitted that the elements of the offence of misconduct in public office had to be satisfied before the respondent could be found to have committed it. He contended that there was no evidence to establish even a prima facie case that the respondent committed this offence. The respondent was never charged with any offence. Mr. Daniels submitted that there was no evidence or document of any recommendation to charge the respondent criminally. There was no evidence from the Tenders Board to support the allegation that the respondent had sought to interfere in its processes. Further, Mr. Daniels submitted that at no point in time was the respondent fired by the Prime Minister. He submitted that there was no termination letter before the court. To the extent that there is any inconsistency between Mr. Spencer's evidence in court and his statement in Parliament, as it relates to the reason why the respondent no longer held the post of ambassador, Mr. Daniels submitted that greater weight ought to be given to Mr. Spencer's evidence under oath as opposed to his statement in Parliament.

[29] For these reasons, Mr. Daniels submitted that the appellant failed to meet the threshold required to prove the truth of the impugned statement. The appellant was required to show that the imputation in respect of which he is sued is true or substantially true but failed to discharge that burden.

Ground C – The meaning of the second publication

[30] In relation to the second publication, Mr. Daniels submitted in oral argument that the publication alleged that the respondent attempted to extort money from the appellant. He invited the Court to find that the respondent's case on extortion was not framed in terms of violence, and in this regard referred the Court to paragraph 50 of the judgment where the learned judge discusses the meaning of the words "demand," "extort" and "extortionate".

[31] As it relates to the defence of qualified privilege, Mr. Daniels submitted that the appellant did not raise this in his defence and, therefore, cannot avail himself of this

defence. Additionally, submitted Mr. Daniels, in order for one to avail himself of the defence of qualified privilege, there should be no improper motive in making or publishing the statement. Mr. Daniels posited this as a reason why the defence of qualified privilege was also defeated as the appellant published the words maliciously and had no duty to do so.

- [32] Finally, Mr. Daniels submitted that this was a fit and proper case for the award of aggravated damages because the appellant pleaded justification even though he had no good reason to believe that the defence would succeed.

Discussion

- [33] At common law, defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society. To succeed in an action for defamation, a claimant must prove the making of a statement by a defendant tending to lower the claimant in the estimation of right thinking-members of the society and the publication of that statement to a third party or parties. The words must be construed in their natural and ordinary meaning which is the meaning that would occur to the ordinary reasonable person.

- [34] It has been held that in determining whether the words were capable of conveying that defamatory meaning:

“[T]he court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation...The ordinary and natural meaning...may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words.”⁹

- [35] As Lord Reid observed in **Lewis v Daily Telegraph**:¹⁰ ‘...but more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning’.

⁹ Jones v Skelton [1963] 1 WLR 1362, at 1370 – 1371.

¹⁰ [1964] A.C. 234, at 258.

[36] In Antigua and Barbuda, a defendant has a defence to a claim of defamation if he can prove, that the imputations contained in the publication were true, or not materially different from the truth; or that the 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.¹¹

[37] It is also a defence to a claim of defamation that words defamatory of a person were spoken or written in circumstances which attract qualified privilege. A circumstance in which this privilege arises is described by the authors of **Gatley on Libel and Slander** in the following terms:

“... a person whose character or conduct had been attacked is entitled to answer such attack, and any defamatory statements he may make about the person who attacked him will be privileged, provided they are published bona fide and are fairly relevant to the accusations made...

Mere retaliation, which cannot be described as an answer or explanation, is not protected, but the defendant is not required to be diffident in protecting himself and is allowed a considerable degree of latitude in this respect.”¹²

[38] In short, a defendant has a qualified privilege to answer an attack made on him, provided that he does so in good faith, and what he publishes is fairly be regarded as an answer to the attack published for the purpose of repelling the attack and without malice.

[39] I turn now to address the specific grounds of appeal

Grounds A and B – The meaning of the first publication and the defence of truth

[40] These two grounds may conveniently be taken together. On this appeal, no issue arises on either publication as to whether the appellant spoke or published the words in question or whether they were directed at the respondent. The essential issues

¹¹ Cap. 241, Revised Laws of Antigua and Barbuda.

¹² 12th edn, Sweet and Maxwell, 2013.

in relation to the first publication is whether the judge erred in holding that the words used by the appellant imputed the commission of the offence of misconduct in public office and whether the judge erred in holding that the defence of truth did not avail the appellant because he had not proved that there was a finding of guilt by a criminal or administrative investigatory body.

The judgment

- [41] The learned judge considered that since there was no issue that the appellant's words were directed at the respondent, her first task was to consider the natural and ordinary meanings of the words spoken and whether they tended to lower the respondent in the estimation of reasonable members of society. The learned judge defined the natural and ordinary meaning as 'the meaning that the words in question would convey to ordinary men and women going about their ordinary affairs'. She acknowledged that the natural and ordinary meaning may be literal or implied or inferred once such implication or inference is reasonably implied or inferred without extrinsic evidence.
- [42] The judge directed herself that in performing that exercise, the court was required to determine whether the publication was capable of being construed in the manner urged by the respondent or another manner that can be viewed as defamatory in the eyes of reasonable persons in society.¹³
- [43] The learned judge examined the words of the first publication and concluded that in its natural and ordinary meaning, 'misconduct' means unacceptable or improper behaviour; mismanagement (citing the Concise Oxford English Dictionary Luxury Edition); or 'unacceptable or bad behaviour by someone in authority' (citing the Cambridge English Dictionary). As stated above, she then concluded at paragraph 36 of the judgment, that:

"At the time when the statement was made members of the society were aware that there were allegations against the claimant and that he was, at the very least, suspended for a period as a consequence of these

¹³ Judgment at para. 18.

allegations. The natural and ordinary meaning to reasonable persons in the society informed accordingly was that (i) the claimant engaged in misconduct while holding public office; (ii) the claimant's appointment in public office was short-lived; (iii) that the claimant was fired as a result of wrongdoing or misconduct (iv) the claimant was short-sighted and (v) the claimant is sullied by matters that go to his integrity. The sting of words was that the respondent engaged in misconduct while in public office and that there was a termination of the claimant's employment while in public office as a result of misconduct. In its natural and ordinary meaning the 'wrong-doing' is tied to the misconduct which resulted in a 'short-lived' appointment in the post. The matter of misconduct in public office is a question of fact which is determined upon the examination of the evidence."

- [44] The judge found the words were capable of bearing a defamatory meaning. It must be right to say that a statement that a person was fired for misconduct is defamatory. What meaning was to be ascribed to the word misconduct emerged more clearly when the learned judge considered the defence of truth.

The defence of truth and the first publication

- [45] Section 20 of the **Defamation Act 2015** provides:

"20. Defence of truth

- (1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, in relation to an action for defamation brought after the commencement of this Act, be known as the defence of truth.
- (2) 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.
- (3) In proceedings for defamation, a defence of truth shall succeed if—
 - (a) 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
 - (b) where the proceedings are based on all or any of the matters 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."

[46] Thus, a defendant may succeed if he can show that the imputations of the words used were true or not materially different from the truth. Alternatively, one may have a situation where taken as a whole, the imputations contained in the publication are substantially true or not materially different from the truth. In such a situation, if having regard to the remaining imputations, the imputation that is not proven to be true does not materially injure the claimant's reputation, the defence of truth will succeed.

[47] The respondent's case in relation to the first publication is that in their natural and ordinary meaning, the words complained of carried the imputation that the respondent was guilty of the criminal offence of misbehavior in public office. The appellant does not seem to deny that the words are capable of bearing a defamatory meaning but maintain that their ordinary meaning does not give rise to the imputation that the appellant was guilty of the offence of misbehavior in public office. They say the words are true in fact and substance since the appellant was in fact terminated by the former Prime Minister and that this was on account of allegations in the public domain that he had misconducted himself while holding the post of ambassador.

The judge's reasoning on defence of truth

[48] Basing herself on section 20 of the **Defamation Act 2015**, the learned judge correctly held that the defence required the appellant to prove that the sting of the publication and any supporting innuendos were true or not materially different from the truth. Alternatively, the appellant would succeed if he could prove that the publication taken as a whole was substantially true if the words not proven to be true do not materially injure the reputation of the respondent having regard to the truth of the remaining imputations.

[49] The learned judge concluded that the defence of truth failed because "there is no evidence before the court that there was a finding either through an administrative investigation or through a criminal investigation that the claimant was guilty of any

form of misconduct while in public office. An allegation of misconduct is materially different from a finding of misconduct which is the natural and ordinary meaning of the statement made by the defendant.”¹⁴

[50] The judge was of the view that the test of whether misconduct was in fact proved required proof of a finding of guilt through a series of word associations: the appellant used the word misconduct, the respondent at the time of his dismissal was a person holding public office, therefore the words meant that the appellant was found guilty of the offence of misconduct in public office. The question is whether to say that a man is alleged to or had misconducted himself is the same as saying that he is guilty of the criminal offence of misconduct in public office.

[51] In determining whether the defence of truth availed the appellant, the learned judge fastened on the word ‘misconduct’ and attributed to it a meaning derived from the criminal law. The learned judge determined that in its ordinary and natural meaning, the word ‘misconduct’ meant that the respondent was found by an administrative or criminal investigatory body to have misconducted himself in public office. In other words, the word misconduct imputed the commission of a criminal offence. No finding of guilt having been made by such a body, the words published by the appellant were neither true nor true in substance, reasoned the judge.

[52] It is not clear how the learned judge transitioned from the ordinary dictionary meanings she ascribed to the word misconduct at paragraph 35 of her judgment to one that connotes a positive finding of misconduct in criminal or administrative proceedings. This was in effect to say that to the reasonable man, the natural and ordinary meaning of the word misconduct, as used by the appellant, was the commission of the criminal offence of misconduct in public office.

¹⁴ Judgment at paras. 41 & 42.

[53] In assessing the standard of the ordinary man and woman in society, the Privy Council in **Bonnick v Morris & others**¹⁵ described the ordinary, reasonable man as:

“... not naive; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. **He would not select one bad meaning where other non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis, and, also, too literal an approach.**” (emphasis added)

[54] Approaching matters in this way, a reasonable ordinary man reading the publication may well have concluded that, in context, the words meant no more than that the former Prime Minister had formed the view that the respondent had engaged in inappropriate or unacceptable behavior which resulted in his appointment as ambassador being terminated. That being so, the learned judge was required to consider whether the words were capable of bearing the meaning contended for by the appellant and to assess all of the evidence in order to determine whether the allegations of misconduct in that sense were substantially true or not materially different from the truth.

[55] In determining this issue, she was required to consider the factors relied on by the appellant which they say were true and which the judge seems to have accepted as such. Among these:

- (a) The answers given in Parliament by the former Prime Minister in response to a question posed to him by the appellant which was predicated on the allegation that the respondent had used his position to influence members of the Tenders Board.
- (b) The cabinet decision to suspend the respondent after only five weeks as ambassador.

¹⁵ [2002] UKPC 31, at para. 9.

- (c) The actual suspension of the respondent via a letter from the Permanent Secretary dated 23rd September 2004.
- (d) The appointment of a sole commissioner to conduct an investigation to enquire into the allegation.
- (e) The respondent in his email correspondence admitted that *"charges were brought and the matter placed before the Magistrates' Court"*.¹⁶
- (f) The subsequent resignation of the respondent in or about December 2004 or January 2005; and
- (g) The inconsistency in the reasons given by the former Prime Minister as to why the respondent was no longer engaged as Ambassador.

[56] The matters at (a) to (f) were unchallenged at trial. The parliamentary question and answer between the appellant and the former Prime Minister bear setting out:

"Clerk: Questions to the Ministers.

Hon. Member for St. John's City (West), Mr. Gaston Browne: Madam Speaker, I rise to pose the following questions to the Member for St. John's Rural (West), the Hon. Prime Minister.

"I am sure that the Hon. Member considers it necessary to inform the nation of the status of Ambassador Isaac Newton given his important role as Ambassador Plenipotentiary of Antigua and Barbuda; will the Hon Member indicate to this Hon. House:

The current appointment status of Ambassador Isaac Newton, Ambassador Plenipotentiary who was suspended for one month for allegedly interfering with the Tender process covering the sale of APUA-PCS?".

[57] Mr. Spencer subsequently responded to the appellant's question on 6th December 2004:

"I turn now to Hon. Member for City (West's) query as to the position of Dr. Isaac Newton. Dr. Newton is no longer employed or in any way active in the foreign service of Antigua and Barbuda. Regrettable though this

¹⁶ See paragraph 30 of the judgment.

development is to me and to many of my colleagues, it dramatizes the ethical ocean that separates the United Progressive Party and the Antigua Labour Party. We have set ourselves unprecedented high standards. This is not the first time nor will it be the last time that the UPP's high standards of accountability may result in casualties that may well, unfortunately, involve good and decent men and women such as Ambassador Newton”.

[58] While the learned judge rehearsed some of these factors at paragraphs 23 to 29 of her judgment as part of the narrative, there is no analysis of them in the context of her assessment of the defence of truth. It does not appear that the learned judge considered these matters to see whether they were substantially true or not materially different from the truth.

[59] Certainly, as it relates to the evidence of the former Prime Minister relating to the reasons why the respondent was no longer engaged as ambassador, the learned judge read this response as saying that the respondent was terminated for failure to meet high ethical standards; not for misconduct. She took the view that if there was no evidence of a finding of guilt, these matters became irrelevant and required no consideration. This seems clear from her remarks at paragraph 46 of the judgment:

“Counsel for the defendant encouraged the court to consider the fact that the then Prime Minister was addressing a specific question raised and the reason given by the Prime Minister in his evidence for the termination of the claimant was implausible. However, given my findings as have been stated herein, I am not of the view that either of the matters raised by counsel remains relevant for consideration. Thus the defence of truth with reference to the first publication must fail.”

[60] The learned judge may yet have come to the conclusion that the defence of truth failed because, for example, she ultimately accepted the Prime Minister's testimony that it was a breakdown in contractual negotiations that led to the respondent being terminated as ambassador and not because of the allegations of misconduct. The reasonableness of such a conclusion might have been open to question but the learned judge was at least required to consider all of the evidence to see whether the allegations of misconduct were proved to be true or not materially different from the truth.

[61] However, the learned judge considered that the only meaning of misconduct, and the manner in which it could be established was through a finding of guilt. The learned judge restricted herself to a technical and legalistic meaning of the word 'misconduct' which seems at variance with the definition of misconduct that she had articulated at paragraph 35 and one which was devoid of full context. In this regard, the learned judge fell into error when she fettered herself in making a proper assessment of whether the defence of truth was established.

[62] For the foregoing reasons, the appeal succeeds on grounds A and B.

Ground C – the meaning of the second publication and the defence of qualified privilege

[63] As it relates to the second publication, the learned judge held that the sting of this second publication relates to the contention that the respondent engages in extortion.¹⁷ She further held that the publication would be understood by a reasonable member of society to mean that the respondent demanded US\$500,000.00 for his services which suggests an unjustified demand and not a reference to exorbitant services.¹⁸

[64] The learned judge regarded "extortion" in the sense of demanding money with menaces, threats, force or unfair means. This view derives from paragraph 50 of the judgment where the judge found it noteworthy that:

"...the defendant alleges that the claimant 'demanded' the sum of \$500 thousand dollars from the defendant for 'a few weeks of political work.' The word 'demand' connotes to a reasonable person in the society a very firm request by the [respondent] that the [appellant] pay to the [respondent] the sum of \$500 thousand dollars...The word "extort" means 'obtain by force, threats or other unfair means'. The word 'extortionate' is '1. (of a price) much too high. 2. Using of (sic) given to extortion.'

¹⁷ Ibid at para. 51.

¹⁸ Ibid at para. 54.

- [65] The court is mindful that the ordinary and natural meaning of a publication is very much a matter for the trial judge and that an appellate court should not disturb the trial judge's conclusions unless satisfied she was wrong.¹⁹
- [66] However, in this case, although the learned judge quoted the dictionary meaning of the word 'extortionate', which the appellant used in reference to the sum of US\$500,000.00, she did not ascribe to it the meaning that the price being charged was too high. The learned judge was influenced by the words 'let your self - proclaimed 'superior' intellect work for you and stop extorting money from people'. She held that these words suggest an unjustified demand and not a reference to extortionate prices.
- [67] It does not appear the learned judge considered or attached any weight to the statement that the fee of US\$500,000.00 was eventually negotiated downwards to US\$20,000 per month for six months which is a factor tending to support the appellant's contention that the words meant that the respondent's original demand for US\$500,000.00 was exorbitant.
- [68] The authorities eschew an approach that ignores an innocuous meaning and fastens upon one that is defamatory. The learned authors of **Halsbury's Laws of England**²⁰ express the proposition thus:
- "The court must not put a strained or unlikely construction upon the words. If they are capable of bearing a number of good interpretations, it is unreasonable to seize upon the only bad one to give the words a defamatory sense. Where a plaintiff complains of words in their natural and ordinary meaning he must accept that meaning with all the derogatory imputations that it conveys; the ordinary reader takes the imputation as a whole and does not divide them up."
- [69] To similar effect is the decision of **Bonnick v Morris** where the Privy Council described the ordinary, reasonable man as:

¹⁹ Bonnick v Morris & others [2002] UKPC 31.

²⁰ Halsbury's Laws of England 4th edn., Vol. 28 at para. 46.

“... not naive; he can read between the lines. But he is not unduly suspicious. He is not avid for scandal. He would not select one bad meaning where other non-defamatory meanings are available. The court must read the article as a whole, and eschew over-elaborate analysis, and, also, too literal an approach.”

[70] Respectfully, the learned judge breached this injunction in preferring the imputation derived from one meaning of ‘extort’ while discounting the non-defamatory meaning of ‘extortionate’ and failing to consider the whole context in which the words were used. When read in context, the words ‘extort’ and ‘extorting’ must be read in conjunction with the appellant’s use of the adjective ‘extortionate’ to characterise the request for US\$500,000.00. In context, this meant that the fee requested was exorbitant and unjustified. This is the sense in which the words would be understood by the ordinary, reasonable man.

[71] Accordingly, we agree with the appellant’s submissions that in their natural and ordinary meaning the words meant and were understood to mean no more than the respondent was demanding money from the appellant telling the truth; and that asking the sum of US\$500,000.00 “for a few weeks political consultancy” was an attempt to obtain an exorbitant amount of money from the appellant.

[72] Accordingly, they were not capable of being defamatory of the respondent in the sense that he engaged in extortion by force, threats or other unfair means. The appeal must also succeed on this ground.

[73] Considering the conclusions reached above, the need to address the defence of qualified privilege is rendered otiose.

[74] We have held that the appeal succeeds on all three grounds and we set aside the orders of the learned judge. However, in relation to Ground A, our finding that the learned judge erred in her construction of the word misconduct and, consequently, in her assessment of the defence of truth leaves unresolved the question whether or not the defence of truth is made out. The resolution of this issue requires an

assessment of evidence and, in particular, an assessment of the credibility of witnesses. An appellate court is not best placed to make such an assessment; that task best falls to be discharged by the trial judge who will have the opportunity to see and hear the witnesses.

Disposition

[75] For the above reasons, we would allow the appeal in its entirety and set aside the decision of the judge. However, we remit the claim in relation to the first publication to be retried by a different judge of the High Court.

[76] The appellant is awarded prescribed costs in the court below and two thirds of those costs on appeal, in accordance with rules 65.5 and 65.13 of the **Civil Procedure Rules 2000**.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar