

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2014/0240

BETWEEN

RISHATHA NICHOLLS

CLAIMANT

and

ARNHIM EUSTACE

DEFENDANT

CONSOLIDATED WITH

SVGHCV2014/0242

RISHATHA NICHOLLS

CLAIMANT

and

ARNHIM EUSTACE

DEFENDANT

Appearances:

Mr. Ronald Marks and Mrs. Patricia Marks-Minors for the claimant.

Mr. Bertram Commissiong Q.C. instructed by Ms. Maia Eustace for the defendant.

2017: Dec. 7 & 21
2018: Apr. 12 & 26
Jul. 12

JUDGMENT

BACKGROUND

[1] **Henry, J.:** Mrs. Rishatha Nicholls was employed by Mr. Arnhim Eustace for over 12 years as his

secretary. During that time Mr. Eustace was the President of the New Democratic Party ('NDP') the political party which formed the Opposition in the House of Assembly, of Saint Vincent and the Grenadines. Mr. Eustace was also the Leader of the Opposition in Parliament. Mrs. Nicholls' employment was terminated on March 28th 2014. The Department of Labour found that she had been wrongfully dismissed and awarded her severance. The Appeal Tribunal confirmed that decision.

- [2] On 23rd April 2014 and again on 24th April 2014 Mr. Eustace called into a popular morning radio programme known as 'AM MAYHEM' and spoke certain words about Mrs. Nicholls. Mrs. Nicholls contended that the words are defamatory of her and were understood to mean that she had committed the offence of theft and was involved in corrupt practices.
- [3] Mr. Eustace denied that words are capable of the alleged meanings. He argued that the statements made on 23rd April constitute fair comment on a matter of public interest and that the words spoken about Mrs. Nicholls on the following day are true in substance and fact.
- [4] Mrs. Nicholls filed two claims¹ against Mr. Eustace in respect of the statements broadcast on those days. She alleged that her character and reputation have been gravely damaged by the referenced utterances. She sought damages for defamation of character; an injunction restraining Mr. Eustace from publishing the same or similar words; interest and costs. Mr. Eustace has denied liability.
- [5] The claims proceeded through the system and various case management and other interlocutory orders were made by the Masters. By order dated 4th July 2017 His Lordship Brian Cottle recused himself from presiding over the claims. When they came on for hearing before me on 2nd October 2017, an order was made consolidating the claims. It was adjourned for trial to 17th October 2017.
- [6] Regrettably, that trial date and two other adjourned trial dates had to be vacated due to the reported illness of Mr. Eustace's counsel (on one occasion); Mr. Eustace's illness (at another hearing); and learned Queen Counsel's absence (on the third instance) - attributable to the recent loss of his brother.² The trial proceeded on 26th April 2018 and concluded with Mr. Eustace's testimony. I have

¹ On 18th December 2014 and 23rd December 2014 respectively.

² On 17th October 2017, 21st December 2017 and 12th April 2018 respectively.

found that Mr. Eustace is liable to Mrs. Nicholls.

ISSUES

[7] The issues are:

1. Whether the words complained of are capable of bearing the meanings ascribed to them by Mrs. Nicholls?
2. Whether Mrs. Nicholls was defamed?
3. Whether the defences of fair comment and justification are made out by Mr. Eustace?
4. To what remedies if any, is Mrs. Nicholls entitled?

ANALYSIS

Issue 1 – Are the words complained of capable of bearing the meanings ascribed to them by Mrs. Nicholls?

[8] Mr. Eustace has not denied uttering the words about which Mrs. Nicholls has complained. He submitted³ that the words cannot be taken to carry the meanings ascribed by her. He claimed in his defence that if the words spoken on 23rd April bear the meaning attributed by Mrs. Nicholls, that they were fair comment on matters of public interest. He insisted that the statements made on 24th April 2018 were not defamatory of Mrs. Nicholls and even if they did they were true.

[9] On both occasions when the alleged defamatory words were spoken Mr. Eustace was having an exchange with the host of the radio programme. Mr. Eustace admitted:-

1. calling into the popular radio programme 'AM MAYHEM' on 23rd and 24th May 2014; and
2. making the statements which were broadcast on Hot 97.1 FM on those days.

[10] On the first of the two days, the conversation progressed as follows:

'The Defendant⁴: Hello

³ In Skeleton arguments filed on his behalf on 21st December 2017.

⁴ Mr. Eustace was described as the defendant in the pleadings. In this judgment, I have retained the descriptive titles given to the speakers in the extract from the broadcast.

Host: Morning! Morning!

The Defendant: Yeah, Eustace here

Host: Mr. Eustace, this thing, with this, what is the real deal with this thing?

The Defendant: Well let me just, you know, I have refused from making any statement on this matter all the time you know, I want to simply say this; there's a lot of things that's been said. I've kept quiet all the time and I have not made any real statement to the press on the matter and today is the first time I am going to say something. First of all, I want to point out that by registered letter on the 14th of April, I sent the severance pay to Mrs. Nicholls.

Host: 2014

The Defendant: 14th of April

Host: Ok

The Defendant: By registered mail. I am surprised that I am hearing that she has not gotten it but that was done on the 14th of April, that is the first thing I have to say, so I am hearing a lot of talks on this matter secondly **I want to point out that I have and the New Democratic Party when we get into office we'll have zero tolerance for corruption and petty theft, you hear me?**

Host: I hear you, I hear you.

The Defendant: I never expected to win at the Tribunal. The Tribunal is a legal process but I know how it works. All I am saying, the payment was made and the New Democratic Party Administration will have no tolerance for corruption and petty theft.' (bold added)

[11] On the following day, the host and Mr. Eustace engaged in further conversation in the following terms:-

'Host: Is it that you are....

The Defendant: **To what I was saying yesterday, we are going to take in a strong stand on theft and corruption and so on once we get into office.**

Host: Ok.

The Defendant: Because there is too much of that going on in the country.

Host: Ok. So you were in no way hinting that your former Secretary was pinching little bit off the edges and not nice

*The Defendant: **Look, what happened is that she took money that she should not have taken.***

Host: Oh, ok.

*The Defendant: **Many times.***

Host: Oh.

*The Defendant: **Ok, and that is what she was in fact paying it back.***

Host: Oooh.... So any of this was reported to anyone, this was like you know...

The Defendant: It was brought to my attention after a while.

Host: Right, and did you report it to anyone to say well you know...

*The Defendant: **Yes man but in my dismissing her I raised that as one of the issues in her dismissal not the only issue one of the issues.*** (bold added)

- [12] Mrs. Nicholls was not happy that Mr. Eustace made those remarks about her. On the contrary, she was aggrieved and felt that they had injured her character. She instructed her lawyers to write to him complaining of the words published on the radio programme. On the 12th day of November, 2014, her lawyer – Mr. Ronald Marks sent two formal letters before action to Mr. Eustace demanding an apology and an appropriate sum of money as compensation.
- [13] Mr. Eustace did not respond to those letters. Mrs. Nicholls proceeded to file the instant claims. She pleaded that the words meant or were understood to mean that she had committed the criminal act of theft which is an offence punishable by imprisonment. She claimed that they also meant that she was involved in corrupt practices. She testified that that is how she understood them in their natural, ordinary and inferential meanings.
- [14] Mrs. Nicholls contended that from the context and the words uttered, the ordinary listener was left, on both days, with the clear allegation that she was a dishonest person, had committed several acts of dishonesty, had lost her job as a result of her criminal conduct and that Mr. Eustace was

justified in terminating her employment notwithstanding the ruling of the Hearing Officer in her favour and the subsequent decision of the Appeals Tribunal upholding that decision.

[15] Under cross-examination Mr. Eustace said:

‘... I mentioned Mrs. Nicholls’ issue at the time and pointing out that she was being paid by the public purse and we would not be tolerating in the party that kind of behavior. I referred to petty theft and other types of corruption and that type of behavior. I indicated that I was particularly concerned that the claimant was paid by the government even though she worked for the party and there are a lot of those cases going on in the public service at the same time and she was already repaying the missing money to Mr. Lynch.’

[16] He amplified his testimony and indicated: ‘I was convinced that as Leader of a party at the time when our country was having a number of thefts; I had to speak out, particularly as the claimant herself was paid by the public purse. We had statements being made by a number of persons in public departments who were being charged at the time. I indicated to the public that we could not stand by as a party seeking to form government and not condemn theft, petty theft and other types of corruption without making a statement on the matter because I knew that the money was being paid by installments, the last of which was repaid on 9th April, the year the matter occurred.’

[17] He acknowledged that he was referring to Mrs. Nicholls in his statement on the radio broadcast on 23rd April 2014 when he said: ‘...*I want to point out that I have and the New Democratic Party when we get into office we’ll have zero tolerance for corruption and petty theft, you hear me?*’ Later in his testimony he said, ‘She removed the money so I concluded she stole the money.’ He accepted that his evidence about corruption and petty theft included reference to Mrs. Nicholls.

[18] Mr. Eustace departed from his pleadings in two material respects when he testified. Firstly, while in his Defence he denied implicitly that he was referring to Mrs. Nicholls when he spoke on the radio broadcast on 23rd April 2014, he accepted under cross-examination that when he made certain statements during the broadcast, he was speaking about her. Secondly, in his pleadings he claimed that those words did not mean that Mrs. Nicholls was implicated in any theft. When testifying, he admitted that he was referring to her when he mentioned the NDP’s and his intention

to have zero tolerance for corruption and petty theft when they assumed the reigns of government.

[19] It is not possible for me to reconcile those two conflicting postures. In any event, I am required to ignore Mr. Eustace's intention⁵ when assessing whether the words complained about are capable of having the meanings ascribed by Mrs. Nicholls. I will do just that. In carrying out the evaluation exercise, I must approach it from the perspective of the reasonable listener to the radio broadcasts. Such a person is deemed to be neither naïve nor unduly suspicious. The law characterizes him or her as someone who can 'read between the lines'; 'catch an implication more readily than a lawyer' and one who may 'indulge in a certain amount of loose thinking'.⁶

[20] Such reasonable listener is considered to be representative of those who would listen to the referenced broadcasts, is an individual who is not 'avid for scandal' and one who 'does not, and should not select one bad meaning where other non-defamatory meanings are available.' Those descriptions were held out by Sir Anthony Clarke MR in **Jeynes v News Magazines Limited**⁶, as the traits which such a reasonable listener would possess. This characterization was adopted and applied by Master Ventose (Ag.) in **David Penn v Platinum Investors Limited**⁷. I do likewise.

[21] Sir Anthony Clarke MR also outlined certain guiding principles which the Court is required to follow in conducting the assessment. He noted that over-elaborate analysis is to be avoided; inquiry into the speaker's intention is not necessary and is irrelevant; the broadcast must be taken as a whole, and any 'bane and antidote' taken together. He pointed out that 'in delimiting the range of permissible defamatory meanings' the Court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation...'.⁷

[22] The Court must also remain mindful that 'it is not enough to say that by some person or another

⁵ At the time of those utterances.

⁶ [2008] EWCA Civ 130 at para. [14].

⁷ BVIHCV2013/0376 at para. 9 (unreported).

the words might be understood in a defamatory sense.' In **Vance Amory v Hastings Daniel**⁸ Edwards J. articulated the principles in similar fashion. She stated:

'They mean what ordinary persons in society would say they mean, bearing in mind the different temperaments, and outlook, ranging from the unusually suspicious to the unusually naïve. I am to regard ordinary persons as persons between these two extremes, who are not avid for scandal. Ordinary persons do not read sensational articles with cautious and analytical care. They read between the lines, and form general impressions based on their knowledge and experience of worldly affairs, There is a certain amount of loose thinking and jumping to conclusions from ordinary persons.'

[23] The guiding principles have been repeated many times including by Lord Nicholls in **Bonnick v Morris**⁹ as summarized by Sir Thomas Bingham in **Skuse v Granada Television Ltd.**¹⁰. The learned authors of Halsbury's Laws of England have included instructive guidance in their volume on Defamation¹¹. They state that before it is possible to determine whether or not particular words bear a defamatory meaning, their meanings must be ascertained. They opine that it is a question of law whether words are capable of bearing a defamatory meaning and that it does not involve a question of legal construction but rather a question of fact. They point out that the meaning is that which the words would convey to ordinary persons¹².

[24] The learned authors state that in arriving at the natural and ordinary meaning, the Court has regard to the literal meaning of the words and also the inferences which a reasonable person would draw from them in their context. Lord Reid explained what is meant by the natural and ordinary meaning in his judgment in **Lewis v Daily Telegraph Ltd. Lewis v Associated Newspapers Ltd..**

[25] He opined:

⁸ SKBHCV1999/0019 at para. 23.

⁹ [2002] UKPC 31.

¹⁰ [1996] EMLR 278 at 285–287.

¹¹ (2012) Vol. 32, at paras. 545 and 546.

¹² Rubber Improvement Ltd v Daily Telegraph Ltd, Rubber Improvement Ltd v Associated Newspapers Ltd [1964] AC 234 at 258.

‘What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. 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.’¹³

[26] In another case, Lord Morris explained that the natural and ordinary meaning may be the literal meaning or the implied or inferred meaning. He stated:

‘The ordinary and natural meaning of words may be either the literal meaning or it may be an implied meaning or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words.’¹⁴

I adopt the foregoing legal principles as articulated in the referenced legal authorities, and apply them to the facts of this case. I turn now to examine the impugned words voiced in each broadcast.

April 23rd 2014 broadcast

[27] The transcript provided to the Court reflects that the host and Mr. Eustace exchanged pleasantries at the beginning of their exchange on 23rd April 2014. Then the host asked him about ‘this thing’, to which Mr. Eustace replied that he had refrained from making any statements before that day. He then proceeded to say that he wanted to firstly make it known that he had sent the severance pay to Mrs. Nicholls by registered mail on 14th April 2014. He added that he was hearing a lot of talk about this matter and he wished to point out that he and the NDP would have zero tolerance for corruption and petty theft when they got into office. The host responded ‘I hear you, I hear you.’

¹³ [1963] 2 All ER 151 at p. 154.

¹⁴ Jones v Skelton [1963] 3 All ER 952 at p.958.

[28] It was then that Mr. Eustace added:

'I never expected to win at the Tribunal. The Tribunal is a legal process but I know how it works. All I am saying, the payment was made and the New Democratic Party Administration will have no tolerance for corruption and petty theft.'

[29] It is immediately apparent that Mr. Eustace said nothing remotely defamatory in the first part of his conversation with the host on 23rd April 2014. His references to corruption and petty theft occurred during his last two comments. He did not mention Mrs. Nicholls by name. Referring again to the mailing of the registered mail, he said:

'The Defendant: By registered mail. I am surprised that I am hearing that she has not gotten it but that was done on the 14th of April, that is the first thing I have to say, so I am hearing a lot of talks on this matter secondly **I want to point out that I have and the New Democratic Party when we get into office we'll have zero tolerance for corruption and petty theft, you hear me?** (bold mine)

Host: I hear you, I hear you.

The Defendant: I never expected to win at the Tribunal. The Tribunal is a legal process but I know how it works. **All I am saying, the payment was made and the New Democratic Party Administration will have no tolerance for corruption and petty theft.**'(bold mine)

[30] Almost in one breath Mr. Eustace speaks about sending out the severance payment, that he has been hearing lots of talk about the matter and that he and the NDP will have little tolerance for corruption and petty theft. It leaves the impression that the three issues are interwoven - 'payment of severance, much talk about the subject and corruption and petty theft.' Almost immediately he speaks about the proceedings in the tribunal, dismisses them as a legal process which is expected to work in that fashion, acknowledges that the payment was made in accordance with the tribunal finding and once again mentioned 'zero tolerance for corruption and petty theft'.

[31] One is left with the distinct impression that the payment of severance, much talk about the

subject and corruption and petty theft, are inextricably bound up or connected. Mr. Eustace submitted that those words do not refer to Mrs. Nicholls and do not identify her as a corrupt person or a thief. He submitted further that what he was saying is that given the fact that there has been stealing of money in parts of the public service in St. Vincent that an NDP government when it comes into office will be intolerant of any such acts.

[32] Mr. Eustace claimed firstly that the words were not defamatory and alternatively, if they were that the statements were made in the way of fair and honest comment on a matter of public interest. He pleaded in his defence certain facts and matters on which he said he was commenting. They did not form part of his pronouncement on that day.

[33] He laid them out as follows:

‘Whilst the Claimant was employed as Secretary to the defendant and her salary was paid out of public funds, sums of money that were received by her which were to be paid over by her to the New Democratic Party (NDP), of which the Defendant is the President, were at times never paid over nor properly accounted for nor accounted for at all by the Claimant when she was required to do so.

The Defendant who is Leader of Her Majesty’s Opposition in the Parliament of St. Vincent and the Grenadines and reasonably expecting to become Prime Minister of St. Vincent and the Grenadines was by his words sending a warning to all public servants that when he becomes Prime Minister, an NDP administration will not tolerate corruption/stealing and refusing to account for or not accounting at all (as had happened in the recent past with public servants) for moneys properly belonging to the funds of the State that have been received by them in their official capacity.’

[34] Mr. Eustace alleged in the defence ‘In so far as the words complained of bear the meaning that the Claimant had committed the criminal offence of theft and that the Claimant was involved in corrupt practices, they are fair comment on a matter of public interest that is to say the conduct of the Claimant whilst serving as Secretary of the Defendant in his capacity as Leader of the Opposition in the Parliament of Saint Vincent and the Grenadines for which she was paid out of public funds.’

- [35] The law requires that a defendant must specify in his defence the defamatory meaning that he seeks to defend as honest comment.¹⁵ In this respect, Mr. Eustace appears to accept that the words are capable of the meaning ascribed to them by Mrs. Nicholls. He has advanced no other defamatory meaning.
- [36] Mrs. Nicholls submitted that after hearing the evidence, the Court is in an even better position to determine the natural and ordinary meaning of the impugned words. She contended that Mr. Eustace made crystal clear in cross-examination that when he called in to the radio programme on both days he was referring to her in his comments.
- [37] She recalled that he testified that the comments were made at a time when there were lots of thefts in the country and that he mentioned her because he was particularly concerned since she was being paid out of the public funds and further that 'we would not be tolerating that kind of behaviour'. She noted that he elaborated by saying 'by this kind of behaviour I am referring to theft, petty theft and corruption'.
- [38] Mrs. Nicholls submitted that this backdrop as painted by Mr. Eustace, puts the words spoken into even sharper focus when he described the 'climate' in which they were published. She argued that he published the words at a time when the issue of corruption and theft were prevalent topics being discussed generally, but was not the topic being discussed when he called in.
- [39] She submitted that he must have known that publishing those words in such a climate would cause the ordinary man to conclude that she was involved in theft and corruption and that she was dismissed from her employment as a result. She has thereby acknowledged that there was much talk about such matters around that time. I accept the parties' similar assertions on this point. I note however that such talks did not arise during Mr. Eustace's broadcast that day.
- [40] Be that as it may, this Court must determine whether the statements are capable of having the meaning outlined in Mrs. Nicholls' pleadings as supported by her testimony. I remind myself that I

¹⁵ Halsbury's Laws of England Vol. 32 (2012) at para. 636.

must be satisfied that the reasonable listener would have interpreted the words in the way Mrs. Nicholls contended that such a listener would have. In this regard, Lord Bridge noted in **Charleston v News Group Newspapers Ltd.**:

‘... although a combination of words may in fact convey different meanings to the minds of different readers, the jury in a libel action, ... is required to determine the single meaning which the publication conveyed to the notional reasonable reader and to base its verdict and any award of damages on the assumption that this was the one sense in which all readers would have understood it.’¹⁶

[41] Two words were used in the 23rd April broadcast which impute criminal behavior – ‘corruption’ and ‘theft’. ‘Corruption’ is defined in the Merriam Webster dictionary as ‘dishonest or fraudulent conduct by those in power, typically involving bribery’. ‘Theft’ is defined as ‘a criminal taking of the property or services of another without consent’. These meanings are generally accepted and applied to those words by the notional reasonable man. They were spoken of and about Mrs. Nicholls. I am assured that on hearing the broadcast that such a listener would have associated those meanings with the use of those words.

[42] Such a person hearing the statements by Mr. Eustace on the broadcast on 23rd April 2014 would have probably concluded that he was hinting or suggesting that Mrs. Nicholls was involved in corruption and/or petty theft in connection with the case adjudicated by the Labour Tribunal. Neither he nor the host made mention of any other person, or case involving any person other than Mrs. Nicholls. The implication and inference is in my opinion quite clear – Mrs. Nicholls was implicated in corruption and/or petty theft.

[43] This is heightened by the mention of the Labour Tribunal proceedings. The reasonable listener in the State of Saint Vincent and the Grenadines would have realistically accepted that a veiled allegation was being made that Mrs. Nicholls stole something during the course of her employment, in relation to which the tribunal proceedings were conducted.

¹⁶ [1995] 2 All ER 313 at p. 317.

[44] I therefore find that the words:

'I want to point out that I have and the New Democratic Party when we get into office we'll have zero tolerance for corruption and petty theft, you hear me? I never expected to win at the Tribunal. The Tribunal is a legal process but I know how it works. All I am saying, the payment was made and the New Democratic Party Administration will have no tolerance for corruption and petty theft.'

meant (in their natural, ordinary and inferential meanings) and were understood by the reasonable listener to mean that Mrs. Nicholls had committed the criminal act of theft and was involved in corrupt practices.

April 24th 2014 broadcast

[45] On April 24th 2014 Mr. Eustace was even more pellucid in his accusations of Mrs. Nicholls. When the host told him pointedly that he perhaps was not saying that his Secretary had been '... pinching little bit off the edges and not nice' he retorted 'Look, what happened is that she took money that she should not have taken. ... Many times.' He added: 'Ok, and that is what she was in fact paying it back. ... It was brought to my attention after a while. ... Yes man but in my dismissing her I raised that as one of the issues in her dismissal not the only issue one of the issues.'

[46] There is no mistaking or misunderstanding the natural and ordinary meanings of those statements. Here, Mr. Eustace openly accused Mrs. Nicholls of stealing money which she was in the process of paying back. He also alleged that he asked her about it during her dismissal.

[47] He pleaded:

'... if and insofar as the words complained of bore or were understood to bear the meaning that the Claimant while she was employed by the Defendant as his Secretary had collected money intended for the New Democratic Party (NDP), the political party of which the Defendant is the President, and not paid it over to the Party as well as other moneys intended for the medical expenses of Elwardo Lynch the same are true in substance and in fact.

[48] He went on to set out particulars of justification as follows:

'Particulars of Justification

- a. The Claimant often collected money from members of the NDP which she well knew was to be paid over to an official of the NDP but never did. The day after the Claimant left the Defendant's employment cheque books and receipt books then in use in the NDP's office could not be found and they still remain missing up to the present time.
- b. Also the Claimant while employed as aforesaid received money from members of the public and the NDP well knowing that it was intended to be paid into a bank account to cover the medical expenses of the late Elwardo Lynch, the then host of the NDP Radio Programme called "New Times", and used it for her own benefit without the consent or knowledge of Elwardo Lynch or the Defendant as Leader of the NDP or any other Senior Member of the NDP. It was not until the fact that the money intended for Elwardo Lynch had been collected by the Claimant became known to the NDP that the Claimant began to pay it back without telling anyone that she was doing so.'

[49] Mr. Eustace maintained this position throughout the trial. He was insistent that Mrs. Nicholls had stolen monies during the course of her employment as his Secretary. I find therefore that the words he spoke about her on the radio broadcast on 24th April 2014, are meant or were understood to mean in their natural and ordinary meaning that Mrs. Nicholls had committed the criminal act of theft and was involved in corrupt practices. Mr. Eustace did not deny this. In fact, he accepted in the defence that if they conveyed that meaning, the allegations were true.

Issue 2 – Was Mrs. Nicholls defamed?

[50] The Eastern Caribbean Supreme Court has articulated the governing principles underlining the law of defamation. In **Lyndon Duncan v Edison Baird** Michel JA summarized the tort of defamation and outlined the constituent elements. He said:

'Defamation, at common law, 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, therefore, 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.'¹⁷

¹⁷ (2014) 86 WIR 214 at para. [11].

- [51] It has been established that publication is deemed to have taken place when the offending words are communicated to someone other than the claimant or defendant in the defamation case.¹⁸ The words are considered to have been communicated when they are heard by that third party; and when they are broadcast on radio. The publication takes place simultaneously and correspondingly when the transmission is picked up and heard by the listener.¹⁷
- [52] Mr. Eustace admitted calling into the radio station on 24th April because the matter was generating a lot of attention. On that date, he recalled that the dismissal and severance payment were being discussed. He stated that people were commenting both in support of and against Mrs. Nicholls. He admitted raising the issues of petty theft and corruption. By his own admission, he published the two impugned statements about Mrs. Nicholls on 23rd and 24th April 2014 when they were broadcast live on a radio programme on Hot 97.1 FM on those dates.
- [53] It follows that the statements were disseminated to third parties via that medium. Mr. Nicholls testified that he heard them and he is aware that other persons in Saint Vincent and the Grenadines did, specifically his co-workers. I accept this. I infer that the listening audience heard those statements. It is perhaps difficult to estimate the coverage area and the population size of the listening audience.
- [54] Mrs. Nicholls pleaded and testified that the broadcast was being streamed live via the internet. She estimates the listening audience to be in the millions. I doubt that the figure reached that level. It would perhaps be closer to the size of the population in Saint Vincent and the Grenadines which is in the region of 100,000. In the absence of measurable or verifiable data, or adequate testimony on this I hesitate to wager a guess or make a conclusive finding.
- [55] Can it be said that the impugned statements tended to lower Mrs. Nicholls in the estimation of right thinking members of society. She claimed that they did. She pleaded and testified that as a result of these false and malicious statements her character and reputation have been gravely damaged and she has been brought into public scandal, odium and contempt. She alleged that the words

¹⁸ Lennox Linton et al v Kieron Pinard-Byrne, DOMHCVAP2011/0017 per Michel JA at paras. [54] and [55], (unreported).

complained of were clearly designed to damage her reputation and that they have prejudiced her prospects for future employment. She testified that she made several attempts to seek employment but was unsuccessful in the aftermath of the broadcasts. She attributed this to the alleged defamatory statements. She contended that Mr. Eustace knew or ought to have known that the words complained of were defamatory but that he nonetheless proceeded to publish them on one of the most listened-to programmes in the country.

[56] Mrs. Nicholls pleaded and attested that Mr. Eustace knew or ought to have known that his words were being streamed live on the internet and that his slanderous utterances were being broadcast to persons throughout Saint Vincent and the Grenadines and the diaspora. She testified that she had been employed by Mr. Eustace for over 12 years before being wrongfully terminated. She averred that she sought redress from the Labour Department because she was dissatisfied with her dismissal and felt that it was not justified since she had done nothing wrong.

[57] Mrs. Nicholls stated that the hearing officer held that her services were not justifiably terminated and she was awarded severance. Mr. Eustace's appeal was dismissed by the Appeals Tribunal in a decision delivered on 14th March 2014. She indicated that after Mr. Eustace made the statements on 23rd and 24th April 2014 on the radio broadcast that she experienced shame and odium on a daily basis because people openly referred to her as a thief and she was publicly ridiculed in the supermarket and at the bus stop. She stated that some persons opined that she should be in prison.

[58] She said that her dismissal was made a public political scandal and her character was attacked on social media and radio talk shows with such frequency that she could not keep up. She testified that persons have referred to her snidely as 'pussy cat' local parlance for 'thief'. Her husband Leroy Nicholls provided similar testimony. He recalled that he was at work when the broadcasts were made.

[59] He indicated that when he got home on 23rd April 2014 he met his wife in a very sad mood. He explained that she told him that she felt deeply ashamed and that persons were already beginning to call her a thief. He recounted that the following day when he arrived home, he found his wife in a

tearful and depressed state. He said that it was destroying her and he could not bear to see it because she is a virtuous and honest woman who holds her character and reputation as one of the central pillars of her being.

[60] Mrs. Nicholls submitted that she was not convicted of any criminal act of theft and that no report of theft was made. She argued that in those circumstances the allegations fall clearly under the category of a defamation that is actionable per se. She cited in support the case of **Lennox Linton et al v Kieron Pinard-Byrne** where Michel JA stated:

‘... although libel is actionable per se and slander is actionable only upon proof of special damage, this is of no consequence where the words complained of impute a crime for which the claimant can be made to suffer physically by way of punishment or where the words are calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication.’¹⁹

[61] Mr. Eustace submitted that in both broadcasts he made it clear that his reference to petty theft and corruption was intended to refer as well to the theft of public funds that had taken place sometime shortly before the broadcasts. None of the witnesses testified that Mr. Eustace mentioned theft by persons other than Mrs. Nicholls, in his broadcasted statements. This is not reflected in the transcript and Mr. Eustace did not provide any audio or written version which differed from the one supplied by Mrs. Nicholls. For these reasons I find that he did not refer to any such persons.

[62] I harbor no doubt that the words spoken by Mr. Eustace on 23rd and 24th April 2014 are defamatory of Mrs. Nicholls, in their natural, ordinary and inferential meanings. Even without Mr. Nicholls and Mrs. Nicholls’ testimony regarding how her life has been impacted, it would be difficult to find that such utterances would not have the effect of lowering her in the esteem of the right- thinking members of the public. Those words impute criminal conduct to her. I agree with her that Mr.

¹⁹ At page 21 para. 52.

Eustace uttered defamatory words about her which had the effect of lowering her reputation in the eyes of right-thinking members of the society. I so find.

- [63] Mr. Eustace has claimed that his pronouncements on April 23rd 2014 are protected by the defences of fair comment and qualified privilege and that his utterances on the following day were justified because they were truthful or that they also were protected by the defence of qualified privilege. He did not plead in either case that his statements were protected by qualified privilege. Furthermore, in his submissions filed on 24th May 2018, he sought for the first time to apply the defence of justification to the 23rd April 2014 broadcast. It was not pleaded and therefore will be disregarded. I will examine each defence mentioned in his submissions starting first with the fair comment arguments.

Fair Comment

- [64] Mr. Eustace pleaded that if and in so far as the words complained of bear the meaning that Mrs. Nicholls had committed the criminal offence of theft and that she was involved in corrupt practices, they are fair comment on a matter of public interest, that is to say her conduct whilst serving as his Secretary in his capacity as Leader of the Opposition, for which she is paid out of public funds. He outlined the facts and matters on which the April 23rd 'comments' were made. I have already set them out at paragraph [32] of this judgment. Mr. Eustace supplemented his pleadings with his and his witnesses' written and oral testimony.
- [65] He testified that as Leader of the Opposition he is entitled to have a Secretary whose salary is paid from the Consolidated Fund. He indicated that when he employed Mrs. Nicholls in 2001 her duties were to attend to matters which he required her to handle. He explained that as a former Prime Minister and Minister of Finance he was particularly concerned that proper records should be kept of the money received from the Ministry of Finance for running the office of Leader of the Opposition, but that proper financial records were kept of all transactions.
- [66] He testified that he introduced the Vote Book about 2010 to further improve record keeping and tighten the financial control in the office. He recalled that Mrs. Nicholls objected to the vote book from the outset and refused to use it. According to him, she insisted that the records she had been

keeping were sufficient. Mr. Eustace stated that their relationship had already been somewhat strained and that it became further strained at that time.

[67] He explained that in 2001 when Mrs. Nicholls was first employed, she was the only person on staff authorized to receive money paid into the NDP coffers. He said that the Treasurer and he were also so authorized. He stated that monies were being paid for membership subscriptions, donations of money, other contributions to the party and monies collected for Mr. Lynch's medical fund. He explained that Mrs. Nicholls was to issue receipts for all monies received.

[68] Mr. Eustace testified that Mrs. Nicholls' behavior in the office deteriorated around 2006. He remembered that she and the office attendant were always at war as they engaged in loud and rowdy quarrels, some of which disturbed the staff of a neighbouring solicitor's chambers. He indicated that he suspended them both. He said that he subsequently dismissed Mrs. Nicholls for dishonesty and disloyalty.

[69] He produced a copy of the dismissal letter. It is dated 28th March 2013 and states:

'Dear Mrs. Nicholls,

I refer to my recent discussions on the need for you to prepare the Vote Book for the Office of the Leader of the Opposition for a whole year now. Twice during that time, you were presented with the relevant book, so I have resorted to refusing to sign checks for the end of March, 2013 for you to take action.

When I left the office after our last meeting, you made a lot of negative comments about me. You have made negative comments about me over the years. I have now lost complete confidence in you as my Secretary. My confidence for some time now has waned to such an extent, that I do not ever give you either my cell phone number or do I give you confidential correspondence to type.

I was particularly concerned when some time ago when I was informed that you used part of the contributions which was donated to Mr. Lynch's illness for your own purposes which you are still repaying to Mr. Lynch.

I have now decided that this state of affairs cannot continue. I hereby terminate your employment as Secretary to the Leader of the Opposition with immediate effect for cause.

You will be paid one (1) month's salary in lieu of notice and your leave entitlement.

Signed Arnhim U. Eustace, MP'

- [70] Under cross-examination Mr. Eustace acknowledged that he did not mention the discrepancy surrounding the missing monies, but that he did so in a subsequent letter dated 30th April 2013. For her part, Mrs. Nicholls said that she was dismissed for three reasons: failure to use the vote book; loss of confidence and using other people's monies.
- [71] Mr. Eustace said that he did not know if a report was made to the police. He added that Mr. Lynch told him that Mrs. Nichols had removed \$900.00 and had agreed to repay him. He added that this conversation with Mr. Lynch took place a couple of weeks before Mrs. Nicholls' dismissal. He stated further that Mrs. Nicholls made the last installment towards the repayment on 9th April.
- [72] Mr. Eustace said that he did not know who asked Mrs. Nicholls to collect money on Mr. Lynch's behalf. He indicated that he did not and that it might have been Mr. Lynch himself. He accepted that he did not know who provided her with the receipt books to record the payments. He assumed that the party provided them. He acknowledged that he did not know that Mrs. Nicholls supplied the receipt books and kept them in her possession at all times.
- [73] He testified that Mrs. Nicholls converted the money to her own use by receiving it and not paying it in. He said that Mr. Lynch told him that she had not paid him the money and he therefore concluded that she stole it. He insisted that she removed the money and this led him to conclude that she stole it.
- [74] Mr. Norris Lewis testified on Mr. Eustace's behalf. He claimed that he visited the United Kingdom in 2011 after a terrible storm caused damage to areas in the North Central Windward Constituency. He indicated that he collected £380, the equivalent of EC\$1580.00 and brought it back to help

some of the persons who suffered during the storm. He stated that he still had the envelope on which he wrote down the amounts received and the names of the persons from whom he received them.

[75] He exhibited an envelope to his witness statement and claimed that was the envelope on which he made those notes. Under cross-examination he testified that he gave the original envelope to Mr. Eustace's legal counsel. It was not produced. Mr. Lewis indicated that the information recorded on the exhibited envelope was done from memory and from another envelope he had. He claimed that he gave the £380 to Mrs. Nicholls. He seemed unsure at points in his testimony when he was being questioned about the envelope. I did not consider him a reliable witness.

[76] Mr. Kenroy Johnson also testified on Mr. Eustace's behalf. He indicated that he is a member of the NDP and was the party's candidate in the North Central Windward constituency for the last two general elections. He said that he had the responsibility of coordinating the party's relief efforts in the aftermath of flooding in the North Windward constituency in 2013. He indicated that Mr. Norris Allen informed him that he had collected financial contributions towards the relief efforts. He claimed that he went to the NDP headquarters to collect the money from Mrs. Nicholls and received less than what he expected. He said that he reported the matter to Mr. Lewis but could not say what action Mr. Lewis took.

[77] Under cross-examination, he said that he collected less than what Mr. Lewis told him. He said that he reported the discrepancy to Mr. Lewis, but could not remember how soon after. His account does not advance the case on either side. It relies heavily on what Mr. Lewis allegedly told to him. This constitutes hearsay and I therefore attach little weight to it.

[78] Mrs. Nicholls testified that Mr. Lynch asked her to and she agreed to collect monies for him and deposit those funds into his bank account. She explained that he travelled abroad to the USA and during his absence she received an envelope from Mr. Cruikshank which was allegedly given to him by Dr. Friday. She indicated that she gave Mr. Cruikshank two separate receipts from her own personal receipt book because Mr. Lynch's receipt book was finished. She said that she could not use the Party's receipt book because it was not a Party matter. She indicated that one receipt was

for the sum of \$754.00 while the other was in respect of US\$60.00, a total of \$900.00. She indicated that she still had those receipt books in her possession.

- [79] She testified that she paid \$100.00 to someone at Mr. Eustace's request, after he promised that the Party would repay it. She said she made a mistake and left the balance of the funds on her desk and it was stolen. She stated that she felt responsible because the monies went missing from her. She said that she reported it to Mr. Cruickshank, Mr. Eustace and to Mr. Lynch when he returned. She recalled that Mr. Eustace said 'ok' when she reported the theft to him.
- [80] She acknowledged that the police was not called in. Mr. Eustace denied that any such report was made to him. Mrs. Nicholls testified that she made arrangements to pay Mr. Lynch because the funds were under her control when they went missing. She said that she paid him the entire \$900.00. Mrs. Nicholls was not charged with petty theft, corruption or other criminal offence.
- [81] Mr. Eustace submitted that the evidence is that Mrs. Nicholls received £380 from Mr. A. Lewis to be handed over to Mr. Johnson, for use for storm relief in the North Windward Constituency and that she handed over to him an amount less than £380. He alleged further that Dr. Friday and Mr. Cruickshank collected \$900.00 to be paid into the bank of Nova Scotia for the purpose of paying off a loan at that bank to meet Mr. Lynch his medical expenses. He submitted that the repayment of the loan was guaranteed by Dr. L. Lewis and him.
- [82] Mr. Eustace contended that it was that \$900.00 which Mrs. Nicholls converted to her own use without Mr. Lynch's consent and without telling anyone she had done so until the matter was raised by Mr. Lynch after she had been dismissed. In those circumstances he claims that what he said on the radio on 23rd and 24th April were true in substance and in fact and was protected by qualified privilege.
- [83] Mr. Eustace submitted that his statement that when the NDP gets into office, that as PM he was going to take a 'strong stand' against theft and corruption, was based on the fact that money had been paid to Mrs. Nicholls which she was supposed to pay out and that she had not done so and had not told him or anyone else about it.

- [84] He argued that under cross-examination Mrs. Nicholls did not say that Mr. Lewis did not pay the money to her, but rather she said she could not remember receiving it and she did not remember paying any money to Mr. Johnson. He reasoned that based on the positive evidence of Mr. Lewis and Mr. Johnson and having had the opportunity to form its opinion of the two witnesses, the Court should come to the conclusion that she received the money from Mr. Lewis and removed part of it which she converted to her own use and never told anyone about it.
- [85] Mr. Eustace argued further that Mrs. Nicholls made no mention of the £380 or the \$900.00 in her witness statements and has not sought anywhere else to answer the allegations by Mr. Johnson and Mr. Lynch. He contended that strangely enough she makes no mention of those specific allegations anywhere in her witness statements or anywhere else. He submitted that those are the only moneys he referred to in the two radio broadcasts.
- [86] It must be noted that a claimant's failure to address and defend herself frontally from an allegation of theft does not prove that she is guilty of theft. She is not obliged to do so. The law requires more to establish theft in a defamation case.
- [87] Mr. Eustace submitted further that it was only after Mrs. Nicholls had been dismissed that she 'learned of her conversion of the £30' and wrote to her asking for her comment. I rather suspect that he meant that **he** learnt about it at that stage. He argued that Mrs. Nicholls never responded to that letter or at all. He argued that the Court should note that Mrs. Nicholls has offered no explanation why Mr. Johnson and Mr. Lewis would falsely accuse her of converting to her own use money left with her for the people of North Windward Constituency.
- [88] It must be pointed out that failure to supply such an explanation, (which if provided would perhaps amount to speculation) would not translate to guilt of theft. Mr. Eustace contended that in considering Mrs. Nicholls' truthfulness, the Court should also take into account that she has made no mention whatsoever of her dealing with the \$900.00 cash donations to Mr. Lynch which she had received from Mr. Friday and Mr. Cruickshank.
- [89] In the **Linton v Pinard-Byrne case**, Michel JA circumscribed the defence of fair comment as

follows:

'It is a defence to a claim of defamation that the words complained of are fair comment on a matter of public interest. The basis of this defence is stated by the authors of *Gatley on Libel and Slander* to be that "[t]here are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters it is desirable that all should be able to comment freely, and even harshly, so long as they do so honestly and without malice".'²⁰

[90] He added:

'... it is a defence to an action for defamation that the words complained of are fair comment on a matter of public interest. To succeed in the defence, a defendant must show that the words are comment and not statements of fact. However, an inference of fact from other facts referred to may amount to a comment. The defendant must also show that there is a basis for the comment contained or referred to in the published words and that the comment is on a matter of public interest, meaning that the matter has been expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern. The defence is defeated though if it is established that the comment was actuated by malice.'²¹

[91] The learned Justice of Appeal also acknowledged the additional guiding principles as articulated by Lord Nicholls of Birkenhead in **Tse Wai Chun Paul v Albert Cheng**²². The Law Lord set out the five elements of the defence of fair comment. Michel JA noted that the defence of fair comment is not made out if any of those ingredients is missing.

[92] The five essential elements of fair comment are accepted to be, that the comment must:

1. be on a matter of public interest;

²⁰ At para. [15].

²¹ At para. [20].

²² [2001] EMLR 31.

2. be recognizable as comment, as distinct from an imputation of fact;
3. be based on facts which are true or protected by privilege;
4. indicate at least in general terms, the facts on which the comment is being made; and
5. be one that could have been made by an honest person and be germane to the subject matter criticized.

[93] The learned authors of Halsbury's Laws of England outlined the applicable law in similar terms. They use the terminology 'honest comment' in place of fair comment and stated:

'In a defence of honest comment it is necessary to prove sufficient facts to sustain the comment, that the comment is one which could be honestly made on those facts, and that the comment is made on a matter of public interest. ... Facts subsequent to publication cannot be relied on to support a defence of honest comment.'²³

[94] Mr. Eustace submitted that in applying the test whether the comment was fair he does not need to 'prove that he held an honest belief as long as the opinion is considered fair by application of the objective test, i.e. "whether the Defendant was an honest man expressing his genuine opinion.' He argued that it is for Mrs. Nicholls to prove malice if she claims that he was not acting in good faith.

[95] The parties agreed that the topic of Mrs. Nicholls' dismissal was played out in the local media on the Hot FM radio station over a period of time. Mrs. Nicholls submitted that in order for the situation to qualify as one of public interest it has to be a matter that is such as to affect persons at large to such an extent that they may be legitimately interested in or concerned as to what was happening to or what may happen to them or others. She contended that there is no evidence to assist the Court in coming to such a conclusion. She argued that the private employment relations between the parties do not fall within the category of a matter of legitimate public interest. I disagree.

[96] Mrs. Nicholls herself stated that she had called into the radio station to speak about her dismissal. She also gave an interview to IWitness News. She indicated that she did so to defend herself

²³ Para. 650 Vol. 32 (2012).

which she also did when she attended the Community College. She recalled that she was being vilified on the media and she felt compelled to respond.

[97] This matter obviously generated ongoing public discussion and therefore falls within the category of matters which are of public interest. Mrs. Nicholls' dismissal had taken place and was therefore factual. Mr. Eustace's allegation that she had stolen money, whether by inference or implication was not proven. She had not been charged, arrested, investigated or prosecuted for any such offence.

[98] The one factual statement was that the severance had been sent to Mrs. Nicholls. No facts were alleged in Mr. Eustace's 23rd April statements, which supported the conclusion that she had stolen. Mr. Eustace did not seek to outline any such facts. Without laying a factual foundation or 'substratum' about the circumstances under which a theft had allegedly taken place, he proceeded to state that the NDP and he would have no tolerance for petty theft and corruption.

[99] His statements amounted to defamatory statements of fact and not comments. Mrs. Nicholls contended that Mr. Eustace has adduced no evidence to support the clear insinuation that she was involved in petty theft and corruption. I agree. I am satisfied that there is no factual foundation which would support a defence of fair comment. Mr. Eustace cannot avail himself of the defence in the circumstances of this case. In the premises, Mrs. Nicholls was defamed by him when he voiced the impugned words on 23rd April 2014.

Justification

[100] There is a presumption in law that defamatory words are false.²⁴ A defendant who seeks to rely on the defence of justification must establish that the defamatory remarks are true in substance and fact. If the words impute the commission of a criminal offence, the defendant must prove on a balance of probabilities that the claimant committed the offence. Mrs. Nicholls submitted correctly that the more serious the allegation the more cogent the evidence which is required to prove it. She cited as authority the case of **Dellow's Will Trust**²⁵.

²⁴ Halsbury's Laws of England, Vol. 32, (2012) para. 591.

²⁵ [1964] 1 WLR 451.

- [101] Mr. Eustace submitted that if the Court holds to be true what he said in the broadcasts on both occasions, then Mrs. Nicholls' claims must be dismissed. This is so. Mr. Eustace argued that 'in the absence of denial or explanation of the allegations made by Mr. Johnson and Mr. Lynch that (Mrs. Nicholls) received the two sums of money and that she paid over to Mr. Johnson a lesser sum than she had received from Mr. Lewis ... together with the whole \$900.00 she had received for Mr. Lynch' and converted all of the \$900.00 to her own use, the Court should be left in no doubt that what he said on the radio broadcasts about her must be considered as true.
- [102] Mr. Eustace has not provided any satisfactory evidence which supports his contention that Mrs. Nicholls stole any monies which were delivered to her at the NDP headquarters. At its height, Mr. Lewis' and Mr. Johnson's testimony amount to nothing more than conjecture and suspicion. Mr. Eustace's belief and assumption that Mrs. Nicholls stole the \$900.00 delivered to her by Mr. Cruickshank is not proof that she stole those funds. She refuted Mr. Lewis' claim that she withheld £30 from a sum of £380 he claimed to have given her towards storm relief efforts. She said she could not remember if he had in fact delivered such an amount to her because she did not have a receipt book to refer to in respect of such a payment. This is entirely understandable.
- [103] Mr. Lewis might very well have left that amount of money with her. However, his recollection and accusation that she withheld £30 for her own use does not amount to proof of theft in circumstances where she denied it and in the absence of a conviction or other cogent evidence supporting that assertion. Mr. Lewis' and Mr. Lynch's accusations do not meet that threshold. Mr. Eustace's defence of justification is not borne out by the facts. It therefore fails. I find therefore that his utterances on 24th April 2014 were defamatory of Mrs. Nicholls.

Qualified Privilege

- [104] Mr. Eustace did not plead qualified privilege as a defence to the claims for defamation. I propose to set the defences out in tabular format for ease of reference. I have already rehearsed paragraph 3 of Claim No. 2014/240 and paragraph 4 of Claim No. 2014/242. I will not repeat them at this stage.

Below are the remaining paragraphs as pleaded.

Claim No. 2014/240	Claim No. 2014/242
1. The Defendant admits only that the Claimant is of full age as pleaded in paragraph 1 of the Statement of Claim and neither admits nor denies the other facts pleaded in that paragraph because he does not know whether they are true.	1. The Defendant admits only that the Claimant is of full age as pleaded in paragraph 1 of the Statement of Claim but neither admits nor denies the other facts pleaded in that paragraph because he does not know whether they are true.
2. The Defendant admits the facts pleaded in paragraphs 2, 3, 4 and 5 of the Statement of Claim but denies that the words complained of bore or were understood to bear or were capable of bearing any of the meanings alleged in paragraph 6 of the Statement of Claim.	2. The Defendant admits the facts pleaded in paragraphs 2 to 4 inclusive and that he spoke the words set out in paragraph 5 of the Statement of Claim.
4. For the reasons stated in paragraph 3 above and that the Defendant has no intentions to publish the same or any other alleged defamation of the Claimant he denies every allegation made in paragraphs 6 to 9 inclusive of the Statement of Claim.	3. The Defendant denies that the words complained of bore or were understood to bear or are capable of bearing any of the meanings alleged in paragraph 6 of the Statement of Claim or any meaning defamatory of the Claimant.
	5. For the reasons given above and the fact that the Defendant has no intentions of publishing the same or any similar alleged defamation of the Claimant he denies every allegation made in paragraphs 6, 7, 8 and 9 of the Statement of Claim.

[105] Qualified privilege is generally pleaded using words such as ‘the defendant denies that the words were defamatory of the respondent and asserts that they were published on an occasion of qualified privilege.’ Mr. Eustace used no such or similar formulation. He has not relied on the defence of qualified privilege and may therefore not avail himself of it at this juncture. It is not necessary to consider that defence for present purposes. Accordingly, his submissions on this issue are omitted from consideration.

Issue 3 – To what remedy is Mrs. Nicholls entitled?

[106] Mrs. Nicholls has succeeded in proving that Mr. Eustace has defamed her on both counts. The appropriate remedy for defamation is damages and invariably an injunction to restrain further publication of the defamatory statements. Mrs. Nicholls submitted that the Court should consider the judgment of the Court of Appeal in **David Carol Bristol v Dr. Richardson St. Rose**²⁶, in which Barrow J.A. highlighted the aggravating effect of a defendant who continued to repeat his accusations against the claimant in purporting to justify the libel.

[107] She contended that Eustace has also aggravated the damages by his actions and conduct after he had slandered her. There is no evidence that Mr. Eustace repeated the defamatory words after 24th April 2014. I find that he did not.

[108] Mrs. Nicholls submitted that the judgment in **Victoria Alcide v Helen Television Systems Ltd. et al**²⁷ is instructive in determining quantum. In that case Smith J. awarded \$20,000.00 for aggravated damages in circumstances where the defendants apologized and withdrew the story, did not republish it and never tried to justify it. Mrs. Nicholls argued that Mr. Eustace took no steps to mitigate the damage of his defamation.

[109] She contended that the publication was done on one of the most popular morning programmes and was available to thousands of people locally and millions in the diaspora. I must note that no

²⁶ SLUHCVP2005/0016, at para. 44.

²⁷ SLUHCV2011/0398.

satisfactory evidence was adduced that the broadcast was distributed to millions in the diaspora. I make no finding whether it was.

[110] Mrs. Nicholls submitted that Mr. Eustace's conduct has been one of defiance and showed a 'wrong but strong attitude'. She argued that he attempted to use his office as Leader of the Opposition to bully and pressure her into silence and is unrepentant for the damage he caused her. No evidence was led which demonstrated any attempt by Mr. Eustace to use his office to bully or pressure Mrs. Nicholls. I reject that assertion.

[111] Mrs. Nicholls contended that because the defamatory statement was repeated it showed outrageous and appalling conduct on Mr. Eustace's part. She submitted that an award of \$100,000.00 for general damages; \$20,000.00 for exemplary damages and \$35,000.00 for aggravated damages would be appropriate in the instant case. She claimed an order for costs and interest on the judgment.

[112] Mr. Eustace countered that that the Court had the opportunity to assess his demeanour and should have no difficulty in coming to the conclusion that he is an honest person. He submitted that the Court should find that his comments were honestly made and that they were comments expressed based on opinions genuinely held. He argued that that is the only conclusion open to the Court because Mrs. Nicholls on whom the burden of proving malice lies has led no evidence as to malice by him.

[113] Under the common law malice had to be pleaded in an action in defamation. That is no longer so because the law presumes that legal malice:

1. exists where a person publishes a defamatory imputation²⁸, and
2. is established on proof of publication.

²⁸ The Law of Torts, Common Law Series, 3rd Ed. (December 2014), at para. 26.125.

- [114] 'Express malice' has a different connotation and refers to a state of mind that might have actuated the publication. Such malice if proved will defeat a defence of qualified privilege. It is not relevant where it has been established that the defence of fair comment is not made out.
- [115] Mr. Eustace contended that if the Court concludes that his statements were defamatory, when assessing damages it should take certain factors into account. In this regard, he argued that he honestly believed that it was his duty and responsibility as Leader of the Opposition to denounce petty theft and corruption. He submitted that before she commenced her action Mrs. Nicholls had been broadcasting on social media (Eye Witness News) the accusations made against her by him.
- [116] He argued that she has admitted that she was being teased and ridiculed while she was at Community College sometime before the broadcasts were made. He reasoned that it is therefore untrue to say that she was being ridiculed and called a thief before his radio appearance or that she started to suffer public ridicule after the broadcasts. He submitted that the Court should award an amount in view of those matters.
- [117] The learning captured in Halsbury's Laws of England demonstrates that when assessing compensation, the Court must have regard to the gravity of the defamation. The authors stated that the 'more closely an allegation touches a claimant's personal integrity or professional reputation, the more serious it is likely to be.' It is clear from the circumstances of this case that Mrs. Nicholls reputation was sullied in one of the most deleterious and extreme ways possible. Allegations of criminal activity are invariably very difficult to shake especially in smaller communities. She obviously suffered considerable distress and embarrassment. I accept that.
- [118] Other relevant considerations include the extent of the publication in terms of circulation and geographical area covered. The Court may infer that substantial dissemination has taken place where the statements have been broadcast on radio. The authors noted that while 'the damages will increase with the circulation' the increase will not necessarily be in direct proportion to such circulation.²⁹

²⁹ Vol. 32 (2012), para. 749.

[119] I am satisfied that the accusations made about Mrs. Nicholls would likely have been widely circulated in the State of Saint Vincent and the Grenadines and maybe even outside, via the internet. The amount of general damages awarded to her must be significant enough to assuage any future attempt to resurrect the defamation or appease the sting associated with such resurrection.

[120] I note Mr. Eustace's contention that he honestly held the belief that Mrs. Nicholls had stolen the monies placed into her custody. He appeared genuinely to believe this. However, this is not enough to justify a public broadcast of such damaging information without indisputable proof. The Constitutional protection of freedom of expression carries with it a corresponding duty to respect another person's right to protection of their reputation. Mr. Eustace was genuinely wrong in the posture that he adopted. He was entitled to and should have conducted his own investigation. He did not do so. In this, he erred.

[121] No testimony was supplied which goes towards mitigation of damages. Neither party put into evidence adequate details which would enable the Court to conduct a proper assessment of damages. I refrain from doing so. I am of the considered opinion that it is best to adjourn such an exercise for a subsequent occasion when both parties would have had ample opportunity to supply pertinent particulars.

[122] It is therefore ordered that judgment is entered for Mrs. Nicholls. Mr. Eustace is required to pay damages to her, to be assessed on application to be made before the Master. Mrs. Nicholls must file and serve such application with supporting affidavit(s) on or before 18th September 2018. Having regard to all the circumstances of this case, it appears to be just to grant the injunction prayed for by Mrs. Nicholls. It is so ordered.

ORDER

[123] It is accordingly ordered:

1. Judgment is entered for Mrs. Rishatha Nicholls in respect of both causes of action.

2. Mr. Arnhim Eustace is restrained from publishing, repeating or causing to be published or repeated the defamatory statements made by him in the radio broadcasts of April 23rd and 24th 2014 on Hot 97.1 FM in respect of Mrs. Rishatha Nicholls.
3. Mr. Arnhim Eustace shall pay to Mrs. Rishatha Nicholls damages to be assessed, on application to be filed and served on or before 18th September, 2018.
4. Mr. Arnhim Eustace shall pay to Mrs. Rishatha Nicholls prescribed costs based on the quantum of damages awarded pursuant to sub-paragraph 3 of this order.

[124] I am grateful to both counsel for the written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar