

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2009/0346

BETWEEN:

DR. PATRICK ANTOINE

Claimants

and

GRENADA TODAY LIMITED
LLOYD NOEL

Defendants

Appearances:

Sir Richard Cheltenham, Q.C. with Ms. Daniella Mitchell and Ms. Dennies Burris,
for the Claimant

Mr. Anselm Clouden for the First and Second Defendants

.....
October 21, 2015
February 24, 2016
.....

JUDGMENT

INTRODUCTION

- (1) **MON DESIR, J. [Ag]:** It is a well established principle of law that, generally speaking, every man is entitled to his good name and to the esteem is which he is held by others, and he has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse.¹

¹ Halsbury's Laws of England, 4th Ed. Vol 28 p. 3

- (2) This general principle is the premise upon which the present action has been commenced. The Claimant is a Grenadian citizen who currently resides in Trinidad and Tobago. He is an Economist as well as a Trade and Economic Consultant. In that regard, he provides investment and trade advice to his clients, which include Governments, Governmental agencies, regional and international organisations, and multi-national corporations. At the time of publication of the article which forms the basis for his complaint, the Claimant was employed as a Consultant to the Government of Grenada for fourteen (14) days of each month and was Grenada's Trade Ambassador to the Republic of Trinidad and Tobago.
- (3) On 3rd October 2008 the Second Defendant wrote and the First Defendant published an article entitled is there no end to the bad deal (the "Article") in the then called Grenada Today Newspaper. The Article was, ostensibly an editorial piece, focusing on the sale of the freehold of land owned by the Government of Grenada and located on Grand Anse Beach to an investment group backed by Lewis Hamilton, the race car driver. The Claimant contends that the Article was defamatory of him in that it impugned his integrity, reputation of competence and has caused him damage both personally and professionally.
- (4) The First Defendant, which is now in liquidation, was a weekly newspaper in Grenada. It had a wide, local, weekly circulation of approximately five to six thousand readers. On occasions, that readership could have amounted to as high as three times that number. Some of the newspaper's publications, including the Article, have been reproduced on the internet on at least two websites.
- (5) The Second Defendant is a writer and political commentator. He is also an Attorney-at-Law with over forty-five (45) years practice at the private Bar and is a former Attorney General of Grenada.

THE ARTICLE

- (6) As matter of expository convenience, I set out here the material aspects of the Article which forms the basis for the instant action. These were outlined in the Claimant's Amended Statement of Claim of 9th February 2010 and are as follows:

"It appears that Lewis Hamilton had a Company Incorporated viz. "Time Bourke Holding (Grenada) Limited" ... to purchase the property on his behalf... But the deal is not as straightforward as it appears.

The land comprises Twenty Acres four and six-tenths Poles (20Acs.4 6/10 Pls.) it was valued for the sale in the sum of Fifteen Million Dollars United States Currency (\$15,000,000.00 US) ...

My understanding, from fairly reliable sources, is that the Agent acting on behalf of the Government of Grenada was the Economic Advisor and roving Ambassador, Dr. Patrick Antoine, who resides in Trinidad- and his fees were in the region of 10% of the land value i.e. One point Five Million US dollars ... but the people of Grenada who really and truly own the said land got nothing...

I have no quarrel in one sense with Lewis Hamilton- except that he should ✓
have done his due diligence and not get himself entangled with those
seasoned dealers and wheelers of longstanding in Grenada- who had
graduated with dishonors in their scams with world-renowned crooks and
smart men and gangsters.

He also must have paid some hard Cash to certain individuals over and
above the professionals who provided their services in implementing that
sordid and shameful deal in the name of our people. ✓

Back in the days of Judas Iscariot in Jerusalem, when he brought back his
dirty and bloodied thirty pieces of Silver to the Leaders of the Pharisees

and Sadducees in remorse- they used the blood money to buy the Potters Field.

I wonder aloud, if those who received their cut of what was paid were brave enough to bring it back to the Treasury- and Hon. Nazim Burke as Finance Minister decided to buy a field in their memory, how he would name it after them.

I would suggest a field "for corrupt and disgraced Politicians (C&DP) of all shades and colours." ...

I cannot believe that the above scampish deal was designed and executed between the diplomatic agent in T&T and the Ex-P.M. without any recourse to cabinet for conclusion."

THE PLEADINGS

The Claimant

- (7) As a result of the publication of the Article, the Claimant filed his Claim Form on 7th August 2009 and his Amended Statement of Claim on 9th February 2010 in which he claimed:
- (a) Damages, including exemplary and/or aggravated damages for the libel published and circulated by the Defendants on the 3rd October 2008;
 - (b) Interest pursuant to section 27 of the West Indies Associated States Supreme Court Act, Chapter 336 of the 1990 Revised Laws of Grenada;
 - (c) An injunction restraining the Defendants by themselves their servants and/or agents or otherwise howsoever from further publishing or causing to be published the said or similar words defamatory of the Claimant;
 - (d) Such further or other relief as may be just; and
 - (e) Costs.

- (8) In his Amended Statement of Claim the Claimant averred that the Article was defamatory of him, contained false statements and was maliciously published. These false allegations of fact, he says, are:
- (a) That the Claimant was acting as agent on behalf of the Government of Grenada while he was Economic Advisor and roving Ambassador.
 - (b) That the Claimant was paid fees of USD\$1.5M, or 10% of the purchase price of the land at Grand Anse.
 - (c) That the land transaction, in which the Claimant participated, was a corrupt deal.
 - (d) That the Claimant is one of the "seasoned dealers and wheelers of long standing in Grenada, who had graduated with dishonors in their scams with world renowned crooks and smart men and gangsters".
 - (e) That the Claimant received and/or facilitated the payment of bribes to Government officials in order to secure the Crown's consent to the transaction.
 - (f) That the Claimant is a Judas, a traitor and a treasonous person.
 - (g) That the Claimant was complicit in the creation of a "diabolical and fraudulent document" designed "to deprive the very loyal subjects of Her Majesty from receiving the true value of their lifelong heritage".
 - (h) That the Claimant was involved in a "deliberate and shameful fraud" on the people of Grenada. (see ll. 5 to 8 of para. 4, column 5 of the article of 3rd October, 2008).
 - (i) That the "above scampish deal, was designed and executed between the diplomatic agent in T&T the Complainant and the ex-p.m without any recourse to Cabinet for a conclusion".

The Defendants

- (9) The Defendants, on the other hand, filed their Defences on 7th October 2009 in which they admit that the Article was written by the Second Defendant and published in the Grenada Today Newspaper on the 3rd October 2008. The publication of the Article is, therefore, not a matter in dispute between the parties.

However, the Defendants deny that the Article or words set out in it were defamatory of the Claimant; or were falsely, maliciously, or recklessly published.

- (10) The Defendants further contend that the article and words written by the Second Defendant are justified and are fair comments on a matter of public interest, insofar as the said words consist of statements of facts, the same are in fact and substance.
- (11) In respect of the words used in the Article which refer to a corrupt transaction in which the Claimant acted as agent for the Government, and in which the Government of Grenada sold the lands in question to a company owned by Lewis Hamilton the Defendants deny that those words were in their ordinary and natural meaning meant, and understood to refer to the Complainant.
- (12) In particular, they deny that they knew that the words published were defamatory, false or that the Defendants were reckless as to the truth or falsity of the words.
- (13) The First Defendant-
 - (1) Says that they had a right to inform the public of matters of public interest.
 - (2) Relied on a plea of justification and fair comment and stated that in so far as the article contained statements of fact, the same are true in fact and in substance.
- (14) The Second Defendant-
 - (1) States that the alleged defamatory article was headlined "Is there no end to the bad deals" and contends that it is a fact "that during the past eight years there have been so many complaints and accusations about wrongdoings and corrupt deals in our public affairs."
 - (2) Contends that he outlines in the article the facts surrounding the transfer of twenty-four (24) acres 4 6/10 poles of land situated at Grand Anse

Beach, St. George's, valued at US\$15,000,000.00 to a company Time Bourke Holding (Grenada) Limited.

- (3) Further contends that it is a fact that there was no monetary consideration for the transfer of the lands to Time Bourke Holding Grenada Limited, and that instead the Government of Grenada would supposedly have had the right to use and reproduce approved photographs of Lewis Hamilton, for and in connection with the promotion of the State of Grenada, for a period of four years.
- (4) Argues that the transfer of the lands gave rise to grave suspicion that, on the facts as set out, the deal was scampish and fraudulent.
- (5) Contends that, in any event, the words used are not defamatory of the Claimant, nor do they bear the meaning attributed to them by the Claimant.
- (6) Argues that, as a journalist he has a right to inform the public of matters affecting their economic well-being.

THE ISSUES

- (15) These rival contentions raise the following issues for the Court's determination, namely:
 - (1) Are the words published by the Defendants defamatory?
 - (2) Has the defence of justification been established?
 - (3) If the words are defamatory, has the defence of fair comment been established?
- (16) In respect of each of these issues, the parties have cited a number of authorities. I have therefore, striven in what ensues to give effect to the relevant principles derived from each of those authorities.

THE LAW

General Principles

- (17) This is an action in libel. In working through the several issues that arise in this case, I direct myself as a matter of law that a libel for which an action will lie is a defamatory statement made or conveyed by written or printed words or in some other permanent form, published of and concerning the Claimant, to a person other than the Claimant. In an action for libel, it is the practice to allege in the statement of claim, as the Claimant has done here, that the words were published falsely or maliciously.² However, the Claimant does not have to prove falsity or malice to establish his cause of action.³ If the words themselves are defamatory, the law presumes that they are false⁴, and it is for the Defendant to plead and prove that the words are true. In other words, the onus of proving justification is on the Defendant.
- (18) I also, direct myself, as a matter of law, that the intention with which the words were written and published is irrelevant to the determination of the questions whether or not the words were understood to refer to the Claimant, and whether they were understood to bear a meaning defamatory of him,⁵ although the Defendant's intention may be relevant to the issue of damage.

Are the Words Defamatory?

- (19) The essence of the defamatory statement is its tendency to injure the reputation of the Complainant. There is no complete or comprehensive definition of what constitutes a defamatory statement, since the word "defamatory" is nowhere precisely defined. Generally speaking, however, it has been held that a statement is defamatory of the person of whom it is published if it tends to lower him in the estimation of right thinking members of society generally⁶ or if it exposes him to

² *Bromage v. Prosser* (1826) 4 B&C 247 at 255, per Bayley J.

³ *Belt v Lawes* (Supra)

⁴ See eg. *Belt v Lawes* (1882) 51 LJQB 359 at 361

⁵ *E. Hulton & Co. v. Jones* [1910] AC 20, HL

⁶ *Sim v. Stretch* [1936] 2 AER 1237 at 1240, HL per Lord Atkin.

public hatred, contempt or ridicule, or if it causes him to be shunned or avoided.⁷ In this context, a person's reputation is not confined to his general character and standing but extends to his trade business or profession.

(20) In deciding whether or not a statement is defamatory, the Court must first consider what meaning the words would convey to the ordinary man.⁸ Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand it in a defamatory sense.

(21) Before it is possible to determine whether or not particular words bear a defamatory meaning, it is necessary to determine their meaning. In that regard, it is understood that words may have not only a literal meaning but also an inferential meaning which goes beyond the literal meaning but is inherent in them, and may depend upon the context in which they were published. The meaning of words for the purpose of the law of defamation is not a question of legal construction, since laymen will read into words an implication more freely than a lawyer. The meaning is that which the words would convey to ordinary persons.⁹ In that regard, it has been said that, "The ordinary person reads between the lines in light of his general knowledge and experience of worldly affairs. Thus, the interpretation of words may vary infinitely, and the right meaning is therefore, a question of fact. However, words may be understood by one person in a different way from that in which they are understood by another. Ordinary men and women have different temperaments and outlooks; some are unusually suspicious; some are unusually naïve; and one must try to envisage people between those two extremes and determine what is the most damaging meaning they would put on the words in question."¹⁰

⁷ See eg. *Yousoupoff v. Metro-Goldwyn-Mayer Pictures Ltd.* (1934) 50 TLR 581, CA

⁸ *Slim v. Daily Telegraph Ltd.* [1968] 1AER 497 at 504, CA per Diplock LJ.

⁹ *Slim v. Daily Telegraph Ltd.* (supra)

¹⁰ Halsbury's Laws of England, Vol. 28 at p. 23; see also, *Rubber Improvement Ltd. v. Associated Newspapers Ltd.* [1964] AC 234 at 259

(22) In approaching this question therefore, I bear in mind that 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.¹¹ As such,

"When a plaintiff complains of words in their natural and ordinary meaning he must accept that meaning with all the derogatory connotations that it conveys; the ordinary reader takes the imputations as a whole and does not divide them up. Once the meaning has been determined, the Court must decide whether the words complained of are defamatory of the plaintiff."

(23) I also bear in mind that the inferential defamatory meaning of words must be deduced or inferred from the words themselves and the context in which they were published. It is a matter of law for the trial judge to decide whether or not the words are reasonably capable of bearing a meaning defamatory of the Claimant. If the Court finds that they are so capable, the judge must then go on to determine as a matter of fact whether the words did in fact bear a meaning defamatory of the Claimant.¹²

(24) In this case, the Defendants have, in their pleading denied that the words were defamatory. However, neither in the evidence they have called nor in their submissions on this point, have they advanced any basis for their assertion.

(25) The Claimant on the other hand has argued that:

- (1) The words are self-evidently defamatory and that the words complained of at para. 4 of his Amended Statement of Claim filed on 9th February 2009 would be understood by the reasonable reader to mean that the Claimant was a traitor who betrayed his country's interests for private and corrupt gain. His counsel argues that "to liken a man to Judas Iscariot is

¹¹ Capital and Counties Bank v. Henry and Son, (1880) 5CPD 514 AT 541

¹² Rubber Improvement Ltd. v. Daily Telegraph Ltd [1964] AC234

client suspending his contract and other persons questioning his professional integrity.

(26) In my view, the evidence in support of the Claimant's contention is simply overwhelming. I find as a matter of law that the words used in the Article are reasonably capable of bearing a meaning defamatory of the Claimant. I also find as a fact that in the particular context of the Article in which they appear, the words complained of did in fact bear a meaning defamatory of the Claimant.

(27) I find as a fact that the words used do carry with them an imputation which tends to injure the Claimant's reputation in business, employment, trade and profession. They clearly impute to him the undesirable qualities of "scampishness" and "dishonesty" which are obviously detrimental to the successful carrying on of his office, profession or trade. It is defamatory to impute to a person in any office any corrupt, dishonest or fraudulent conduct or other misconduct, as the Defendants have done in this case in respect of the Claimant.¹³ I therefore find that the Claimant has established on the balance of probabilities that the words are defamatory of him.

Reference to the Claimant

(28) I now turn to the question of whether the words used in the Article concern or refer to the Claimant. The statement complained of must be published of and concerning the Claimant. Words are not actionable as libel unless they are published of and concerning the Claimant.¹⁴ The Claimant can therefore only rely on the defamatory matter contained, whether expressly or by implication, in the statement in respect of which the action is brought and not on defamatory matter contained in statements made about the Claimant by other persons on other occasions.¹⁵

¹³ According to Gatley: "2.26. to 2.28 Reputation in business, trade or profession.

¹⁴ Knupffer v. London Newspaper Express Ltd [1944] AC 116

¹⁵ Astaire v. Campling [1965] 3AER 666

- (29) Where the Claimant is referred to by name, or is otherwise clearly identified, the words are actionable even if they were intended to refer to some other person.¹⁶ As such, in the context of the instant case where the Claimant is referred to as "the Economic Advisor and roving Ambassador, Dr. Patrick Antoine, who resides in Trinidad"; and "the diplomatic agent in T&T" it is beyond dispute that the words used concern and refer to the Claimant. I therefore find as a fact that these statements refer to the Claimant.
- (30) However, it is not at all essential that the Claimant should be named in the statement. Where the words do not expressly refer to the Claimant, they may still be held to refer to him if ordinary sensible readers with knowledge of special facts could and did understand them to refer to him.¹⁷ Those facts are material facts, must be pleaded in the statement of claim and must be proved in evidence in order to connect the plaintiff with the words complained of.¹⁸
- (31) In the instant case, other than in the references that I have referred to in the preceding paragraph, the Defendants have denied that there were any other references to the Claimant. Where identification is in issue, it is for the Court as, a matter of law to rule whether or not the words are reasonably capable of being understood to refer to the Claimant.¹⁹ In determining this question, the Court must consider whether or not ordinary sensible men, having the knowledge, could understand the words to refer to the Claimant. If no reasonable person could have reasonably so understood the words, there is no question of fact to be left to the trial judge as the arbiter of the facts before him. However, if the words are such as could reasonably lead persons acquainted with the Claimant to believe that he was the person referred to, then the Court must go on to decide, as a question of fact, whether or not the words did in fact refer to the Claimant.²⁰

¹⁶ *Newstead v. London Express News Paper* [1940] 1KB 377

¹⁷ *Morgan v. Odham Press Ltd* [1971] 2AER 1156.

¹⁸ *Morgan v. Odham Press Ltd* (supra)

¹⁹ *Knupffer v. London Express Newspaper Ltd.* [1944] AC 116 at 121

²⁰ *Morgan v. Odham Press Ltd.* [1971] 2AER 1156 at 1168

- (32) The Claimant is entitled to call witnesses at the trial to testify that they understood the words to refer to him.²¹ He may also adduce evidence as to the effect of the words complained of on others.²² It is for the judge, as tribunal of fact, to assess the credibility and reliability of the witnesses called, what weight, if any, to be placed on all or any particular aspect of the evidence; and whether reasonable people would reasonably understand that the Claimant was referred to.
- (33) In that regard, it should be noted that neither defence disputed that the words complained of would be understood by the ordinary reader to refer to the Claimant. The Claimant contends that it is not open to the Defendants, on the witness stand, for the first time, to make such a denial. I agree with that contention, but this Court is nevertheless obliged to go further and consider whether or not the words are reasonably capable of being understood to refer to the Claimant
- (34) Having read closely the words of the Article, and having reviewed the evidence of both sides regarding this matter, I find as a matter of law that the words used in the Article, are in the particular context and manner in which they were used by the Defendants reasonably capable of being understood to refer to the Claimant. I am of the view that ordinary sensible men, having the knowledge, would be left in no doubt that the words referred to the Claimant and further, that no reasonable person would have reasonably understood the words to mean otherwise than as referring to the Claimant.
- (35) Having thus concluded, I also find as a fact that the following words did in fact refer to the Claimant and carry with them the irresistible imputation that the Claimant has ascribed to them, namely that:
- (a) the land transaction, in which the Claimant participated, was a corrupt deal;

²¹ Morgan v. Odhams (supra)

²² Jozwiak v. Sadek [1954] 1AER 3 (where evidence of statements made at public meetings and of anonymous telephone ecisely defined.

- (b) the Claimant is one of the "seasoned dealers and wheelers of long standing in Grenada, who had graduated with dishonours in their scams with world renowned crooks and smart men and gangsters";
- (c) the Claimant received and/or facilitated the payment of bribes to Government officials in order to secure the Crown's consent to the transaction;
- (d) the Claimant is a Judas, a traitor and a treasonous person;
- (e) the Claimant was complicit in the creation of a "diabolical and fraudulent document" designed "to deprive the very loyal subjects of Her Majesty from receiving the true value of their lifelong heritage";
- (f) the Claimant was involved in a "deliberate and shameful fraud" on the people of Grenada; and
- (g) the "above scampish deal, was designed and executed between the diplomatic agent in T&T [the Complainant] and the ex-PM without any recourse to Cabinet for a conclusion".

(36) I therefore, hold that the statements complained of in the Article were, at least in respect of the aspects identified by the Claimant, published of and concerning the Claimant.

Publication

(37) Finally, I turn to the issue of publication. No action for libel will lie unless there has been a publication. The Claimant must allege and prove that the Defendant published, or caused to be published, of and concerning the Claimant, the words complained of to a third person, namely to some person other than the Claimant.

Has the Defence of Justification been established?

Submissions for the Defendants

(38) In this case, the Defendants have raised two defences, namely: (1) justification, in that the words complained of were true in substance and in fact; and (2) that the words complained of were fair comment on a matter of public interest. The

Defendants contend that the Article and the words written therein are justified and fair comments on a matter of public interest, a matter which the Second Defendant was of the belief that the citizenry of the Grenada ought to have addressed their minds to.

"On Justification"

(39) The Second Defendant in particular, also contends that:

(1) The Article consisted of statements of fact. According to him, among those facts are:

"The facts surrounding the transfer of twenty four (24) acres 4 6/10 poles of Crown Lands situated at Grand Anse Beach, St. George's, valued at \$15,000,000.00 to a company, Time Bourke Holding Grenada Limited. He stated as a fact that there was no monetary consideration for the transfer of the lands to Time Bourke Holding Grenada Limited as evidenced in Indenture dated the 7th day of July 2008, but instead the Government of Grenada would have the right to use and reproduce approved photographs of Lewis Hamilton for and in connection with the promotion of the State of Grenada for a period of four (4) years."

(2) According to him, as a fact-

"The transfer of the lands gave rise to grave suspicion, that is, based on the facts set out the deal itself appeared to be scampish and fraudulent, such deal involving the Economic Advisor to the Government of Grenada, Dr. Patrick Antoine, the Claimant herein, an employee of the State."

(3) He further contended that the Article stated as a matter of fact the following:

- (a) that lands situated at Morne Rouge extending to Grand Anse Beach, St. George valued at USD \$15,000,000.00 was conveyed to the Company for no monetary consideration;
- (b) that according to the conveyance, the value of the of said lands would be realized by the grant of the Purchaser to the Vendor of the right to use and produce approved photographs and recordings of Lewis Hamilton and Lewis Hamilton's name, autograph and approved biography for and in connection with the promotion of the State of Grenada for a period of four (4) years;
- (c) that to the Second Defendant and many other Grenadians, such a transfer appeared quite peculiar, especially as the subject matter was not merely Crown Lands, but valuable and prime Crown Lands, which the citizenry of Grenada cherish as prized Heritage Lands;
- (d) that the Deed of Indenture was in fact executed and signed one day prior to Grenada's 2008 General Elections, a fact that would naturally cause one to become suspicious;
- (e) that at all material times the Claimant was an Economist engaged as an Advisor and Negotiator for the Government of Grenada in matters relating to International Trade and on contract dated the 27th of June 2008;
- (f) that, according to him "the Claimant was employed as Strategic Policy Advisor on Finance Trade and Economic Development in the Ministry of Foreign Affairs. As such it was inferred from the above stated fact that serving in his capacity at the time the said property was transferred, the Claimant acted as Agent on behalf of the Government; the Defendant also stated that he received other related information from "fairly reliable sources".

- (40) The Complainant, on the other hand, has argued that in respect of the words complained, namely the defamatory words, and many of the alleged facts asserted by the Defendants upon which their comments were based, are in fact untrue.
- (41) The defence of justification is that the words complained of were true in substance and in fact. It has been held, therefore, that justification is a defence because the law will not permit a man to recover damages in respect of an injury to a character which he does not, or ought not, to possess.²³ However, since the law presumes that every man is of good repute until the contrary is proved, it is for the Defendant to plead and prove affirmatively that the defamatory words are true or substantially true.
- (42) If a Defendant pleads justification, where the words complained of consist of statements of fact and comment, he must prove that the defamatory statements of fact are true or substantially true, and that the defamatory inferences borne by the comment are true.²⁴ In that regard, it should be noted that the concept of the "rolled-up plea" is a plea of fair comment only; the averment that the facts are true merely lays the necessary basis for the defence of fair comment. However, this is not a case in which the Defendants have sought to rely on a rolled-up plea, which is quite different from the plea of justification, which the Defendants have relied on and in respect of which the Defendants must prove the truth of both the facts and any comments upon them.²⁵
- (43) Further, the defence of justification admits the substance of the publication of the whole or so much of the defamatory statement as is justified, and asserts that it is true in substance and in fact. A Defendant should only plead justification where there is clear and sufficient evidence that the allegation is true. Failure to establish

²³ *McPherson v. Daniels* (1829)

²⁴ *Broadway Approvals Ltd. v. Odham Press Ltd.* [1965] 2AER 523 @ 535.

²⁵ *Sepp. Sutherland v. Stopes* [1925] AC 47 @ 63, 63, HL per Viscount Finlay.

the defence at the trial may properly be taken into account in aggravation of damages.²⁶

- (44) The Defendants may justify the words complained of in their natural and ordinary meaning or any innuendo meaning that has been pleaded. Where, as is the case here, the Complainant relies on the natural and ordinary meaning, he will, except in the most obvious cases, be required to plead the meaning that the words bear. In this case, the Complainant has done so, in fairly explicit terms, at paragraphs 4 to 10 of his Statement of Claim.
- (45) Have the Defendants therefore justified the words complained of in this case? The answer in my view is that they have not. First of all, the matters which were cited as facts by the Defendants (referred to at paragraph 39 above), the veracity of which the Defendants have established and relied upon, are not the matters complained of by the Complainant. The defence of justification is that the words complained of were true in substance and in fact. The Defendants have therefore failed to even address the question of the truthfulness or not of the words complained of. They have led no evidence on the point and have also in my view, failed to prove that the facts and the inferences from both fact and comment are true and to justify the comments.²⁷
- (46) As the law presumes that the defamatory words are false, it is for the Defendants to satisfy this Court that the statement which they seek to justify is true in substance and in fact. If, as is the case here, the statement complained of imputes the commission by the Claimant of a criminal offence, (namely corruption and fraud), to succeed in their plea of justification the Defendants must prove the commission of the offence charged, albeit the standard of proof is proof on a balance of probabilities.²⁸ This, the Defendants have neither sought to nor

²⁶ Associated Leisure Ltd. (Phonographic Equipment Co. Ltd) v. Associated Newspapers Ltd. [1970] 2 QB 450 @ 456, CA

²⁷ Broadway Approvals Ltd. v. Odhams Press Ltd. [1965] 523 @ 535, CA

²⁸ Hornal v. Neuberger Products Ltd. [1957] 1QB 247 @ 258, CA, per Lord Denning MR.

succeeded in doing. I find therefore that they have failed to discharge this burden that that law has placed on them.

(47) Further, even in respect of those matters complained of by the Claimant, which do not impute the commission of a criminal offence (for example the assertion that- (1) the Complainant was acting for and on behalf of the Government in the transaction; (2) that he received in excess of one million dollars for his services; and (3) the transaction was entered into without the approval of Cabinet the Defendants must satisfy the Court that the statement justified is substantially true. Every material particular must be proved.²⁹ In this case not only have the Defendants failed to prove that these statements were true, but both the Claimant and his witness, Mr. Gregory Bowen, testified that these statements were all false. Neither witness was shaken in cross- examination on this or any of the matters to which they testified, and I find them both to be extremely credible and reliable witnesses of truth. However, what is even more compelling is the fact that when asked under cross examination specifically about these matters, both the Defendant and his witness, Mr. George Worme, admitted to never even bothering to confirm the accuracy of the statements before they were included in the Article.

(48) I therefore find that the Defendants have failed to establish the defence of justification and that although they have pleaded it, they have failed to prove affirmatively, or at all, that the defamatory words are true or substantially true.

Has the Defence of Fair Comment been established?

(49) I now turn to the issue of fair comment upon which the Defendants have placed heavy reliance. The Second Defendant submitted and the First Defendant concurred that-

²⁹ Weaver v. Lloyd (1824) 2B&C 678

"On Fair Comment"

- (1) In writing the Articles he was "commenting not only in his capacity as Political Commentator but as also as patriotic Grenadian, on topical issues of public interest and concern." Further, that the Article was, as his learned counsel submitted "a fair comment on a matter concerning one of Grenada's finest assets, that is, the Grand Anse Beach, and included statements of undeniable fact as well as opinion". He also argued that in so doing the Second Defendant "did not purport to disseminate information, but merely weighed in on a topical issue, expressing his views based on fact and information received from "fairly reliable sources", for the purpose of public discussion as with any other commentary column of any local newspaper of weekly circulation."
- (2) Finally he avers that the Article, having been placed in the commentary section of the newspaper-
Was as could be gleaned on its face, in fact a comment and opinion on a matter of public concern. He by no means purported to write an article so as to disseminate information to the public; the article was recognisable by the ordinary reasonable Grenadian as comment or political commentary on a topical issue, touching and concerning the citizens of Grenada.

The Law on Fair Comment

- (50) The defence of fair comment is in the nature of a general right, and enables any member of the public to comment on matters of public interest.³⁰ Like the defence of justification, it must be based on facts proved to be true, but, it differs from justification in that it is available only in relation to statements which are expressions of opinion and not defamatory statements of fact. Where the Defendant seeks to justify his comment, he must prove that the facts and inferences from both fact and comment are true.

³⁰ Campbell v. Spottiswoode (1863) 3 B&S 769.

- (51) The Claimant contends that the Defendants have also failed to establish the defence of fair comment.
- (52) The Defendants must satisfy the Court that; (i) the statements complained of must be comment and not fact; (ii) the comments must have a sufficient factual basis, that is, they must be based on facts which are, themselves, true; (iii) the comments must be ones which a fair-minded man could honestly hold (this is an objective test and is unrelated to reasonableness); and (iv) the subject matter of the comment must be one of legitimate public interest.
- (53) The elements of the defence are discussed at length in Chap. 12 of **Gatley on Libel and Slander, 12th Ed.** However, the elements are more succinctly set out at para. 9-02 of **Defamation Law, Procedure and Practice, 3rd Ed. by David Price.** In order to establish the defence of fair comment the Defendants must satisfy the Court that each of the elements is present.
- (54) Whether the matter is one of legitimate public interest is a question of law for the judge. It is a question of fact for the trial judge, as the tribunal of fact, to decide whether the fact or facts on which the comment is based have been sufficiently proved and whether the comment on such fact or facts is fair.
- (55) The Claimant accepts that the sale or lease of prime beachfront lands owned by the Crown is a matter of public interest. However, they contend that none of the other elements of the defence can be or have been proved by the Defendants. They further submit that in any event, the public does not have an interest in comments that are not based on facts which are themselves substantially true. The comments, they contend, cannot exist in 'thin air'. The Defendants had a duty to prove that the factual building blocks on which the comments were based were

true or substantially so. For those reasons the Claimant contends that the defence of fair comment fails³¹.

- (56) The question of whether the words complained of are fact or comment is important. The defence of fair comment does not protect statements of fact which are defamatory. Defamatory statements of fact must be defended by a plea of justification. The test to be applied in determining whether words are statements of fact or statements of opinion was set out by **David Price in Defamation Law, Procedure and Practice** where the learned author state that-

"The test is how the words would be understood by the ordinary reader. One way of considering the matter, which is not conclusive, is whether or not the statement is capable of proof"³².

- (57) If the words complained of are facts, then the defence of fair comment fails. In this case there were several assertions of fact which were provable but were never established by the Defendants. Further, in order for the defence to succeed the comment must be *based on facts* which are themselves true.³³ The Defendants have set out several facts which were untrue. The defence of fair comment cannot protect defamatory statements of fact and any comment contained in the article must be based on true facts.

- (58) Several false statements were made in the article, namely: (i) that the Claimant was the Government's agent in this 'scampish' deal; (ii) that he received USD\$1.5M for his role in the transaction which the author described as treasonous; and (iii) that the Claimant, along with the former Prime Minister, had 'designed and executed' the corrupt scheme without recourse to Cabinet. If those statements of purported fact are false there can be no defence of fair comment. At trial it was established by the Claimant that those statements had no basis in truth and the Defendants could produce no evidence to support those statements of fact. Indeed, the Defendants continually stated that they relied on the

³¹ See the case of *Broadway Approvals Limited v. Oldham Press Limited* [1964] 2 Q.B. 683.

³² At para. 9-03 – Fair Comment

³³ see para. 9-04 of *Defamation Law, Procedure and Practice*.

conveyance as the factual basis on which the author's comments rested. However, the conveyance makes no reference to any of those alleged facts as set out in the article.

- (59) The liberality of the defence of fair comment is justified on the basis that the reader can recognise an opinion as the subjective view of the publisher or editor and make up his or her mind whether to accept it or not. The inclusion of words suggesting a comment will not necessarily suffice to turn a statement of fact into a comment.³⁴ A matter which does not indicate, with reasonable clarity, that it purports to be a comment and not a statement of fact, cannot be protected by a plea of fair comment.³⁵ Statements of fact, however, are far more damaging because they are likely to be accepted at face value. Readers are disposed to accept statements of fact or what purports to be fact published in a newspaper as true. Comments must, therefore, not be so mixed up with facts that the reader cannot distinguish between what is comment and what is not.³⁶
- (60) Further, even based on the facts which were true, namely that the Government had arranged to sell the land to Time Bourke Grenada Holdings Limited in exchange for intellectual property belonging to Lewis Hamilton, the Defendants were not entitled to make the comments made by the author in the Article. The factual allegations of corruption, fraud and treason must be justified. The defence can only succeed if the comments can be considered fair based on the facts which the Defendants aver to be true. In this case, the Claimant contends, and this Court agrees, that no reasonable person would regard the comments in the article as fair based on the proven facts. The author himself, on the witness stand, agreed that the intellectual property of Lewis Hamilton had a value and it could not be said that the people of Grenada would receive nothing in exchange for the land.

³⁴ London Artists Ltd. v. Littler, [1969] 2QB 375 @ 392

³⁵ Hunt v. Star Newspaper [1908] 2KB 309 @ 319, 320

³⁶ Davis v. Shepstone (1886) 11App Cas 187 @ 190

(61) In the circumstances, the Defendants have failed to satisfy this Court that the requirement that the words are comment and not facts, or that the facts on which the comments are based are substantially true. Additionally, the Defendants have not established that the comments based on the facts which have been established are 'fair'.

(62) In his submissions on this point, learned counsel for the Defendants citing the dicta of Fletcher Moulton L.J. in *Hunt v Star* [1908] 2 K.B at p 319, submitted that-

"If the facts are stated separately and comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavorable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer, though not necessarily set out by him. In the one case the insufficiency of facts to support the inference will lead fair minded men to reject the inference....".

(63) He argues, therefore, that in the Article, there was no intermeddling of fact and comment, but that if there was, given the fact that the Article was, in his words-

"a mere commentary published in the commentary section of the Newspaper, and certain information was claimed to be in the Second Defendant's understanding, from fairly reliable sources, the fair-minded man would reject any unfavourable inferences made where he is of the belief that there exists an insufficiency of facts to support the inference made."

(64) I do not accept those arguments as applicable to the instant case, and I am of the view that even the fair-minded reader who is prejudiced, obstinate, guilty of gross exaggeration and given every latitude in his right to comment would not have commented as the Defendants did on the proved facts. The defence of fair comment therefore, fails. Indeed, quite apart from the unestablished veracity of the underlying material facts upon which the comments were based, in this Court's view, the use of the following language is far from fair:

- (a) "seasoned dealers and wheelers of long standing in Grenada, who had graduated with dishonours in their scams with world renowned crooks and smart men and gangsters";
 - (b) "diabolical and fraudulent document" designed "to deprive the very loyal subjects of Her Majesty from receiving the true value of their lifelong heritage";
 - (c) the "above scampish deal, was designed and executed between the diplomatic agent in T&T [the Complainant] and the ex-PM without any recourse to Cabinet for a conclusion";
- (65) Further, on the basis of the evidence before this Court, I am of the view that the Defendants were reckless as to the truth of a defamatory statement, and seemed not to care whether the statements published about the Claimant were true or false. The evidence under cross-examination of both Mr. Worme, and the Second Defendant himself, portray a disposition of disinterest on their part to avail themselves of means of information readily to hand which would have shown the imputation to be groundless.
- (66) While the failure to make an inquiry before publication may not, by itself, constitute recklessness, when it is combined with the flippant way in which they spoke to the issues, their callous demeanour on the witness stand, and the fact that the statements made in the Article are unsupported even by the singular document which was relied on by the Defendants, namely the conveyance, there arises in this Court's assessment of an irresistible inference of recklessness on their part in the publication of this Article. Even as at the date of the trial neither the Defendant nor indeed Mr. Worme has bothered to enquire as to whether the words complained of by the Claimant were true or not. In my view, it is an incredible indifference which borders on being malicious. That said, malice should only be found where the Defendant's dominant motive is malicious. Therefore, although I have found that the Defendant acted recklessly, I do not, however, find that they were actuated by malice in publishing the comments complained of.

LIABILITY

- (67) Every person who takes part in or procures the publication of a libel, is prima facie liable jointly and severally for all the damage caused by it. Thus, if the libel appears in the newspaper, as it does here, the author of the libel, and the proprietor, editor, printer, publisher and vendor of the newspaper are prima facie jointly and severally liable.
- (68) There is sufficient publication to a third person if there is publication to a stranger, or the Claimant's relatives, employees or employers. This is because, for the purposes of a civil action for libel, publication is the communication of the defamatory matter to a third person.³⁷ In that regard, publication consists in making known the defamatory statement after it has been reduced to some permanent form. Publication occurs at the place where communication is effected.³⁸ As such, if the Defendant is within the jurisdiction, he may be sued for publication abroad if the publication is actionable according to Grenada law and it is not justifiable by the law of the place where publication occurred³⁹, or is actionable by that law.⁴⁰
- (69) A newspaper proprietor, printer or editor is answerable civilly for his employee's or agent's acts in conducting the paper, even though he has in fact nothing to do with the publication. The Defendant will, therefore, be liable as the publisher of the libel if he requests, procures or, as is the case here, he authorizes the publication to a third person. In this case, the evidence, the facts as found and the inferences that can be drawn from the surrounding circumstance, point irresistibly to the conclusion that the First Defendant authorized the repetition in written form, or at the very least anticipated and wished that his words be repeated in that form or another⁴¹.

³⁷ See *Pullman v Walter Hill & Co. Ltd* [1891] 1QB 524 @ 529

³⁸ *Bata v. Bata* [1948] WN 366, CA

³⁹ *Phillips v. Eyre* (1870) LR 6 QB 1 @ 29

⁴⁰ *Chaplin v. Boys* [1971] AC 356, @ 389, [1969] 2AER 1085 @ 1102, HL, per Lord Wilberforce

⁴¹ See *Weid-Blundell v. Stephens* [1920] AC956 @ 999 per Lord Wrenbury

- (70) I therefore find both Defendants liable for the publication of the defamatory article and the resultant damage to the Claimant.

DAMAGES

- (71) The Damage which the Claimant has suffered by the publication of these defamatory statements is best gleaned from the evidence of the Claimant himself, which is substantially undisputed by the Defendants. The Claimant, Dr. Patrick Antoine, provided a witness statement filed on 3rd May 2010, which was tendered into evidence at the trial. In his evidence the Claimant testified that he is a Grenadian citizen living in Trinidad and Tobago and that he is a trained economist, having obtained his BSc in Economics from the University of the West Indies. The Claimant further testified that he has an MSc in Economics from the University of Florida as well as a PhD in Economics with a specialisation in International Trade and Econometrics from the same institution.
- (72) At para. 5 of the Claimant's witness statement he set out in some detail the clientele he services, including regional and international organisations, regional Governments and multinational corporations. The Claimant gave evidence that he provided consulting services on investments to those clients and gave advice on tax policy, structuring tax regimes, trade policies (helping countries and large conglomerates to take advantage of opening opportunities regionally, hemispherically and globally) and advice in an area known as competitiveness.
- (73) At para. 7 of his witness statement, the Claimant stated that he became aware on the 5th October 2008 of the publication of the article under dispute. The Claimant testified that he was overseas in Latin America when he received telephone calls about the publication of the article. The Claimant further testified that his immediate family, including his parents and brothers, felt pain because the allegations were untrue and had received such wide circulation. His family also felt pain because it went against the values of truth and honesty to which they, as a

family, were committed. The Claimant testified that for the first time his family was confronted with a predicament which they could not fix collectively.

(74) The Claimant testified that, as stated at para. 14 of his witness statement, he called the Second Defendant. The call was motivated by his disbelief and total lack of comprehension as to how the Second Defendant could write an article about him when the two men had had no contact and yet the article so savagely defamed him. The Claimant testified that he found the cruelty of it difficult to accept since he believes in the Caribbean view that there is a bond between Caribbean citizens. The Claimant stated that he felt pain, confusion, hurt and disbelief.

(75) The Claimant further testified that it was not true that in the course of their telephone call the Second Defendant offered to publish any facts submitted to him by the Claimant as was pleaded by the Second Defendant. At para. 18 of his witness statement the Claimant testified about the adverse impact of the article on his professional relationship with Archer Daniel Midland, one of his corporate clients. The corporate compliance department of the company intervened and stopped payments to the Claimant following the publication. Payments were resumed fifteen months later and only after the company had conducted its own independent and grueling investigation of the allegations contained in the article which took over a year. That investigation included information gathering. The relationship continued thereafter but the Claimant's integrity stood in question for the duration of the investigation.

(76) The claimant testified that he also saw the article online at www.spiceislandertalkshop.com approximately a week after the article was brought to his attention. The article is no longer on that website but the fact that it appears on other websites continues to be a matter of deep distress to the Claimant. He testified that as recently as two days prior to his testimony the article continued to be on the website www.grenadaconnection.com. Whenever it is

raised it is a matter of deep embarrassment to the Claimant to whom questions are addressed on this issue about a dozen times a year. The Claimant testified that he starts business relationships by 'having to clear the deck', as it were, since in today's world the first thing people do is 'google' someone. He testified that the Prime Minister, Minister of Foreign Affairs and the Attorney General in the new administration, following publication of the article, stated the facts and issued a statement that there was nothing improper about the transaction between the Government and the Hamilton Group. However, neither the publisher nor the author has ever offered the Claimant an apology.

- (77) In his evidence the Claimant stated that the fact that the article continues to be on the internet remains a matter of deep pain to his family, including his son who is now studying economics and politics, and continues to cause damage as well. He testified that the facts stated by the Claimant at para. 22 are not historic and that the damage identified there is contemporaneous and ongoing. At the time of his witness statement the Claimant's son was at secondary school, but he is now at university. And as he tries to develop professional relationships the defamation against his father adversely impacts him. The Claimant made reference to one of his teachers George Brizan, among others such as Professor Frank Alleyne, Andrew Downes and Nobel Laureate, Henry Tyre, all of whom were particularly affected. He stated that Mr. Brizan and Professor Tyre were in tears when they called him about the article.
- (78) Under cross-examination the Claimant stated that he spoke with Mr. Noel, the Second Defendant only once. The Claimant testified that he called the Second Defendant following the publication but did not call him again after the initial call. The Claimant stated that he had to retain Counsel to deal with the investigation with ADM and had to suffer fifteen (15) months of not being paid. He was also overlooked for a position as Department Head at the Arthur Lok Jack School Graduate School of Business. He stated that the matter continues to have currency and he has presented the evidence he has. Further, while there is

corroborating documentary evidence by way of letters and emails, these could not be disclosed for reasons of compliance and confidentiality.

- (79) The Claimant testified further that following the publication of the article the special purpose vehicle which came into being in Grenada to facilitate the investment was disbanded because the project was frustrated.

The Law

- (80) In considering this issue of damage to the Claimant, the Court must bear in mind that the damages awarded in defamation must be proportionate to the loss suffered by the Claimant. The High Court of Australia in **Carson v. John Fairfax and Sons** identified the three purposes to be served by damages in defamation. The principles underlying those purposes were applied in the case **Dr. Philbert Arron v. Abel Jno Baptiste, 'aka Checko'**⁴². The three purposes are:

- (1) consolation for the claimant's personal distress and hurt;
- (2) reparation for the harm done to the claimant's reputation (including where relevant business reputation; and
- (3) vindication of reputation.

- (81) The guidelines in determining damages have been well-established as follows:

- (1) the gravity of the allegation;
- (2) the extent of the publication;
- (3) the extent and nature of the Claimant's reputation;
- (4) the effect of the publication; and
- (5) the conduct and behavior of the Defendant.

- (82) These guidelines were applied in the case of **Marina Marshall v. Lenisha Augustine et al**⁴³ which concerned an email circulated over the World Wide Web which was distributed by the Defendants defaming the Claimant as a whore. In

⁴² Suit No. DOMHCV2013/0015) at para. 51

⁴³ DOMHCV2001/0318

determining quantum the Judge relied at para. 20 of his judgment on the decision of Mitchell J in the case of **Murio Ducille v. Robert Hoffman et al.** At para. 23 of the decision, the Learned Judge made the following finding:

"The extent and nature of the Claimant's reputation. The publication of photographs on the World Wide Web cannot be retracted or recalled. ... it is not possible to recall or retract any defamation published on the internet. The defamation is available for viewing as long as the World Wide Web exists."

- (83) At para. 25 the Learned Judge went on to consider the conduct of the Defendants as follows:

"The conduct and behaviour of the defendants. The defendants ... have never offered an apology, they have not withdrawn the defamatory allegations nor expressed any remorse for the said defamation; in the circumstances, the defendants should be held or deemed to have persisted in the defamation."

- (84) The absence of apology in this case, as in the **Marina Marshall (supra)**, shows an absence of contrition, an insistence on the humiliation of the Claimant, almost evidencing a degree of malice and high-handedness on the part of the Defendants.

- (85) The Claimant sought, in his Claim Form filed herein on 7th August 2009 and his Amended Statement of Claim on 9th February 2010 damages, including aggravated and/or exemplary damages. **Sections 2 and 3 of Chap. 9 of Gatley on Libel and Slander, 10th Ed.** provides as follows:

9.13. Aggravated damages. The conduct of the defendant, his conduct of the case, and his state of mind are all matters which the claimant may rely on as aggravating the damages.

9.15. Nature of exemplary damages. Exemplary damages are intended to punish the defendant for the willful commission of a tort or to teach him

that tort does not pay. They are not, even in the attenuated sense, concerned with compensation of the claimant.

9.16. The defendant's state of mind in relation to the statement. The defendant may of course know that he is committing the tort of defamation but that is not necessary. Recklessness will do and recklessness here has a meaning analogous to that of the mental element of deceit, that is to say, the statement must be made without belief in its truth. 'The publisher must have suspected that the words were untrue and have deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty. However, mere negligence will not do ... Conduct which shows a high degree of negligence is, of course, capable of being evidence of recklessness. At the moment it is established that there is vicarious liability for exemplary damages..."

- (86) Dr. Antoine is a well-qualified and accomplished Caribbean man. He serves the private sector throughout the region and the public sector in Grenada at a high level. His trading assets are his professional skills and his reputation. This unwarranted assault on his personal integrity and professional reputation continues, as it is permanently accessible on the World Wide Web. It is not likely to be forgotten and it re-emerges from time to time. He has been put through a painful and intense ordeal, which has not fully abated, and quite likely, never will.
- (87) At paras. 31 to 36 of the decision in **Marina Marshall (supra)** the Court considered the aggravating factors in that case. The Court awarded general damages in the amount of \$225,000, aggravated damages in the amount of \$180,000 and exemplary damages in the amount of \$120,000, that is, total damages in the sum of \$525,000.00. The Court was persuaded to award such damages based on the intentional and calculated conduct of the defendants in persisting in the defamation and the permanent accessibility of the defamation. In that case the Court considered it highly probable in the event that the defamation would re-emerge. However, in this case the Claimant's evidence is that the defamation against him re-emerges several times a year.
- (88) In the particular circumstances of this case, I therefore award damages to the Claimant in the amount of \$575,000.00, itemized as follows:

- (a) General Damages – \$275,000.00
- (b) Aggravated Damages – \$180,000.00
- (c) Exemplary Damages – \$120,000.00

DISPOSAL

(89) In the circumstances:

- (1) I award judgment for the Claimant for libel as a result of the publication of the Article.
- (2) The Defendants are ordered to pay the Claimants damages in the amount of \$575,000.00.
- (3) The Defendants are ordered to pay the Claimant's costs, which costs are to be taxed in default of agreement.

André A. Mon Désir
High Court Judge (Ag.)